No. _____

IN THE
Supreme Court of the United States

JASON DIX,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

E. Travis Ramey
Appellate Advocacy Clinic
University of Alabama School of Law
Box 870382
101 Paul W. Bryant Drive, East
Tuscaloosa, Alabama 35487
(205) 348-4960

Kimberly H. Albro
Counsel of Record
Assistant Federal Public Defender
Federal Public Defender's Office
District of South Carolina
1901 Assembly Street, Suite 200
Columbia, South Carolina 29201
(803) 765-5088
kimberly_albro@fd.org

Counsel for Petitioner Jason Dix

QUESTIONS PRESENTED

Here, the United States failed to argue that the lack of proper notice to Petitioner Jason Dix of a new theory for applying a sentencing enhancement was harmless error. Nevertheless, the United States Court of Appeals for the Fourth Circuit held that it was compelled to raise and decide harmless error sua sponte. There is general agreement that government parties bear the burden to show that favorable errors are harmless. Federal and state courts divide, however, on whether and when they may raise and decide harmless error sua sponte if a government party fails to raise the issue in its appellate briefing.

I. May an appellate court, consistent with due process, relieve a government party of its burden to show that a favorable error is harmless, decide the issue sua sponte, and thereby assume the government party's burden itself?

II. If appellate courts may assume a government party's burden to show that a favorable error is harmless, is doing so mandatory or discretionary?

III. If doing so is discretionary, what limitations do due process or other considerations place on when appellate courts may exercise that discretion and when appellate courts should exercise that discretion?

PARTIES TO THE PROCEEDING

Petitioner, defendant-appellant below, is Mr. Jason Dix.

Respondent, appellee below, is the United States of America.

CORPORATE DISCLOSURE

There are no corporate parties in this case.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings in the United States District Court for the District of South Carolina and the United States Court of Appeals for the Fourth Circuit:

- *United States v. Dix*, No. 19-4725. *United States v. Dix*, 60 F.4th 61 (4th Cir.), *reh'g granted, opinion withdrawn,* No. 19-4725, 2023 WL 2784870 (4th Cir. Apr. 5, 2023), and *on reh'g*, 64 F.4th 230 (4th Cir. 2023). The court denied Dix's motion for rehearing en banc on May 24, 2023. *See United States v. Dix*, 69 F.4th 149 (4th Cir. 2023).
- *United States v. Dix*, No. 3:18-cr-00958-JMC-1 (D.S.C. Sept. 23, 2019).

No other proceedings in state or federal trial or appellate courts, or in this court, are directly related to this case.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jason Dix respectfully asks for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The United States Court of Appeals for the Fourth Circuit affirmed the district court's judgment in a published opinion, *United States v. Dix*, 60 F.4th 61 (4th Cir. 2023). Pet. App. 1A-23A. On rehearing, the court published a revised opinion, *United States v. Dix*, 64 F.4th 230 (4th Cir. 2023). Pet. App. 24A-47A. The court denied Dix's second petition for rehearing en banc, and that published order can be found as *United States v. Dix*, 69 F.4th 149 (4th Cir. 2023). Pet. App. 48A-61A.

JURISDICTION

The United States Court of Appeals for the Fourth Circuit issued final judgment on April 5, 2023. The Fourth Circuit denied Dix's second petition for rehearing en banc on May 24, 2023. This Court granted Dix's Application for an Extension of Time Within Which to File a Petition for a Writ of Certiorari on June 27, 2023. No. 22A1117. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. V and 18 U.S.C. § 922(g)(1) are reproduced in the Appendix to this petition.

STATEMENT OF THE CASE

Dix was driving a car belonging to Andrea Hair when a deputy sheriff noticed him and thought he was "behaving suspiciously." Pet. App. 25A; JA144-45.[1] The deputy sheriff began to follow Dix, who sped away. Pet. App. 25A. After a car chase, Dix ultimately crashed into another vehicle. *Id.* After Dix was arrested, police recovered a firearm and ammunition from the car and charged Dix with violating 18 U.S.C. § 922(g)(1). *Id.* At the time of arrest, Dix stated he had permission to use the vehicle. JA 59. Hair later claimed her vehicle was stolen. JA 61. Dix was charged in state court with several offenses, including grand larceny/possession of a stolen vehicle and failure to stop for a blue light. JA 159.

Dix pleaded guilty to violating 18 U.S.C. § 922(g)(1). In the presentence investigation report (PSR), the probation office applied a four-level enhancement for using or possessing the gun in connection with another felony offense, identified as grand larceny/possession of a stolen vehicle. JA 160. Dix unsuccessfully objected to the PSR on that basis, explaining that he did not commit the offense the PSR identified because he borrowed the car with the owner's permission. JA 177-179. The government made no objections to the PSR. JA 177.

At the sentencing hearing, Dix objected to the enhancement, maintaining he had permission to use the vehicle. JA 59-60. The district court declined to apply the enhancement based on the grand larceny theory the probation office had included in

[1] Citations to JA refer to the appellate record compiled in the joint appendix on file with the Fourth Circuit. *See Joint Appendix, Vol I & II*, *United States v. Dix*, No. 19-4725, (4th Cir. filed Sept. 21, 2021) (ECF Nos. 24-25).

the PSR. Pet. App. 26A. So, the government raised—for the first time at the sentencing hearing—a new enhancement theory based on possessing a firearm in connection with Dix's failure to stop for a blue light. *Id*. Dix objected to the new theory because the PSR did not list the offense as a basis for the enhancement. JA 62. Over that objection, the district court applied the four-level enhancement based on the newly identified offense. JA 81-82. The result was a total offense level of 27 and a guidelines range of 100-120 months. JA 163. The court sentenced Dix to 99 months and three years of supervised release. JA 127-128.

On appeal, Dix argued he should have received notice of the government's alterative theory for the enhancement before the sentencing hearing. Pet. App. 30A, 39A. The government responded that further notice was unnecessary and never asserted that the lack of adequate notice was a harmless error. Pet. App. 39A.

At oral argument, the Fourth Circuit—not the government—first raised the question of harmless error. Pet. App. at 39A, 42A. The Fourth Circuit panel agreed Dix's rights were violated in the sentencing process. Pet. App. 32A, 39A, 42A. But a divided panel determined—on its own, without briefing, and over a dissent—that the violation was harmless error. Dix petitioned for rehearing en banc. The majority granted a panel rehearing sua sponte and issued a revised opinion, again over a dissent. Pet. App. 24A-47A.

Dix then petitioned again for rehearing en banc. Splitting evenly 7 to 7, the Fourth Circuit denied rehearing en banc over two written dissents. Pet. App. 48A-49A.

REASONS FOR GRANTING THE PETITION

I. The government bears the burden to show harmless error.

This Court has repeatedly held that, when a criminal defendant makes a timely objection to an error during their trial, the government has the burden on appeal to prove the alleged error was harmless. *See, e.g.*, *United States v. Vonn*, 535 U.S. 55, 68 (2002); *O'Neal v. McAninch*, 513 U.S. 432, 437-38 (1995); *United States v. Olano*, 507 U.S. 725, 741 (1993). Further, "[e]very United States Court of Appeals that adjudicates criminal cases also has come to the same conclusion," *Commonwealth v. Hamlett*, 234 A.3d 486, 495 n.1 (Pa. 2020) (Wecht, J., dissenting), separately from their obligation to follow this Court's precedent. *See* U.S. Const. art. III, § 1; *Hutto v. Davis*, 454 U.S. 370, 375 (1982); *see also e.g.*, *United States v. Jadlowe*, 628 F.3d 1, 21 (1st Cir. 2010).[2]

The consensus among the federal courts extends to the rationale for the rule as well. When the Fourth Circuit held that the government has the burden because it is "the beneficiary of the error," *United States v. Garcia-Lagunas*, 835 F.3d 479, 488 (4th Cir. 2016), it was echoing this Court's holding that the government has this burden because it is the party seeking to deprive the other party of his or her liberty. *Shinseki v. Sanders*, 556 U.S. 396, 410 (2009); *accord United States v. Haidley*, 400

[2] *See also United States v. Seng*, 934 F.3d 110, 129 (2d Cir. 2019); *United States v. Franz*, 772 F.3d 134, 151 (3d Cir. 2014); *United States v. Ivey*, 60 F.4th 99, 111 (4th Cir. 2023); *United States v. Gutierrez-Mendez*, 752 F.3d 418, 426 (5th Cir. 2014); *United States v. Susany*, 893 F.3d 364, 386 (6th Cir. 2018); *United States v. Robinson*, 724 F.3d 878, 888 (7th Cir. 2013); *United States v. Davis*, 859 F.3d 592, 597 (8th Cir. 2017); *United States v. Esparza*, 791 F.3d 1067, 1074 (9th Cir. 2015); *United States v. Russian*, 848 F.3d 1239, 1248 (10th Cir. 2017); *Bester v. Warden*, 836 F.3d 1331, 1338 (11th Cir. 2016); *United States v. Burnett*, 827 F.3d 1108, 1119 (D.C. Cir. 2016).

F.3d 642, 644 (8th Cir. 2005) (noting the burden of proving harmless error is on the beneficiary of the error); *United States v. Cerno*, 529 F.3d 926, 939 (10th Cir. 2008) ("[T]he burden of making this showing [of harmlessness] falls on the beneficiary of the error."). Thus, federal courts are unanimous in their approach to, and justification for, requiring the government to meet this "decidedly heavy burden," *United States v. Waller*, 654 F.3d 430, 438 (3d Cir. 2011), of proving that a properly preserved error in a criminal appeal was harmless. *United States v. Dominguez-Benitez*, 542 U.S. 74, 81 n.7 (2004).

Likewise, state supreme courts agree that the state, "as beneficiary of the error," must satisfy the burden of the harmless error test. *State v. DiGuilio*, 491 So. 2d 1129, 1138 (Fla. 1986).[3] So, regardless of whether a criminal defendant is in federal court or state court, the government must show an error did not affect the outcome of the proceedings. Relieving the government of this burden would give it "preferential treatment over other litigants." *Dix*, 69 F.4th at 152 (denying reh'g en banc) (King, J., dissenting).

[3] *See also, e.g., State v. Henderson*, 115 P.3d 601, 607 (Ariz. 2005) (en banc); *State v. Lemanski*, 242 A.3d 532, 537 (Conn. 2020); *People v. Nitz*, 848 N.E.2d 982, 989 (Ill. 2006); *Harper v. Commonwealth*, 266 S.W.3d 813, 818 (Ky. 2008); *State v. Gibson*, 391 So. 2d 421, 426 (La. 1980); *State v. Shoen*, 598 N.W.2d 370, 377 (Minn. 1999); *Smith v. State*, 986 So.2d 290, 300 (Miss. 2008); *State v. Botelho*, 83 A.3d 814, 819 (N.H. 2013); *State v. Montoya*, 333 P.3d 935, 946 (N.M. 2014); *Pemberton v. State*, 959 N.W.2d 891, 898 (N.D. 2021); *State v. Jones*, 156 N.E.3d 872, 875 (Ohio 2020); *Commonwealth v. Story*, 383 A.2d 155, 162 n.11 (Pa. 1978).

II. The lower courts disagree on whether and when a court may meet the government's burden for it.

A. Lower court acceptance of sua sponte review for harmless error is not unanimous.

In federal court, the broad consensus that the government bears the burden to show harmless error exists side by side with the common acceptance of the contradictory proposition that a court may sometimes "choose . . . to do the government's homework," *United States v. Molina*, 407 F.3d 511, 524 (1st Cir. 2005), by considering the harmlessness of a trial court's error even if the government has not even attempted to meet its burden. *See, e.g.*, *United States v. Adams*, 1 F.3d 1566, 1575 (11th Cir. 1993) ("[T]his Court may consider the harmlessness of a trial court's error where it has not been briefed by the Government."); *see also, e.g.*, *United States v. Faulks*, 201 F.3d 208, 213 (3d Cir. 2000) ("We can employ harmless error analysis *sua sponte*."). As with the proposition that the government bears the burden of establishing the harmlessness of an error in a criminal appeal, the federal courts of appeals unanimously allow sua sponte harmless error analysis even when the government has not raised the issue on appeal.[4]

Unlike the federal circuits, however, the states that have considered the issue do not agree on whether their courts have the power to sua sponte consider harmless

[4] *United States v. Rose*, 104 F.3d 1408, 1414 (1st Cir. 1997); *United States v. Silver*, 954 F.3d 455, 459 (2d Cir. 2020) (per curiam); *United States v. Brizeula*, 962 F.3d 784, 799 (4th Cir. 2020); *Jones v. Cain*, 600 F.3d 527, 541 (5th Cir. 2010); *Gover v. Perry*, 698 F.3d 295, 300 (6th Cir. 2012); *United States v. Giovannetti*, 928 F.2d 225, 227 (7th Cir. 1991); *Lufkins v. Leapley*, 965 F.2d 1477, 1482 (8th Cir. 1992); *United States v. Gomez*, 6 F.4th 992, 1008 (9th Cir. 2021); *United States v. Samaniego*, 187 F.3d 1222, 1224-25 (10th Cir. 1999); *United States v. Pryce*, 938 F.2d 1343, 1348 (D.C. Cir. 1991).

error when the government fails to raise it. A majority of the states that have decided the issue agree that their courts have the power to consider harmless error even when the government has failed to argue it. *See, e.g.*, *State v. McKinney*, 777 N.W.2d 555, 561 (Neb. 2010) ("It is well established that an appellate court has discretion to overlook the State's failure to argue that an error is harmless.").[5]

But other jurisdictions take different approaches. For example, Idaho does not allow for sua sponte review when the government has failed to raise harmless error. *State v. Ruiz*, 248 P.3d 720, 722 (Idaho 2010); *see also State v. Almaraz*, 301 P.3d 242, 256-57 (Idaho 2013).[6] The Court of Appeals of the District of Columbia has recognized the general authority for a court to exercise sua sponte review, although it has failed to explain whether their jurisdiction allows it.[7]

The District of Columbia is not the only jurisdiction that has left its courts with an unsatisfactory answer to the question of sua sponte harmless error review. The

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[5] *See also Hassan-El v. State*, 911 A.2d 385, 398 (Del. 2006)*; Huess v. State*, 687 So. 2d 823, 823 (Fla. 1996); *State v. Marshall*, 882 N.W.2d 68,103-04 (Iowa 2016); *Belcher v. State*, 464 P.3d 1013, 1023 (Nev. 2020); *Hamlett*, 234 A.3d at 492-93; *Vigil v. State*, 98 P.3d 172, 179-80 (Wyo. 2004).

[6] *Almaraz*, 301 P.3d at 263 (Jones, J., dissenting) ("Admittedly, this Court has intimated that it will not examine sua sponte whether trial errors were harmless.").

[7] *Morales v. United States*, 248 A.3d 161,182 n.21 (D.C. 2021) ("It appears to be an open question in this jurisdiction whether we have that discretion when it comes to constitutional errors . . . [b]ut we have found no binding precedent that purports to extend this discretion to, much less exercised it in, a case involving a constitutional error."); *Rose v. United States*, 629 A.2d 526, 538 (D.C. 1993) ("[T]here *may* be occasions when an appellate court should bail out the government by raising sua sponte an argument on appeal that the government has failed to raise. But this is not such a case.") (emphasis added).

North Dakota Supreme Court evaded a clear answer in *Pemberton v. State*, recognizing that the government's failure to brief harmless error should mean forfeiture but also referencing how other jurisdictions allow their courts to raise harmless error sua sponte. 959 N.W.2d at 898. Maryland has given a similarly unclear answer, acknowledging the benefits of both sides without choosing one. *See State v. Jones*, 771 A.2d 407, 444 (Md. Ct. Spec. App. 2001) ("The cases cited above elucidate for us that, in a criminal case, the State can be found to have waived a valid claim, even if the waiver leads to the reversal of a conviction. On the other hand, when the State fails to raise an important argument, an appellate court ordinarily has discretion to review the record or the trial judge's ruling in its effort to reach a sound result.").

In *State v. Porte*, the Court of Appeals of Minnesota did not definitively answer the sua sponte question, although it implied it disagreed with *Giovannetti*. 832 N.W.2d 303, 313 (Minn. Ct. App. 2013).[8] The court recognized that, generally, failure to raise an issue on appeal equates to forfeiture of the issue but that the federal circuits have agreed that *Giovannetti* provides an exception. *Id.* The court declined to exercise sua sponte review because "our application of the *Giovannetti* factors does not persuade us to make an exception to the general rule of waiver." *Id.*

Thus, sua sponte harmless error review presents a jurisdictional split. Although most states that have addressed the issue and the federal circuits agree

[8] *See also State v. Rodriguez*, 889 N.W.2d 332, 338 (Minn. Ct. App. 2017) (citing *Porte*, the court held that state had waived harmless error by not briefing the issue on appeal and did not exercise sua sponte review to bail out the government).

that a court has the power to raise harmless error sua sponte when the government forfeits the argument, at least Idaho does not allow sua sponte review. Further, jurisdictions like Maryland, Minnesota, North Dakota, and the District of Columbia have refused to take a definite side on the issue, adding ambiguity to the divide.

B. Among courts that allow sua sponte review for harmless error, there is significant disagreement about when to allow it.

Among jurisdictions holding that courts may conduct harmless error analysis sua sponte, there is division on precisely when courts may do so. Some courts require the case to satisfy certain criteria for the court to have discretion to conduct harmless error review sua sponte. Others hold that they have unqualified discretion to conduct sua sponte harmless error review without any prerequisite showing. But, within this second line, courts divide about how to decide when to exercise that discretion. Finally, opening a third line of decisions, the Fourth Circuit held here that a court is, at least sometimes, obligated to raise harmless error sua sponte.

The seminal case for the first two approaches is *United States v. Giovannetti*, "a leading opinion cited across numerous circuits," on the question of sua sponte harmless error analysis. *Gover*, 698 F.3d at 300 (6th Cir. 2012); *see also United States v. Gonzalez-Flores*, 418 F.3d 1093, 1100 (9th Cir. 2005) ("Several circuits have followed or approvingly cited *Giovannetti*."). In *Giovannetti*, the Seventh Circuit held:

> [W]e have discretion to overlook a failure to argue harmlessness, and in deciding whether to exercise that discretion the controlling considerations are [1] the length and complexity of the record, [2] whether the harmlessness of the error or errors found is certain or debatable, and [3] whether a reversal will result in protracted, costly, and ultimately futile proceedings in the district court.

928 F.2d 225, 227 (1991) (per curiam).

1. Approach One: The *Giovannetti* factors govern when courts have discretionary authority to raise harmless error sua sponte.

Some courts see the *Giovannetti* factors as testing the outer bound of their ability to raise harmless error sua sponte, and they require satisfaction of some or all of those factors before they hold they have discretion to conduct such review. That is, the *Giovannetti* factors test when courts *may* reach harmless error sua sponte.

a. Circuits

At least four circuits view the *Giovannetti* factors as prerequisites to their ability to raise harmless error sua sponte, requiring satisfaction of some or all of them before they have discretion to conduct sua sponte harmless error review. For example, in *Wyoming v. Livingston*, the Tenth Circuit held that it "may . . . address harmless error *sua sponte* if three conditions are met," before citing the *Giovannetti* factors in previous circuit case law. 443 F.3d 1211, 1226 (10th Cir. 2006) (citing *Samaniego*, 187 F.3d at 1224-25); *accord United States v. Holly*, 488 F.3d 1298, 1312 (10th Cir. 2007) (Kelly, J., concurring in part and dissenting in part) ("In recognition of the difficulty of conducting harmless error review *sua sponte*, we have previously cabined our discretion to do so with the [*Giovannetti*] factors.").

Similarly, in *Lufkins v. Leapley*, the Eighth Circuit held that a court has the discretion to overlook the government's failure to argue harmlessness only "under certain circumstances," which it identified as the three laid out in *Giovannetti*. 965 F.2d 1477, 1481 (8th Cir. 1992) (citing *Giovannetti*, 928 F.2d at 227). Then, in *United States v. Montgomery*, the court held that it has discretion to overlook the government's failure to argue harmlessness "*after* taking into consideration" the

Giovannetti factors. 100 F.3d 1404, 1407 (8th Cir. 1996) (citing *Lufkins*, 965 F.2d at 1481) (emphasis added). Later Eighth Circuit decisions have similarly treated the *Giovannetti* factors as required conditions for sua sponte harmless error analysis, not as mere helpful guides. *See, e.g.*, *United States v. Ghane*, 673 F.3d 771, 787 (8th Cir. 2012) (noting that courts may raise harmless error sua sponte "in certain circumstances" dependent on the *Giovannetti* factors); *United States v. Hansen*, 944 F.3d 718, 724 n.3 (8th Cir. 2010) (noting that the court undertakes sua sponte harmless error analysis within the bounds of the *Giovannetti* factors); *United States v. Jacobs*, 97 F.3d 275, 283 n.9 (8th Cir. 1996) (noting that courts "may undertake [harmless error] analysis *sua sponte*" only after assessing the case in light of *Giovannetti*).

The Ninth Circuit also allows sua sponte consideration of harmless error only within the *Giovanetti* parameters. Generally, when the government fails to address harmlessness in its brief on appeal, the Ninth Circuit deems the issue waived and will not consider the harmlessness of any error it finds. *See, e.g.*, *United States v. Kloehn*, 620 F.3d 1122, 1130 (9th Cir. 2010); *Gonzalez-Flores*, 418 F.3d at 1100; *United States v. Varela-Rivera*, 279 F.3d 1174, 1180 (9th Cir. 2002). The Ninth Circuit applies this rule so strictly that it still considers the government to have waived harmless error even if the government mentions harmless error in its brief but fails to produce a "developed theory" on the subject. *United States v. Murguia-Rodriguez*, 815 F.3d 566, 573 (9th Cir. 2016). The court has justified this approach by holding

that "it is the government's burden to establish harmlessness, and it cannot expect us to shoulder that burden for it." *Gonzalez-Flores*, 418 F.3d at 1100.

The Ninth Circuit has, however, carved out an exception to this "general and consistent rule." *Murguia-Rodriguez*, 815 F.3d at 573. The court does not have unlimited ability to consider harmless error sua sponte, but it does have "discretion to consider harmlessness *sua sponte* in extraordinary cases." *United States v. Brooks*, 772 F.3d 1161, 1171 (9th Cir. 2014); *Murguia-Rodriguez*, 815 F.3d at 57; *Kloehen*, 620 F.3d at 1130; *Gonzalez-Flores*, 418 F.3d at 1100. The court held that it "should consider three factors to identify such [extraordinary] cases," and cited the *Giovanetti* factors. *Brooks*, 772 F.3d at 1171; *accord Gomez*, 6 F.4th at 1007 (holding that the court "may raise harmless error *sua sponte* in consideration of" the *Giovannetti* factors).

The Ninth Circuit cited all three *Giovannetti* factors approvingly to identify the extraordinary cases in which it has discretion to review harmless error sua sponte, but it held that the second factor—the extent to which the harmlessness is certain or debatable—is "of particular importance." *Gonzalez-Flores*, 418 F.3d at 1101. In a partial dissenting opinion, which the Ninth Circuit cited favorably when it adopted sua sponte harmless error review in *Gonzalez-Flores*, Judge Berzon noted that, if the harmlessness of the alleged error is even somewhat debatable, it "is enough, under the *Giovannetti* line of cases to bar *sua sponte* harmless error review." *United States v. Rodriguez-Preciado*, 399 F.3d 1118, 1143 (9th Cir. 2005) (Berzon, J., dissenting in part); *Gonzalez-Flores*, 418 U.S. at 1101 (citing *Rodriguez-Preciado*, 399

F.3d at 1143 (Berzon, J., dissenting in part)). If the certainty of the harmlessness is "at all debatable," the second *Giovannetti* factor is not satisfied, and the case is not extraordinary enough to qualify for sua sponte harmless error review. *See Gonzalez-Flores*, 418 U.S. at 1101.

The Ninth Circuit limits sua sponte harmless error analysis to rare cases because "the practice may unfairly tilt the scales of justice by authorizing courts to construct the government's best arguments for it without providing the defendant a chance to respond." *Id.* (citing *Stuard v. Stewart*, 401 F.3d 1064, 1067 (9th Cir. 2005)). To serve this policy, the Ninth Circuit operates within the *Giovannetti* parameters and requires at least the second factor to be satisfied: "We therefore conclude that *sua sponte* recognition of an error's harmlessness is appropriate *only* where the harmlessness of the error is not reasonably debatable." *Id.* (italics in original). *C.f.*, *Giovannetti*, 928 F.2d at 227 ("[T]he controlling considerations [include] whether the harmlessness of the error or errors found is certain or debatable.").

The Eleventh Circuit shares the Ninth Circuit's requirement of satisfaction of the second *Giovannetti* factor. *See Adams*, 1 F.3d at 1576. Thus, it considers itself to have discretion to conduct harmless error review sua sponte only "[i]n some contexts." *Harris v. Lincoln Nat't Life Ins. Co.*, 42 F.4th 1292, 1298 (11th Cir. 2022).

Thus, in the Eighth, Ninth, Tenth, and Eleventh Circuits, the Seventh Circuit's *Giovannetti* factors are not mere guides to help a court decide when it should exercise its unlimited discretion. They are prerequisites to the court having discretion at all.

b. States

Similarly, many state courts use the *Giovannetti* test to determine when they have authority to exercise sua sponte harmless error review. Unless those courts conclude the *Giovannetti* test is met, they hold they lack discretion to decide a harmless error question the government has not raised.

For example, Wyoming uses the three *Giovannetti* factors for that purpose. In *Harlow v. State*, the Supreme Court of Wyoming exercised sua sponte review because the three *Giovanetti* factors applied to that case. 70 P.3d 179, 195 (Wyo. 2003). In Wyoming, "a reviewing court may consider" the *Giovannetti* factors, *Daniel v. State*, 78 P.3d 205, 212 (Wyo. 2003), and has "considerable discretion in deciding sua sponte whether to engage in a harmless error analysis," *Vigil*, 98 P.3d at 180.

Wyoming is not alone. The Supreme Court of Nevada has also held that the presence of the *Giovannetti* factors presents a situation where courts can discretionarily exercise sua sponte harmless error review. *See Belcher*, 464 P.3d at 1024. Likewise, the Supreme Court of Iowa ruled courts can choose to exercise sua sponte harmless error review when the *Giovannetti* factors apply. *See Marshall*, 882 N.W.2d at 103-03 (citing *In re Det. Of Blaise*, 830 N.W.2d 310 (Iowa 2013)). Both Iowa and Nevada agree with the Ninth Circuit that the second of the three *Giovannetti* factors are the most important, but the Supreme Court of Wyoming did not specify if any single factor should receive more weight.[9]

[9] *Compare Marshall*, 882 N.W.2d at 104, *and Belcher*, 464 P.3d at 1024, *with Harlow*, 70 P.3d at 195.

2. Approach Two: Courts have unlimited discretion to raise harmless error sua sponte, but *Giovannetti* or some other test guides the exercise of courts' discretion.

Under another line of decisions, courts set no limit on their discretion to reach harmless error sua sponte. Within this line of decisions, instead of testing to determine whether they have discretion, courts apply tests to determine whether they should exercise that discretion. But the courts are split as to whether the *Giovannetti* test is the exclusive test for deciding when to exercise this discretion or whether the *Giovanetti* factors are merely three useful considerations among many.

a. Circuits

Unlike the four other circuits multiple state courts that hold that they have discretion to review for harmless error *sua sponte* only after concluding that some or all the *Giovannetti* factors are satisfied, at least seven circuits hold they have unqualified discretion to do so. But there is division even within these circuits, with that division spawning three different analyses. The Third Circuit uses *Giovannetti* as the sole guide when deciding whether to exercise its unlimited discretion. Five other circuits see the *Giovannetti* factors as useful, but not exclusive, guides. Finally, the Second Circuit holds that it has unqualified discretion to conduct harmless error review sua sponte, but it has identified no factors to use when deciding whether to exercise that discretion.

i. The Third Circuit relies exclusively on the *Giovannetti* factors.

First, the Third Circuit considers itself to have unlimited discretion to conduct harmless error review sua sponte, and it relies on only the *Giovannetti* factors as

appropriate considerations when deciding whether it should exercise that discretion. In *United States v. McLaughlin*, the court held that it had discretion to consider unbriefed harmless error without qualifying that discretion in any way. 126 F.3d 130, 135 (3d Cir. 1997). And it has reiterated this unrestricted approach in later decisions. *See, e.g.*, *Faulks*, 201 F.3d at 213 ("We can employ harmless error analysis *sua sponte*."); *Guadalupe v. Att'y Gen. U.S.*, 951 F.3d 161, 166 n.30 (3d Cir. 2020) (noting that the court may consider the question even if the government does not address it without imposing any parameters). When the court adopted discretionary harmless error review in *McLaughlin*, it identified only the *Giovanetti* factors as guides to help "[i]n deciding whether to exercise that discretion." 126 F.3d at 135; *accord United States v. Shavers*, 693 F.3d 363, 388 (3d Cir. 2012), *vacated on other grounds* 133 S. Ct. 2877 (2013).

Thus, in *Faulks*, the Third Circuit declined to exercise its discretion because it was not persuaded it should do so under the *Giovannetti* factors. 201 F.3d at 213. The court did not consider other reasons to conduct harmless error review sua sponte as some other courts do. *Compare id.*, *with Rose*, 104 F.3d at 1414. Instead, it held that *Faulks* was "an inappropriate case" for sua sponte harmless error review due to the failure to satisfy the *Giovannetti* factors. 201 F.3d at 213. Similarly, in *United States v. Davis*, the court refused to raise harmless error sua sponte because it saw no reason to do so when examining the case under the *Giovannetti* factors. 726 F.3d 434, 445 n.8 (3d Cir. 2013).

ii. Five circuits treat the *Giovannetti* factors as useful but non-binding considerations.

Second, five circuits use the *Giovannetti* factors as merely three factors, among many, to use when considering whether to exercise discretion to conduct harmless error review sua sponte. In *Giovannetti* itself, the Seventh Circuit first established its unqualified discretion to conduct harmless error review sua sponte without any prerequisite demonstration "for the sake of protecting third-party interests including . . . systemic interests." *Giovannetti*, 928 F.2d at 226. When announcing the *Giovannetti* factors, the Seventh Circuit, unlike later courts, *compare Livingston*, 443 F.3d at 1226, was not articulating rigid prerequisites but was instead offering factors to help "in deciding whether to exercise [its] discretion" in service of the overarching policy of protecting third-party and systemic interests. *Giovannetti*, 928 F.2d at 227.

In the intervening decades since the *Giovannetti* decision, the Seventh Circuit has affirmed its view that it has unlimited discretion to review harmless error sua sponte and that its three factors are simply guides in service of its policy-goal of protecting third-party interests. *See Bourgeois v. Watson*, 977 F.3d 620, 632 (7th Cir. 2020) (noting courts may exercise their discretion to serve this overarching policy goal without requiring any *ex-ante* showing); *United States v. Arrellano*, 757 F.3d 623, 635 (7th Cir. 2014) (noting courts may overlook failure to argue harmlessness if it serves the policy goal without imposing any prerequisite showing); *Sanders v. Cotton*, 398 F.3d 572, 582 (7th Cir. 2005) (noting it would usually overlook waiver of a harmlessness argument only when the *Giovanetti* factors were met).

The First Circuit simply holds that it has unqualified "discretion on direct appeal to . . . consider the issue of harmlessness *sua sponte*." *Rose*, 104 F.3d at 1414; *accord United States v. Magee*, 834 F.3d 30, 38 (1st Cir. 2016); *United States v. Burgos-Montes*, 786 F.3d 92, 114 (1st Cir. 2015). In *Rose*, the court anticipated many later decisions from its sister circuits when it held, "[w]hile we find helpful the reasoning of the Seventh Circuit, we do not restrict ourselves to the *Giovannetti* test." 104 F.3d at 1415. To support this proposition, the First Circuit cited the District of Columbia Circuit's decision in *United States v. Pryce*, in which that court similarly approved of the "general approach of *Giovannetti*" without confining itself to the three factors. 938 F.2d 1343, 1348 (D.C. Cir. 1991) (opinion of Williams, J.).

In the Fifth Circuit, the court did not provide any further details when it held that it may conduct harmless error review sua sponte "for obvious reasons," implying that court sees it as inherently part of its role as an appellate court. *United States v. Rodriguez*, 602 F.3d 346, 360 (5th Cir. 2010). The court has reasoned that it can conduct such a review as a matter of right, noting that it "ordinarily [has] the discretion to decide legal issues that are not timely raised" without any limits. *United States v. Vontsteen*, 950 F.2d 1086, 1091 (5th Cir. 1992); *accord Atkins v. Hooper*, 979 F.3d 1035, 1049 (5th Cir. 2020) ("[W]e have the discretion to reach the issue [of harmless error] even *sua sponte*."); *Jones,* 600 F.3d at 541 (5th Cir. 2010) ("The court can, in its discretion, consider the harmless error defense *sua sponte*."). The Fifth Circuit held that *Giovannetti* illustrates its powers well, *Vontsteen*, 950 F.2d at 1091, but the court does not treat the factors as mandatory, having raised harmless error

sua sponte to "prevent a miscarriage of justice," *Rodriguez*, 602 F.3d at 360, which is not one of the *Giovanetti* factors, *see Giovannetti*, 928 F.2d at 227.

Similarly, the Sixth Circuit has held that it has discretion to conduct harmless error review sua sponte "and when a court determines whether to do so, it should utilize the *Giovannetti* factors among other relevant considerations." *Gover*, 698 F.3d at 301. The court was careful to emphasize courts should consider *Giovannetti* "when deciding whether to exercise its discretion; however, the determination is not limited to those factors alone." *Id.*

iii. The Second Circuit has never articulated a test for deciding when to exercise discretion.

Third, the Second Circuit agrees with *Giovannetti* that courts have unqualified discretion to raise harmless error *sua sponte*, but it has articulated no factors for choosing when to use that discretion. The court has held: "We have discretion to consider the harmlessness of an alleged error even though the Government has not argued this line of defense," without placing any qualifications or limits on that discretion. *United States v. Dolah*, 245 F.3d 98, 107 (2d Cir. 2001) *abrogated on other grounds by Crawford v. Washington*, 541 U.S. 36, 64 (2004); *accord United States v. Mason*, 692 F.3d 178, 184 (2d Cir. 2012) (noting the court's unqualified discretion to review for harmless error sua sponte). So unlike some of its sister circuits, *compare Livingston*, 443 F.3d at 1226, the Second Circuit has seemingly opted for an *ad hoc*, case-by-case determination of when to exercise its discretion. *See Dolah*, 245 F.3d at 107; *Mason*, 692 F.3d at 184; *see also Silver*, 954 F.3d at 459 (per curiam) (acknowledging the existence of the *Giovannetti* factors but not assessing or using

them). The Second Circuit's approach to sua sponte harmless error analysis is perhaps best summed up by *United States v. Arrous*, when the court conducted such a review because "common sense considerations compel" it. 320 F.3d 355, 356 (2d Cir. 2003).

b. States

Multiple states rely on *Giovannetti,* or a *Giovannetti* progeny case, as a rationale for sua sponte harmless error review but do not explain how to apply the *Giovannetti* factors in their jurisdiction or when sua sponte review is appropriate. Although the courts in these states agree they *can* exercise sua sponte review, they have given no guidance on *how* this review should work. This causes, and will continue to cause, inconsistencies among the states, as courts grapple with whether and when to consider harmless error sua sponte.

For example, the majority of the Supreme Court of Pennsylvania endorsed sua sponte harmless error review because of *Giovannetti*, but it did not mention any of the factors or how courts should apply the test. *Hamlett*, 234 A.3d at 492-93. Not all the justices were pleased with this answer. One Justice pointed out that "[i]mportant questions remain to be resolved in future cases, including whether appellate courts are required to order supplemental briefing when invoking the harmless error doctrine." *Id.* at 494 (Donohue, J., concurring). Pennsylvania courts are left with no answer to the question of "[w]hat is the relevant test for determining whether an error affected the outcome when harmless error is invoked sua sponte?" *Id.*

Another Justice went further in criticizing the court's confusing application of sua sponte review:

> But I find no practical limitations here, no standard, no rubric by which to distinguish an "appropriate" case from an inappropriate one, and no reason to expect that this purported "exception" to a litigant's burden will prove to be anything other than the norm, to the extent that the exception has not swallowed the rule already.

Id. at 496 (Wecht, J., dissenting)

Pennsylvania is not the only state that has failed to give its appellate courts a satisfactory explanation for sua sponte harmless error review. The Supreme Court of Nebraska used sua sponte review in *McKinney* because the *Giovannetti* factors applied to that case, but it conceded that it had no explanation for how this review applied. 777 N.W.2d at 561.[10] Delaware and Florida have done even less. The supreme courts of both states briefly concluded they had the power to raise harmless error on their own because federal appellate courts had done it. *See Hassan-El*, 911 A.2d at 398; *Huess,* 687 So. 2d at 824. But neither court attempted to explain when or how sua sponte review can or should occur.

Thus, even states that agree courts can exercise sua sponte harmless review are divided about when and how this review can and should occur. States like Iowa, Nevada, and Wyoming have applied the *Giovannetti* test much like the federal circuits. Other states have not explained how those factors or other factors apply. Further, in states like Delaware and Florida, those factors do not apply at all.

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[10] *McKinney*, 777 N.W.2d at 561. ("Our authority to consider harmless error sua sponte may not have been expressly discussed in our opinion or in denying McKinney's motion for rehearing. But it was necessarily decided, both in our denial of the motion for rehearing and implicitly with our finding of harmless error in *McKinney I.*").

3. Approach Three: Courts must perform a sua sponte review for harmless error.

Finally, the Fourth Circuit adopted a third approach to sua sponte harmless error analysis here. On appeal from the District of South Carolina, the court assessed whether it was error for Dix to receive a sentencing enhancement based on an offense not identified in the PSR. *Dix*, 64 F.4th at 235. The court held: "This, we conclude was procedural error, and therefore we *must* determine whether it was harmless." *Id.* (emphasis added). The Fourth Circuit's decision here, that it is required to consider harmless error sua sponte contrasts with the decisions of its sister circuits that—despite their points of disagreement—unanimously hold that sua sponte harmless error review is discretionary. *See, e.g.*, *Harris*, 42 F.4th at 1298 ("[T]hat discretion is not an obligation, and we choose not to assess the matter of prejudice here without briefing.").

To reach its conclusion, the Fourth Circuit relied on a reading of Federal Rule of Criminal Procedure 52(a) that other circuits have rejected. That Rule states: "Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded." Fed. R. Crim. P. 52(a). Other circuits have considered the same language in Rule 52(a) and rejected the argument that a court is ever obligated to raise harmless error sua sponte. For example, in *Giovannetti*, the Seventh Circuit held that the mandatory language of Rule 52(a) is simply a "general feature of legal rules," that exists against a background of general understanding of invoking or waiving the rule's benefits. *Giovannetti*, 928 F.2d at 226. The court identified two major issues with compelling a court to review for harmless error sua sponte. *Id.*

First, it found troubling the idea that a court could ever be compelled to review for harmless error without "the guidance of the parties on the question whether particular errors were harmless." *Id.* Second, it did not want to "invite salami tactics" by allowing the government to forgo arguing harmless error but always having recourse to seek rehearing on that basis. *Id.* Those concerns led the court to hold that sua sponte harmless error review is a discretionary prerogative it exercises based on overarching policy goals. *Id.*

The Fourth Circuit may be alone among the federal circuits in holding that sua sponte harmless error analysis is an obligation but at least one state has come to the same conclusion. In *Goodwin v. State,* the Supreme Court of Florida held that there is a "solemn obligation of the Court to perform an independent harmless error review." 751 So. 2d 537, 545 (Fla. 1999). The court held that this obligation persists "even when the state has not argued that the complained of error was harmless." *Id.* (citation omitted). In *Knowles v. State*, the court similarly referred to this review as a non-discretionary "duty of a reviewing court to determine harmless error 'regardless of any lack of argument on the issue by the state.'" 848 So. 2d 1055, 1057 (Fla. 2003) (quoting *Goodwin*, 751 So. 2d at 545). In the decades since *Goodwin*, Florida courts have routinely affirmed that sua sponte harmless error analysis is an obligation incumbent on all courts. *See, e.g., McCray v. State*, 919 So. 2d 647, 649 (Fla. Dist. Ct. App. 2006) ("Although [the government] does not assert harmless error in its brief, we must address that issue.").

* * *

Given the tension between the government bearing the burden to show harmless error and allowing courts to reach the issue sua sponte, and given the nature of the rights at issue, the Court should resolve the division in the lower courts.

III. The petition raises an important question of federal law that this Court should address.

A. Courts raising harmless error sua sponte implicates a criminal defendant's constitutional due-process rights.

Procedural due process has been a foundational legal principle since this nation's inception. U.S. Const. amend. V; *accord* U.S. Const. amend. XIV, § 1. This Court recognizes that "[e]ngrained in our concept of due process is the requirement of notice." *Lambert v. People of the State of California*, 355 U.S. 225, 228 (1957). Although the Court noted *Lambert* dealt with civil litigation, they determined the principle was "equally appropriate" in criminal cases. *Id.*; *accord Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 313-16 (1950); *Hagar v. Reclamation Dist.* No. 108, 111 U.S. 701, 708 (1884).

The use of the phrase "due process of law" in the Constitution is meaningful. It is "intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice." *Bank of Columbia v. Okely*, 17 U.S. (4 Wheat.) 235, 244 (1819). It is worth saying twice: due process "secure[s] the individual from the arbitrary exercise of the powers of government." *Id.*

As well, courts should not "want 'to encourage the government's laxness and failure to follow . . . clear, applicable precedent' assigning it the burden of establishing harmlessness." *Belcher*, 464 P.3d at 1023 (quoting *United States v. Rodriguez,* 880

F.3d 1151, 1163 (9th Cir. 2018)). That is no radical proposition. In fact, members of this Court have had much the same idea. "An automatic application of harmless-error review in case after case, and for error after error, can only encourage prosecutors to subordinate the interest in respecting the Constitution to the ever-present and always powerful interest in obtaining a conviction in a particular case." *Rose v. Clark*, 478 U.S. 570, 588-89 (1986) (Stevens, J., concurring).

A court considering harmless error sua sponte raises fairness concerns. That review "may unfairly tilt the scales of justice by authorizing courts to construct the government's best arguments for [harmlessness] without providing the defendant with a chance to respond." *Belcher*, 464 P.3d at 1023 (quoting *Gonzalez-Flores,* 418 F.3d at 1101). When a court engages in sua sponte harmless error review, not only does it appear the court is aiding the government in prosecuting the defendant, but it appears the court is precluding the defendant's opportunity to defend their position.

Even if it appears the error did not harm the proper outcome of the trial, criminal procedure has a broader ethical vision that "encompasses non-result-related interests such as providing defendants with space for autonomous decisionmaking, enforcing compliance with nondiscrimination norms, and making transparent the inner workings of criminal justice." Justin Murray, *A Contextual Approach to Harmless Error Review*, 130 Harv. L. Rev. 1791, 1794 (2017). Harmless error doctrine itself already receives criticism for neglecting to consider values besides the accuracy of criminal convictions, important values such as "restraining human rights abuses and protecting the dignity of the accused." John M. Greabe, *The Riddle of Harmless*

Error Revisited, 54 Hous. L. Rev. 59, 120 n.324 (2016). Due process should protect those rights. Compounding harmless error doctrine with courts raising harmless error on the government's behalf exacerbates the danger of loss of the rights due process is meant to protect.

B. The differences between the lower court's approaches are meaningful and result in arbitrary differences in due process protections.

Further, the differences between the lower courts' approaches result in arbitrary differences in due process protection. When some jurisdictions allow sua sponte harmless error review but others do not, when jurisdictions apply different tests to determine if they have discretion to decide the issue and when they should exercise any such discretion, defendants receive differing constitutional due-process protection depending on the jurisdiction in which they find themselves. Those defendants in jurisdictions where courts readily "do the government's homework," *Molina*, 407 F.3d at 524, by considering harmless error when the government has not attempted to meet its burden are less protected than those in jurisdictions that decline to raise harmless error sua sponte or do so only under more limited circumstances.

For example, if Dix had appealed his case to the Tenth Circuit, precedent would have required the court to establish that the case satisfied all three of the *Giovannetti* factors before it *could* conduct harmless error analysis sua sponte. *See Livingston*, 443 F.3d at 1226 (citing *Samaniego*, 187 F.3d at 1224-25). Had he appealed in the Third Circuit, the court would have assessed the same factors to determine whether it *should* conduct harmless error review. *See McLaughlin*, 126 F.3d at 135. In both

instances, it would have been significantly less likely that the government would prevail in his appeal based on an argument the government did not make, as happened here. Had Dix been subject to prosecution in Idaho, the appellate court would never have conducted sua sponte harmless error review at all. *See Ruiz*, 248 P.3d at 722.

Courts serve due process better by "plac[ing] the duty of care to prevent errors on the party who commits the error or who benefits from the judge's error." Darryl K. Brown, *Does It Matter Who Objects? Rethinking the Burden to Prevent Errors in Criminal Process*, 98 Tex. L. Rev. 625 (2020). At the very least, if courts raise harmless error sua sponte, they should uniformly apply clear factors, such as the ones from *Giovannetti*, to increase transparency, consistency, and faith in due process.

C. Sua sponte harmless error review raises separation of powers concerns and allows the executive to avoid bearing a minor burden by imposing a significant burden on the judiciary.

It is imperative that courts treat litigants the same, no matter who those litigants may be. For example, the Fourth Circuit has held litigants other than the government accountable when they forfeit arguments on appeal by failing to raise them. *See United States v. Hudson*, 673 F.3d 263, 268 (4th Cir. 2012) (Niemeyer, J.) (noting that failure by a criminal defendant to raise an issue in their opening brief constitutes a proper waiver); *Omni Outdoor Adver., Inc. v. Columbia Outdoor Adver., Inc.*, 974 F.2d 502, 505 (4th Cir. 1992) (Wilkinson, J.) (observing that "[t]he most rudimentary procedural efficiency demands that litigants present all available arguments to an appellate court on the first appeal").

True, the United States is not the average litigant, but that cuts both ways. The Court has discussed the special role of a federal prosecutor: their interest "in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935). Thus, "while he may strike hard blows, he is not at liberty to strike foul ones." *Id.* In sum, prosecutors are responsible for upholding the integrity of the law just as much as they are responsible for enforcing the law.

Moreover, the Court has treated government entities the same as other litigants when it comes to forfeiture. For example, this Court has held the State accountable when it fails to raise an argument in other circumstances. *See*, *e.g.*, *Schiro v. Farley*, 510 U.S. 222, 229 (1994) (holding that although this Court "undoubtedly [has] the discretion" to analyze a defense not raised by the State, the failure to raise the defense is "significant" and thus the Court would not analyze the argument).

Separation of the judiciary from the executive is important, actually and in perception. Prosecutors argue the case, but judges must remain neutral arbiters of justice. That separation is most important in criminal proceedings, where citizens' liberty interests are at stake. When courts engage in sua sponte harmless error review, especially without clear and uniform guidelines to follow, they risk breaching that separation and come "perilously close to exercising an executive branch function." *Rose*, 629 A.2d at 535. This step into the executive branch's function by the

courts "would be inconsistent with the neutrality expected of the judiciary in our adversary system of justice." *Id.*

Further, sua sponte harmless error review imposes burdens on appellate courts, and it is improper for the executive to offload its burden to show an error is harmless onto the judiciary. Not only because it is unfair to the defendant, who cannot rebut the assertion the error is harmless, but the review also "imposes greater burdens on an appellate court, which would need to identify and become familiar with the relevant parts of the trial record without the benefit of briefing from the parties." *Porte*, 832 N.W.2d at 313 (citing *Gonzalez-Flores,* 418 F.3d at 1100-01); *accord Belcher,* 464 P.3d at 1023 (noting the court should not overlook the burden sua sponte harmless error review places on the reviewing court). Thus, the Court should disfavor sua sponte review.

Not that sua sponte harmless error review has no benefits. Other courts have noted that not applying sua sponte harmless error review would "elevate form over substance and hamper the goal of efficient use of judicial resources." *McKinney*, 777 N.W.2d at 561 (Neb. 2010). As it stands, trial courts avoid retrying a case when the prosecution fails to raise harmless error and the appellate courts determine the harm sua sponte.

But that is, at best, a zero-sum benefit to the judiciary. Trial courts save resources, but only at the expense of appellate courts expending additional resources. And requiring prosecutors merely to raise harmless error in their appellate briefs is not imposing an Atlas-like burden on the executive. Given that the burden on the

executive is low and the net burden–benefit to the judiciary zeroes out, criminal defendants' due-process rights should tilt the analysis in favor of at least limiting sua sponte harmless error analysis to extraordinary cases based on a clear standard.

D. The issue is recognized, widespread, and recurring.

The potential problems and divisions resulting from sua sponte review are nothing new. Legal scholarship has touched on the issue, and the D.C. Circuit's decades-old decision in *Pryce*, anticipated the current divide among the lower courts.

As scholars have noted, little incentive exists for prosecutors not to commit error in trial if they can not only rely on the harmless error doctrine but on the court to raise harmless error on its own. This recognition of the low stakes of prosecutorial error "strongly suggests that the courts do not care very much about prosecutorial misconduct." Mary Nicol Bowman, *Mitigating Foul Blows*, 49 Ga. L. Rev. 309, 351-52 (2015). Increasingly, the government can predict that appellate courts will ignore its misconduct if there is sufficient evidence to prove the defendant's guilt. *Id.* As long as the evidence of the defendant's guilt is clear, the harmless error doctrine coupled with the government not needing to meet its burden to raise it, unintentionally encourages prosecutorial error since the conviction will likely be affirmed regardless. *Id.* This system incentivizes prosecutors neither to refrain from error nor to meet their burden to raise harmless error. *Id.* Instead, it fosters incongruence between courts denouncing prosecutorial misconduct but refusing to hold the government responsible. *Id.*

In addition, scholars have often noted the issues that arise when courts step in without the urging of prosecution. "Prosecutorial misconduct may benefit the

prosecution at trial, so the prosecution should bear the burden of showing that it did not actually receive a benefit from this behavior." Bowman, *supra*, at 374-75. The government, therefore, should be fulfilling its obligations to the court instead of relying on judges to fix their omissions. But with liberal or mandatory sua sponte harmless error review, prosecutors are often saved from their own mistakes. Conversely, restraining courts from engaging in sua sponte harmless error review, or at least limiting the use of that review to exceptional circumstances, maintains separation of powers and the integrity of the Federal Rules of Criminal Procedure.

In sum, "it would be unfair to allow the prosecutor to break rules of conduct and then require that the defendant prove the misconduct changed the outcome of the proceeding." *Id.* (quoting Michael T. Fisher, *Harmless Error, Prosecutorial Misconduct, and Due Process: There's More to Due Process than the Bottom Line*, 88 Colum. L. Rev. 1298, 1320 (1988)). Another scholar noted the current "harmless error standard . . . encourages rule-breaching trial tactics" by allowing prosecutors to have a safety net: the courts. Brown, *supra*, at 645. When appellate courts undertake this review completely of their own accord and without any real standard of application, "appellate courts signal to prosecutors that committing such errors is cost free." *Id.*

Further, the division in the lower courts is nothing new. In fact, a fractured panel of the D.C. Circuit reached much the same division that exists today among appellate courts. In that decision, Judge Silberman dissented in part because he disagreed that the defendants' "appeals [could] be rejected under the harmless error doctrine notwithstanding the government's inexplicable failure to argue that the

error was harmless." *See Pryce*, 938 F.2d at 1352 (Silberman, J., dissenting in part). In short, Judge Silberman would have held that the government forfeits harmless error when it fails to raise in on appeal, much the same stance Idaho takes today. Judge Randolph's concurrence took the opposite position. Judge Randolph reasoned, relying in large part on Federal Rule of Criminal Procedure 52(a), that sua sponte harmless error review is mandatory. *See id.* at 1351 (Randolph, J., concurring). That is much the same stance the Fourth Circuit took here. Finally, writing for the court, Judge Williams reasoned, relying on *Giovanetti*, that sua sponte harmless error review was discretionary. *See id.* at 1347-48 (Williams, J. op.).

More than thirty-two years have passed since *Pryce*, yet state and federal courts remain divided along the same general lines as the *Pryce* panel. Only this Court can resolve this long-standing division.

E. The Fourth Circuit's en banc decision shows the importance of the issue and highlights the potential arbitrary nature of outcomes on this issue.

A federal court of appeals taking a case en banc is no small feat. This is by design. The Federal Rules of Appellate Procedure state: "[a]n en banc hearing or rehearing is not favored and ordinarily will not be ordered unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance." Fed. R. App. P. 35(a). "Cases where the panel merely got it wrong do not satisfy the standard." Amy C. Barrett, *Stare Decisis and Due Process*, 74 U. Colo. L. Rev. 1011, 1046 (2003). Not only is the burden high, but judges typically disfavor granting en banc review because they believe it is "burdensome and inefficient." *Id.* Due to those factors, "it is

unsurprising that the courts of appeals resolve fewer than one percent of their cases en banc." *Id.*

Consistent with the idea that en banc review is rare, the Fourth Circuit explained in 2019 that it grants a rehearing en banc in "approximately 0.3% of the cases in which it is requested."[11] As the court explained, the court grants petitions for hearing en banc only when either the panel decision conflicts with the Supreme Court or Fourth Circuit precedent or the decision is exceptionally important in some way, such as conflicting with other circuits' authoritative decisions.[12]

Recent statistics are consistent. The Administrative Office of the U.S. Courts published that the Fourth Circuit had fifty-four petitions for rehearing per active judge in 2022.[13] The Fourth Circuit has fifteen judgeships, equaling 810 petitions for rehearing.[14] In 2022, the Fourth Circuit heard three cases en banc.[15] Therefore, the Fourth Circuit granted rehearing in 0.37% of cases in which parties requested it.

Given the data, the even 7-7 split in the decision to rehear Dix's case is even more important. Half of the judges in the Fourth Circuit considered this issue so

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[11] United States Court of Appeals for the Fourth Circuit, *FAQs – Statistics*, https://perma.cc/A6J2-Z9TS.

[12] *Id.*

[13] United States Courts, *Federal Court Management Statistics – Summary* (Dec. 31, 2022), https://www.uscourts.gov/sites/default/files/data_tables/fcms_na_appsumary1231.2022.pdf.

[14] *Id.*

[15] United States Court of Appeals for the Fourth Circuit, *En Banc Cases*, https://www.ca4.uscourts.gov/opinions/en-banc-cases#2022.

important that they were willing to invest time and resources to hearing it en banc. The dissenting judges felt so strongly about the issue that four judges signed one dissenting opinion, and two of the same judges signed another. *Dix*, 69 F.4th at 150, 154 (4th Cir. 2023).

In one dissent, Judge King, joined by the Chief Judge and two others, explained that both factors used to determine whether en banc is warranted are satisfied in Dix's case. *Id.* at 150 (King, J., dissenting). Judge King noted the decision in Dix's case directly conflicts with *Brizuela*, 962 F.3d at 789. *Dix*, 69 F.4th at 151 (King, J., dissenting). *Brizuela* held the court should avoid raising harmless error sua sponte when "the question of harmless error is close." 962 F.3d at 799. Judge King then explained this question is exceptionally important because "the panel majority consistently ignored . . . the actual prejudice" Dix suffered. *Dix*, 69 F.4th at 153 (King, J., dissenting). In sum, "the majority's decision—which either ignores the government's intentional waiver of the harmless error issue, or simply provides cover for prosecutorial oversight—failed to explain why that fact alone is *not* prejudicial to Dix. Nor can it do so." *Id.* at 154.

In the other dissent, Judge Wynn, joined by Judge Thacker, echoed the sentiment of Judge King's dissent and emphasized two points. First, Judge Wynn expressed concern about what "appears to be an increasing practice in our Court to give special dispensation to prosecutors." *Id.* at 154 (Wynn, J., dissenting). He noted the court seemed ready to cover the government when they abandon issues and sua sponte "deem 'harmless' a government's recognized noncompliance with its

obligations when the government itself did not even argue [the court] should do so." *Id*. He then described a "rather glaring difference" in the court's apparent treatment of certain defendants based on their socioeconomic status. *Id.* at 155. Judge Wynn stated, "even the appearance of such 'preferential treatment' . . . has no place in our judicial system." *Id.*

Further, given that half of the Fourth Circuit has concluded that the divided panel below reached the wrong conclusion about whether to engage in sua sponte harmless error review or the outcome of that review, the outcome of Dix's case hinged on the outcome of a metaphorical coin flip. Dix is now serving a sentence that is "at least 12 months longer" than he should, with the possibility of the sentence being 30 months—two and a half years—longer than what he would be serving if he had won that coin flip and one judge on his panel switched. *Id.* at 153 n.4 (King, J., dissenting).

The law should not change based on a metaphorical coin flip, and parties should not win or lose appeals based on something as arbitrary as who makes up the panel or in what jurisdiction they find themselves. Today, unclear and varied standards for if and when a court may raise harmless error sua sponte leaves a defendant's due process rights up to chance. The Court should clarify the standard so every defendant, regardless of panel makeup or jurisdiction, receives the same protections.

IV. This case is an ideal vehicle to resolve the issue.

The issue on appeal to the Fourth Circuit was whether Dix should have received notice of the other felony offense on which the government intended to rely for a four-level enhancement under the U.S.S.G. § 2K2.1(b)(6)(B), and whether the

enhancement was erroneously applied and resulted in an erroneous sentence. (Brief for Appellee). The Fourth Circuit agreed that Dix received inadequate notice. But the Court sua sponte determined the error was harmless.

Thus, the only issues for this Court to resolve are whether and when courts may properly raise harmless error sua sponte. And this case is an ideal vehicle for resolving those questions.

The Fourth Circuit issued three separate decisions, and all three featured significant analysis of the sua sponte harmless error question. Further, both Dix and the government filed full briefing on the issue, albeit in the context of a petition for rehearing. (ECF 50; ECF 62; ECF 65.) Thus, the Court will have the benefit of analysis and rehearing briefing in the Fourth Circuit, and there is no question the question is fully preserved for this Court's review.

The questions are dispositive to Dix's case. If the Fourth Circuit improperly raised harmless error sua sponte or applied the wrong standard, then the Fourth Circuit's decision cannot stand. The Court would need to vacate and either remand for resentencing or remand for the Fourth Circuit to apply the correct standard. If, however, the Fourth Circuit's decision is correct, Dix's appeal is at an end.

Moreover, the issue is not entwined with any factual, state-law, or other non-certiorari-worthy issues. The sole remaining issue is the propriety of the sua sponte harmless error review the Fourth Circuit employed, a purely federal question. Dix pleaded guilty and is not appealing his conviction. The facts are undisputed, and the issue arose out of a federal sentencing error.

Finally, as discussed above, the Fourth Circuit's decision deepens an already existing division among courts about sua sponte harmless error review. Multiple approaches for determining when courts can or should engage in that sort of review already existed. By holding that sua sponte harmless error review is mandatory—the first federal circuit to do so—the Fourth Circuit deepened that division. Thus, review is particularly appropriate here.

V. The Fourth Circuit's decision is contrary to all its sister circuits, contrary to Fourth Circuit precedent, and reaches the wrong conclusion about the harmfulness of the district court's error.

Although, as discussed, there is significant division among courts about whether and when courts may engage in sua sponte harmless error review, every single United States Court of Appeals and every single state save one—Florida—disagrees with the approach the Fourth Circuit took here. All those courts either hold that sua sponte harmless error review is improper or that courts at least have discretion to refuse to engage in that review. Not so, held the Fourth Circuit here. Instead, it aligns itself with only the Florida Supreme Court by holding that sua sponte harmless error review is mandatory. *See* Pet. App. 32A; *see also Goodwin*, 751 So. 2d at 545; *accord Pryce*, 938 F.2d at 1351 (Randolph, J., concurring).

Not only is the Fourth Circuit's decision here outside the ordinary bounds of the division on this issue but also, it is contrary to the Fourth Circuit's own precedent. As Judge King recognized in his dissent to denial of rehearing, the Fourth Circuit previously refused to engage in sua sponte harmless error review. *Brizuela*, 962 F.3d at 789. The Fourth Circuit already recognized sua sponte review was discretionary, not mandatory, reasoning it "should avoid doing so when, as here, the question of

harmless error is close." *Id.* So, the Fourth Circuit's decision here calls out for correction, not only because it conflicts with every other circuit, but also because it conflicts with the Fourth Circuit's own precedent.

Because the Fourth Circuit concluded sua sponte harmless error review was mandatory, it did not analyze whether it could or should conduct such a review. Therefore, the Fourth Circuit failed to analyze the due process parameters or whether the government can be relieved of its burden to show harmless error, a burden this Court has confirmed more than once is one for the government to bear. *See, e.g.*, *Vonn*, 535 U.S. at 68; *O'Neal*, 513 U.S. at 437-38; *Olano*, 507 U.S. at 741. It did no analysis of the *Giovanetti* factors or any other factors to determine whether it had discretion to reach the question or whether it should exercise any discretion it might have. Instead, it erred by leaping straight to the conclusion that Rule 52(a) mandated harmless error review even though the government had never raised the issue. Pet. App at 39A. At minimum, the lack of any analysis (meaningful or otherwise) of whether the court had discretion to relieve the government of its burden to show harmless error and, if it did, whether it should exercise that discretion militates strongly in favor of granting the petition, vacating the Fourth Circuit's decision, and remanding for additional analysis under an appropriately defined standard.

To make matters worse, the Fourth Circuit's decision butchers the harmless error analysis. It focuses on whether Dix might have raised different arguments "to contest the validity [and] applicability" of the sentence enhancement had he received proper and sufficient notice that the government would seek to use failure to stop for

a blue light as the basis for applying the enhancement. Pet. App. 34A-35A. But that analysis ignores why Dix received insufficient notice—the government did not object to exclusion of failure to stop for a blue light from the PSR—and the correct consequence for failing to object to the PSR—forfeiture of the objection. *See* Pet. App. 32A ("[T]he government did not object to the presentence report, as required by Rule 32(f), on the ground that it should also identify the blue-light offense as a basis for the enhancement.")); *United States v. Hodge*, 902 F.3d 420, 427-30 (4th Cir. 2018) (refusing to allow the government, who failed to object to the PSR, to change positions and assert a different offense as the basis of an enhancement); *United States v. Terry*, 916 F.2d 157, 162 (4th Cir. 1990) (noting that, in the absence of any objection, the court can adopt the PSR); Fed. R. Crim. P. 32(f). Thus, the quality of Dix's counterarguments to the government's belated efforts to rely on failure to stop for a blue light to apply the enhancement are irrelevant.

Further, as the judges dissenting in denying rehearing noted, the Fourth Circuit overlooked a practical and real-world prejudice Dix has suffered from the error. "Dix has been prejudiced because he is presently serving a 99-month prison sentence—which is at least 12 months more than he would likely be serving absent the four-level enhancement." Pet. App. 56A. That is, absent the Fourth Circuit's apparent bald assumption that the district court—if fully cognizant that it could not consider the government's late-raised theory for applying the enhancement without violating Dix's rights—would have continued the sentencing hearing instead of

holding the government to its non-objection to the PSR, Dix would be serving less time in prison.

At minimum, "reasonable minds could differ on the question of harmless error," *Brizuela*, 962 F.3d at 789, and demonstrably did differ. Pet. App. 50A-61A. And in the Fourth Circuit before this case and at least the Ninth and Eleventh Circuits, Iowa, and Nevada, that "reasonable minds could differ" on the second *Giovannetti* factor would foreclose sua sponte harmless error review. *See Gonzales-Flores*, 418 F.3d at 1101; *Adams*, 1 F.3d at 1576; *Marshall*, 882 N.W.2d at 104; *Belcher*, 464 P.3d at 1023-1024.

In sum, the Fourth Circuit's lack of any analysis of whether it could engage in sua sponte harmless error review, its lack of any analysis of whether it should engage in sua sponte harmless error review, the conflict its decision creates with decisions of courts in other jurisdiction, and its flawed harmless error analysis all warrant this Court accepting review and vacating the Fourth Circuit's decision.

CONCLUSION

For these reasons, the Court should grant the petition for certiorari.

Respectfully submitted,

s/ *Kimberly H. Albro*

Kimberly H. Albro
Counsel of Record
Assistant Federal Public Defender
Federal Public Defender's Office
District of South Carolina
1901 Assembly Street, Suite 200
Columbia, South Carolina 29201
(803) 765-5088
kimberly_albro@fd.org

E. Travis Ramey
Appellate Advocacy Clinic
University of Alabama School of Law
Box 870382
101 Paul W. Bryant Drive, East
Tuscaloosa, Alabama 35487
(205) 348-4960