No. 23-_____

==========

IN THE SUPREME COURT OF THE UNITED STATES

_____

RONELL WHITEHEAD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

==========

Petition for Writ of Certiorari
To the United States Court of Appeals for the Third Circuit

==========

PETITION FOR WRIT OF CERTIORARI

PETER GOLDBERGER
Counsel of Record
50 Rittenhouse Place
Ardmore, PA 19003-2276
(610) 649-8200
peter.goldberger@verizon.net

November 2023

QUESTIONS PRESENTED

1. Section 846 of title 21 provides that the available penalties for a controlled substances conspiracy violation are "the same … as those prescribed for the offense, the commission of which was the object of the … conspiracy." Under *id.* § 841(b)(1), the penalties for "the offense" of drug distribution – which was the object of the conspiracy for which petitioner was convicted – vary according to whether a given substantive "violation" is one "involving" at least a certain amount of a particular controlled substance. A course of drug dealing is not an "offense" and cannot be prosecuted as a count of "distribution," so as to aggregate the quantities involved in a series of transactions and thus increase the penalties. In this case, petitioner was sentenced to serve 22 years on the conspiracy count, based on the sum of the amounts involved in all distributions that were found to be within the scope of the conspiratorial agreement and foreseeable to him. The question presented, on which the Circuits are divided, is:

> How is the quantity of controlled substances "involved" determined for purposes of sentencing for conspiracy under 21 U.S.C. § 846, when the offense of drug distribution is the object of the conspiracy?

2. Does Federal Evidence Rule 704(b) bar a governmental expert witness only from testifying in so many words to a defendant's "mental state … that constitutes an element of the offense," or does it also bar, for example – in a prosecution for drug trafficking conspiracy, where an element of the offense is that the defendant *intended to agree* with others to distribute drugs – that the trial evidence suggests the defendants were acting as a "group" rather than as individual dealers in a common territory? (And should this case be held pending disposition of *Diaz v. United States*, No. 23-14, cert. granted 11/13/2023?)

LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties to this petition (petitioner Whitehead and respondent United States). Petitioner had multiple co-defendants at trial. In the court below, his appeal was consolidated with those of co-defendants Donald Womack, Spencer Payne, and Breon Burton. To petitioner's knowledge, none of his co-defendants or co-appellants have filed petitions in this Court. The appeal of co-defendant Paris Church was decided separately; he likewise did not petition this Court.

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES

CASES

CONSTITUTION, STATUTES and RULES

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

Ronell Whitehead respectfully petitions this Court for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit upholding his conviction and lengthy sentence.

OPINIONS BELOW

The Third Circuit's precedential opinion (per Restrepo, J., with Jordan & Porter, JJ.), is published *sub nom*. *United States v. Womack*, 55 F.4th 219. Appendix A. The United States District Court for the Eastern District of Pennsylvania (McHugh, J.) did not write any pertinent opinion.

TIMELINESS and JURISDICTION

On November 29, 2022, the United States Court of Appeals for the Third Circuit filed its opinion affirming petitioner's convictions and sentence. Appx. A. A timely petition for rehearing was denied on March 6, 2023. By order filed July 19, 2023, for good cause shown to the court of appeals, the Third Circuit recalled its mandate, vacated the order denying rehearing, and re-entered the rehearing denial as of that date. Appx. B-C. On October 13, 2023, at No. 23A324, Justice Alito extended by 30 days the deadline for filing this petition, making it due no later than November 16, 2023. The petition is being filed on or before that date. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

FEDERAL STATUTES and RULE INVOLVED

Title 21, United States Code, provides, in pertinent part:

§ 841. Prohibited Acts – A

(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 the intent to manufacture, distribute, or dispense, a controlled 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—

* * * *

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

* * * *

(iii) 280 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

* * * *

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life * * *, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $10,000,000 if the defendant is an individual or $50,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a serious drug felony or serious violent felony has become final, such person shall be sentenced to a term of imprisonment of not less than 15 years and not more than life imprisonment * * *, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $20,000,000 if the defendant is an individual or $75,000,000 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 2 or more prior convictions for a serious drug felony or serious violent felony have become final, such person shall be sentenced to a term of imprisonment of not less than 25 years and fined in accordance with the preceding sentence. Notwithstanding section 3583 of title 18, 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—

* * * *

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

* * **

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

* * * *

(iii) 28 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

* * * *

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years * * *, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $5,000,000 if the defendant is an individual or $25,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a serious drug felony or serious violent felony 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 * * *, 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 $50,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, 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.

21 U.S.C. § 841.

§ 846. Attempt and Conspiracy

Any person who attempts or conspires to commit an 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.

21 U.S.C. § 846.

The Federal Rules of Evidence provide, in pertinent part:

Rule 704. Opinion on an Ultimate Issue

(a) In General — Not Automatically Objectionable. An opinion is not objectionable just because it embraces an ultimate issue.

(b) Exception. In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone.

Fed.R.Evid. 704.

STATEMENT OF THE CASE

William Dorsey supplied heroin, cocaine and crack to numerous street-level sellers in Chester, Pennsylvania. Indicted in June 2014, Dorsey became a cooperating witness for the government, not just against his own larger-quantity suppliers but also against his customers and others. As a result, petitioner Ronell Whitehead and other street-level crack dealers were named on September 25, 2014, in a superseding indictment and finally as one of 22 co-defendants named in a 261-count, 310-page second superseding indictment filed on April 1, 2015, in the U.S. District Court for the Eastern District of Pennsylvania. This last indictment charged him with selling crack cocaine as part of what was characterized as a neighborhood-based conspiracy to distribute controlling substances in Chester, in violation of 21 U.S.C. § 846.

a. Trial and Sentencing.

Petitioner pleaded guilty before trial to three counts charging particular sales of user quantities of crack, all within 1000 feet of Widener University, in violation of 21 U.S.C. §§ 841(b)(1)(C), 860. After a nearly month-long trial on the conspiracy count alone, Whitehead and four others were convicted of participating in the larger conspiracy. The jury found that petitioner conspired in violation of 21 U.S.C. § 846 to distribute at least 280 grams of crack and 500 grams or more of powder cocaine.

"The Rose and Upland area," CA3 Appx892, 1151, consists of a few blocks on the East Side of Chester, Pennsylvania, including the alleys off those streets and a nearby playground and bar. The principal issue at trial was whether the individuals who sold drugs on and around Rose Street, including petitioner Whitehead, constituted a single conspiracy to distribute crack and cocaine, as described and charged in the indictment. The defendants contended otherwise, arguing that the evidence showed them to be independent albeit friendly competitors. Customers would regularly drive, bicycle or walk to the area to buy small amounts of cocaine, cocaine

base (crack) and heroin. CA3 Appx1153, 1172, 1354. When not making sales, the dealers would hang out together on the small stoops of the neighborhood's row houses. CA3 Appx968, 1139, 1618; GX 125b. They knew each other well; in order to sell drugs on Rose Street or nearby, a person had to have grown up and live in the neighborhood or have family living there. CA3 Appx887–890. Over timely objection under Fed.R.Evid. 704(b), a government witness denominated as an expert testified that the evidence presented at trial was highly consistent with the activities of a "group," the same term used in the indictment (but never by any percipient witness) as the purported name of the conspiratorial "drug trafficking organization," that is, the "Rose and Upland Drug Trafficking Group."

Although conspiracy was the only count on trial, testimony about petitioner's individual selling was presented. Various cooperators testified that they saw Whitehead making drug sales. The majority involved small, street-level amounts to users, but some were to other sellers in the neighborhood. One witness testified that Whitehead was selling $5 ("nickel," that is, 0.58 gram) bags of crack every day from August 2012 into fall 2012. That witness estimated he saw Whitehead sell crack on Rose Street about 100 times. CA3 Appx1412. Another testified that he saw Whitehead supply 14 grams of crack to co-defendant Payne twice, saw Whitehead supply co-conspirator McGurn 7 grams, and saw Whitehead supply another co-conspirator 7 grams, twice. CA3 Appx1505. One cooperating witness said that Whitehead supplied co-defendant Burton with 28 grams of crack (that is, an ounce) on four or five occasions. CA3 Appx1501. Dorsey, the alleged "hub" and cooperating witness, testified that petitioner once gave him an ounce of powder cocaine. CA3 Appx1209. In other words, the largest quantity attributed to petitioner on any occasion was 28 grams of

crack, an amount, if that particular witness were believed beyond a reasonable doubt, that would trigger a mandatory minimum of five, not ten years. Otherwise, there would be no mandatory minimum at all, and a maximum of 20 years. *See* Statutes Involved.

Labeled under the sentencing guidelines as a "career criminal," petitioner was sentenced to serve 22 years' imprisonment. By virtue of the jury's special verdict on the conspiracy count in relation to crack, which called for aggregation of all foreseeable quantities within the scope of the entire alleged conspiracy, the district court was bound to impose a sentence of at least ten years' imprisonment; the sentencing guidelines likewise suggested (but did not mandate) a sentence based on all quantities foreseeably distributed by anyone in the course of the same conspiracy. Dorsey, the large-scale dealer at the hub of the entire charged conspiracy, received a 15-year sentence, shorter than the punishments applied to his alleged underlings.

b. The Decision Below

Petitioner appealed to the U.S. Court of Appeals for the Third Circuit. He challenged both the fairness of his trial and the legality of the sentence. In particular, he pursued his objection to the admission of opinion evidence, in this conspiracy case, addressing whether the individual defendants, including petitioner, constituted and functioned as a "group." He also challenged the instructions delivered at trial to guide the jury in determining whether certain threshold drug quantities had been met to justify a level of conviction under 21 U.S.C. § 841(b)(1). That special verdict, in turn, would potentially support a higher mandatory minimum sentence on the conspiracy

count. *See* Statutes Involved. After argument, the panel issued a precedential opinion rejecting all of petitioner's contentions. Appx. A.

Petitioner's challenge to the opinion testimony was rejected on the basis that:

> "It is only as to the last step in the inferential process – a conclusion as to the defendant's mental state – that Rule 704(b) commands the expert to be silent." [*United States v. Watson*, 260 F.3d 301, 309 (3d Cir. 2001)], (quoting *United States v. Dunn*, 846 F.2d 761, 762 (D.C. Cir. 1988)).

Appx. A, 55 F.4th at 229. The court below further suggested, with reference to selected items of trial evidence, none of which directly addressed the existence of a conspiracy or organization, that any error under the Rules of Evidence would be harmless. *Id.* 230–31.

Petitioner's challenge to the jury instructions on determining the pertinent drug quantity was denied under the Third Circuit's controlling precedent, *United States v. Williams*, 974 F.3d 320, 362–67 (3d Cir. 2020). *See* Appx. A, 55 F.4th at 231–34. Under that precedent, each defendant convicted of conspiracy is held accountable, for purposes of determining the mandatory minimum sentence (if any), for "those quantities involved in violations of § 841(a) that were within the scope of, or in furtherance of, the conspiracy and were reasonably foreseeable to the defendant as a consequence of the unlawful agreement." 55 F.4th at 233, *quoting* 974 F.3d at 366.

On petition for rehearing *en banc*, the petitioner argued that *Williams* should be overruled, because the formula first announced there entirely disregards and is not based on the text of the governing statute, that is, 21 U.S.C. § 846. He had preserved that point in his opening brief. The court of appeals denied petitioner's request for rehearing. Appx. B, Appx. C.

c. Statement of Lower Court Jurisdiction Under Rule 14.1(g)(ii). The United States District Court had subject matter jurisdiction of this case under 18 U.S.C. § 3231, because the indictment alleged federal offenses committed in the district. The court of appeals had jurisdiction under 28 U.S.C. § 1291.

REASONS FOR GRANTING THE WRIT

1. The circuits are divided on how a jury should determine the quantity of drugs necessary to trigger a mandatory minimum under 21 U.S.C. § 841(b)(1) in a conspiracy case under § 846. The decision of the court below defies this Court's cases by failing even to consider, much less to implement, the statutory language that answers this important question.

This Court has long held that just as there are no federal common law crimes, see *United States v. Hudson*, 11 U.S. (7 Cranch) 32 (1812), so only Congress can prescribe the maximum punishment (and any minimum) that a judge may impose for the commission of a federal crime. The scope of available punishments is never for courts to define, independent of any statute. See *United States v. Evans*, 333 U.S. 483 (1948) (affirming dismissal of indictment, where statute prohibited certain conduct but specified no penalty).[1] Petitioner Whitehead argued on appeal that the interrogatories supplied to the jury at his trial for the purpose of ascertaining facts needed to set the governing minimum penalties were erroneous, because they did not correlate to or implement the terms of the governing statute. Relying on idiosyncratic circuit precedent, the Third Circuit nevertheless affirmed, Appx A, 55 F.4th at 231–33, and then denied a petition for rehearing en banc seeking to overturn that misguided authority. Appx B. Because the circuits are divided on the test that applies for setting the limits of penalties under the frequently prosecuted controlled substances conspiracy statute, 21 U.S.C. § 846, and because the rule applied below defies this Court's precedent on the application of controlling statutes, this petition for certiorari should be granted.

---

[1] In *United States v. Batchelder*, 442 U.S. 114, 123 (1979), the Court declared that the rule announced in *Evans* was an application of the constitutional prohibition on vagueness in criminal statutes.

The trial court understood that because drug quantity (and type) affects the maximum punishment and may trigger a mandatory minimum, the jury must decide that question, applying the reasonable doubt standard. See *Alleyne v. United States*, 570 U.S. 99 (2013), elaborating and extending *Apprendi v. New Jersey*, 530 U.S. 466 (2000). But on the controlled substances conspiracy count, it instructed that the question for the jury to decide was the amount "involved" (a concept it did not define) in the conspiracy, insofar as this was foreseeable to a given defendant or in which that defendant participated. Based on the verdict that the jury then returned, the trial court imposed a 22-year conspiracy sentence on petitioner Whitehead within the highest, § 841(b)(1)(A) range (*see* Statutes Involved *ante*) of ten years to life. On appeal, the panel held that the mandatory minimum applicable to each defendant must be individually determined based on and limited to – as stated in the approved jury instruction – the quantity of drugs that is "'attributable to … the defendant,' 'reasonably foreseeable to the defendant, or both.'" Appx A, 55 F.4th at 233 (quoting instructions). The formula it said was to be used in determining these amounts was based on an amalgam of non-statutory conspiracy law and U.S. Sentencing Guidelines rules, without reference to the governing statute, 21 U.S.C. § 846. See *United States v. Williams,* 974 F.3d 320, 362–67 (3d Cir. 2020).

In the precedent-setting *Williams* case followed in deciding petitioner's appeal, the Third Circuit devised a formula for aggregating quantities of drugs involved in the case as whole. The panel – recognizing that different circuits have taken divergent approaches to this question – invoked the parameters defined by this Court (for an entirely different purpose) in *Pinkerton v. United States*, 328 U.S. 640 (1946), and (again for a different purpose) in the "relevant conduct" provision of the United States Sentencing Guidelines, USSG § 1B1.3. The court's analysis did

not start with, or seek to justify its holding under (or even refer to) the governing language of 21 U.S.C. § 846. Neither the *Pinkerton* doctrine nor the "relevant conduct rule" is incorporated into, or even alluded to, in any of the words of § 846. The decision below thus conflicts with this Court's cases explicating proper statutory construction, and is inconsistent with decisions in other circuits for setting drug conspiracy sentence exposure (none of which applies the correct rule).

The terms of the governing statute expressly and exclusively tie the penalty for a drug conspiracy to the punishment prescribed for "the offense, the commission of which is the object of the conspiracy." 21 U.S.C. § 846; *see* Statutes Involved, *ante*.[2] Instead of acknowledging, parsing and then implementing that language, the court below articulated in *Williams* a complex and novel form of quantity aggregation for determining the mandatory minimum penalties for a drug conspiracy in violation of § 846. (Compounding the problem, this rule is different from another, equally non-statutory formula for determining the maximum available sentence which the court had articulated some years earlier**Error! Bookmark not defined.**. See *United States v. Phillips*, 349 F.3d 138, 143 (3d Cir. 2003).) In doing so, it deepened a circuit split and entirely disregarded this Court's cases that emphasize that only text-based statutory construction can answer such questions of federal criminal law, including substantive sentencing law. The split demands resolution and the Third Circuit's fundamental error requires correction.

---

[2] The governing statute provides, in full: "Any person who attempts or conspires to commit an 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." 21 U.S.C. § 846.

The basic error is this: in determining the meaning of a governing statute (*i.e.*, § 846), the court below did not begin with (or even discuss) the legislative language but instead went immediately to past case law and general principles of conspiracy law. Applying a text-first analysis, on the other hand, produces a different (and more favorable) result.

Based on the language of section 846, the questions to be answered – which nowhere appear in the court of appeals' opinions (either the opinion below, or the precedent on which it relies) – are simply these: What is "the offense, the commission of which was the object of the ... conspiracy"? And what are "the same penalties" that are "prescribed for [that] offense"? The answer to the first question, in the present case, is simple: "the offense" is a violation of 21 U.S.C. § 841(b), the law that criminalizes violations of § 841(a.[3] And what are "the penalties ... prescribed for [that] offense"? According to every circuit to have addressed the latter question, including the Third in *United States v. Rowe*, 919 F.3d 752 (3d Cir. 2019), the penalties for the substantive offense which was the object of this conspiracy are the penalties set forth in § 841(b)(1) for any one discrete instance of possession or distribution. See *United States v. Lartey*, 716 F.2d 955, 967–68 (2d Cir. 1983) (noting that courts "have uniformly held that separate unlawful transfers of controlled substances are separate crimes under § 841, even when these transfers

---

[3] Section 841(a) defines "unlawful" conduct, which is regulated and controlled in a variety of ways under Title 21, but the *criminal offense* is created by § 841(b) and its subsections, not § 841(a) itself, because the former both fully incorporates the latter and articulates the penalties. See *United States v. Vazquez*, 271 F.3d 93, 107–15 (3d Cir. 2001) (en banc) (Becker, J., with Ambro, J., concurring in result). Absent a legislatively prescribed punishment, a legislative prohibition of conduct, such as § 841(a), is simply not a criminal law. *United States v. Evans*, 333 U.S. 483 (1948). *Cf. United States v. Oakland Cannabis Buyers' Club*, 532 U.S. 483 (2001) (discussing injunction against § 841(a) violations, brought under 21 U.S.C. § 882(a)).

are part of a continuous course of conduct," citing, *inter alia*, *United States v. Noel*, 490 F.2d 89 (6th Cir. 1974) (per curiam).[4]

This Court's landmark case on distinguishing single from multiple offenses, *Blockburger v. United States*, 284 U.S. 299, 301–03 (1932), construed a predecessor federal drug statute – indistinguishable from § 841 in the respect under consideration here – to require a separate count for each single act of distribution or continuous course or instance of possession. As this Court stated in *Blockburger*, and as remains true today, "The Narcotic Act does not create the offense of engaging in the business of selling the forbidden drugs, but [rather] penalizes any sale ...." 284 U.S. at 302. There is no reason to suppose, and no case holds, that Congress intended to overthrow that ruling when it enacted the Controlled Substances Act. Neither section 841 nor section 846 creates a federal crime of "being in the business of selling heroin." There are other such statutes, *see* 18 U.S.C. § 1962(c) (RICO); 21 U.S.C. § 848 (Continuing Criminal Enterprise), but section 846 is not one of them.

But what if the agreement constituting the conspiracy is not to commit one discrete violation but rather, as applies here and in many cases, to commit a series of such violations (or to commit several offenses carrying varying penalties)? Does "the offense, the commission of which" refer to the penalty for the type, level and category of offense (or perhaps, the most serious category of offense) that the conspirators agreed to commit? (This is what petitioner argues.) Or does it perhaps mean the sum of the penalties for all the separate instances of the offense that the

---

[4] See also *United States v. Elliott*, 849 F.2d 886, 888–90 (4th Cir. 1988); *United States v. Palafox*, 764 F.2d 558 (9th Cir. 1985) (en banc); *United States v. Mancuso*, 718 F.3d 780, 793 (9th Cir. 2013); *United States v. Smith*, 757 F.2d 1161 (11th Cir. 1985); *United States v. Weatherd*, 699 F.2d 959 (8th Cir. 1983); *United States v. McDonald*, 692 F.2d 376 (5th Cir. 1982).

conspirators agreed to commit? (No one suggests that that is the right answer; and it is not consistent with the statutory language.) Or does it refer to the penalties that *would be* prescribed for an "offense" consisting of *all* the intended instances of the object offense *were they to be committed at one time*, which never happened nor was agreed to, rather than separately, as was in fact the case? The last of these is effectively the answer of the court below, which it calls "aggregation."

The decision below is egregiously wrong. Whenever there is a statute that addresses the question before the court, the starting point for decision must be the statutory language, a principle as true of criminal laws addressing elements or punishment as it is of any other. *Holloway v. United States*, 526 U.S. 1, 6 (1999); *United States v. Turkette*, 452 U.S. 576, 580 (1981). And where the statute's language is plain, "the sole function of the courts is to enforce it according to its terms." *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989) (Bankruptcy Code), quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917) (criminal appeal). Here, the parameters of the penalties for a violation of § 846 are established in that statute, which states, "Any person who ... conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the ... conspiracy."[5] Thus, unless one or more of the terms at issue had a traditional, common law meaning (as understood at the time of enactment) when used in a criminal statute, see *United States v. Shabani*, 513 U.S. 10, 13–14 (1994) (whether use of "conspires" in § 846 implies an overt act), the task of the court is only to interpret these words consistent with their "ordinary meaning ... at the time

---

[5] *See* Statutes Involved, *ante*.

Congress enacted the statute."[6] *Wisconsin Central Ltd. v. United States*, 585 U.S. —, 138 S.Ct. 2067, 2070 (2018), quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979). The opinion of the court below overlooked this fundamental precept. By starting from a mistaken spot, it arrived at an erroneous conclusion.

Being "'unmoored from any statutory text," *Oklahoma v. Castro-Huerta*, 597 U.S. —, 142 S.Ct. 2486, 2496 (2022), the methodology for determining the applicable sentence adopted by the court below is necessarily wrong, as was its conclusion. The Third Circuit cobbled together its non-textual theory of punishment for drug conspiracy violations from other bodies of law, rather than from the statute at hand, that is, 21 U.S.C. § 846 itself. Aggregation of drug quantities is a rule for determining "relevant conduct" under the U.S. Sentencing Guidelines, *see* USSG § 1B1.3, which in turn is used to select the correct "offense level" and thus ultimately what suggested imprisonment range the Court must consider (within statutory bounds) under 18 U.S.C. § 3553(a)(4). See *Williams*, 974 F.3d at 365, discussing *United States v. Collado*, 975 F.2d 985 (3d Cir. 1992). The *Williams* court, setting the precedent followed below, also referenced the venerable principle of evidence law under which a member of a conspiracy is responsible for acts and statements of co-conspirators. *Id.* 364, citing *Bannon v. United States*, 156 U.S. 464, 469 (1895). Similarly, the vicarious liability of co-conspirators for substantive offenses committed in furtherance of the agreement, 974 F.3d at 364–65, is a common law rule announced by this Court in *Pinkerton v. United States*, 328 U.S. 640 (1946),[7]

---

[6] The Controlled Substances Act including the present section 846, was enacted in 1970 and last amended in 1988. *Shabani*, 513 U.S. at 13. There is no suggestion that the common meaning of the words at issue here has changed in the last 35 years.

[7] The decision in *Pinkerton* is itself subject to criticism for announcing a basis for liability for a substantive offense (a completed crime committed in furtherance of a conspiracy),

but having nothing to do with sentencing law. Certainly, Congress might have incorporated any or all of those principles into a sentencing statute for drug conspiracies, but there is nothing that references any of them, explicitly or implicitly, in § 846.

The interpretation announced in the decision below, in addition to being atextual, is virtually unadministrable at a real jury trial. Under that rule, the maximum applicable penalty is determined by one (non-statutory) test, while the mandatory minimum is determined by another (equally non-statutory) rule. *Williams*, 974 F.3d at 365, discussing *United States v. Phillips*, 349 F.3d 138, 143 (3d Cir. 2003) (maximum is based on total quantity of drugs "involved in" the entire conspiracy), and related out-of-circuit case law.[8] Presumably the jury is to receive two sets of instructions, one for each purpose (mandatory minimum and statutory maximum). But there is no clause of § 841(b)(1) that allows a minimum from subparagraph (B), for example, to be coupled with a maximum from subparagraph (A). The decision of the court below is utterly uncoupled from the statute it purports to interpret and enforce. And the cases in the other circuits, none of which adopt the same rule as the Third, are not even consistent with one another. As the court below

_____(cont'd)

based on common law criminal liability principles without reference to, much less reliance on, the statute that appears to address and thus to pre-empt the field, that is, 18 U.S.C. § 2.

[8] See *United States v. Collins*, 415 F.3d 304, 313–15 (4th Cir. 2005) (reaffirming *United States v. Irvin*, 2 F.3d 72, 75–78 (4th Cir. 1993)); *United States v. Colon-Solis*, 354 F.3d 101, 103 (1st Cir. 2004); *United States v. Swiney*, 203 F.3d 397, 405–06 (6th Cir. 2000); *United States v. Ruiz*, 43 F.3d 985, 992 (5th Cir. 1995); *United States v. Young*, 997 F.2d 1204, 1210 (7th Cir. 1993); *United States v. Bacerra*, 992 F.2d 960, 967 n.2 (9th Cir. 1993) (reaffirmed in *United States v. Banuelos*, 322 F.3d 700, 704–05 (9th Cir. 2003)); *United States v. Martinez*, 987 F.2d 920, 925 (2d Cir. 1993); *United States v. Jones*, 965 F.2d 1507 (8th Cir. 1992). This authority, going back more than 25 years, draws a sharp distinction between the facts that trigger an increased maximum (the full scope of the conspiracy) and what triggers a mandatory minimum (the extent of the defendant's own involvement). This entire body of sentencing law is created from whole cloth, with no basis in the governing statute.

noted in *Williams*, the circuits are divided in announcing various tests for applying § 846, 974 F.3d at 365 & n. 33 (canvassing the circuits and discussing *sui generis* Sixth Circuit rule). But none of them is correct, because none is founded in the simple words of the statute.

Just as a conspiracy under 18 U.S.C. § 371 (the general federal conspiracy offense) has the same five-year maximum sentence regardless of how many different offenses are agreed to be committed or how often or for how long, *Braverman v. United States*, 317 U.S. 49 (1942), a violation of § 846 is expressly punishable by reference to the *type of* "offense, the commission of which was the object of the ... conspiracy." See *Shular v. United States*, 589 U.S. —, 140 S.Ct. 779, 785 (2020) (contrasting sentencing statute that makes reference to another "offense" with another provision that references criminal *conduct*). It was for Congress, not the courts, to decide as a matter of penal policy whether to punish more severely conspiracies that involve an agreement to handle and distribute larger quantities of drugs at one time, as compared with agreements to handle smaller quantities, even repeatedly. "Only the people's elected representatives in the legislature are authorized to 'make an act a crime.'" *United States* v. *Davis*, 588 U.S. —, 139 S.Ct. 2319, 2325 (2019) (quoting *United States* v. *Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812)).[9] It is equally well-settled that a court cannot, without violating the separation of powers, determine the range of available punishment for proscribed behavior other

---

[9] Even if there were any ambiguity in the statutory language of § 846 that might support the creative rule(s) devised by the courts of appeals, which there is not, petitioner's suggestion is also consistent with the principle that where statutory language defining criminal punishment is genuinely ambiguous, the rule of lenity requires the court to select the interpretation (consistent with a fair reading of that language) which is more favorable to the defendant. *Bifulco v. United States*, 447 U.S. 381, 387 (1980).

than by fairly construing – not altering or amending – what Congress wrote. *United States v. Evans*, 333 U.S. 483, 486 (1948).

The court below reviewed this issue in petitioner's case for plain error, holding principally that there was no error at all. Alternatively, the panel suggested that petitioner had failed to demonstrate that he suffered any prejudice (that is, a different outcome) and then finally, in passing, a belt-and-suspenders suggestion that petitioner's "substantial rights" were not impaired.***Error! Bookmark not defined.*** Appx. A, 55 F.4th at 234. But if this Court corrects the fundamental error at the heart of the ruling, a remand for reconsideration of those matters would be appropriate. Only one witness testified that petitioner ever distributed so much as 28 grams of crack at a time, and even if he did there was no evidence whatsoever that he ever agreed to distribute 280 grams of crack much less five kilos of cocaine on any occasion. A properly instructed jury, in other words, could not have found petitioner liable for a sentence at the (b)(1)(A) level, and not likely at the (b)(1)(B) level. See *United States v. Zavala-Martí*, 715 F.3d 44, 52–54 (1st Cir. 2013) (properly explaining impact of plain error analysis under *United States v. Cotton*, 535 U.S. 625 (2002), in this context). An entirely different sentencing framework would apply. It is highly doubtful, then, that the district court would have imposed a 22-year sentence on petitioner, a persistent but very low-level seller of drugs.

For these reasons, to decide the important and recurring question of statutory construction, the instant petition should be granted.

2. Even if the petition is not granted on the sentencing-law question, this petition should be held for disposition in light of the decision to be rendered later this Term in *Diaz v. United States*, No. 23-14.

On November 13, 2023, the Court granted certiorari in *Diaz v. United States*, No. 23-14, to decide the following question presented:

> In a prosecution for drug trafficking—where an element of the offense is that the defendant *knew* she was carrying illegal drugs—does [Federal Evidence] Rule 704(b) permit a governmental expert witness to testify that most couriers know they are carrying drugs and that drug-trafficking organizations do not entrust large quantities of drugs to unknowing transporters?

Rule 704(b) bars an expert witness in a criminal case from expressing "an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense." If the Court decides the *Diaz* case favorably to that petitioner-defendant, it seems likely it would do so on a broader basis of interpreting the scope of Rule 704(b) than just the rather fact-specific context articulated in the wording of the *Diaz* Question Presented.

Petitioner Whitehead's second Question is essentially the same as that granted in *Diaz*, albeit in the context of his own case. The court below held that Rule 704(b) did not prevent the government's "expert" (a DEA agent) from opining that certain evidence indicated the existence of a "group" rather than individual drug dealers buying from a common source and selling in the same neighborhood. But an element of the crime of conspiracy is the defendant's "intent to agree" that a certain crime be committed by one or more of them by working together toward that objective, that is, a state of mind that is necessary to make the related activities of numerous persons into the functioning of a "group." See *Ocasio v. United States*, 578 U.S. 282, 297–98 (2016), *citing, inter alia, Salinas v. United States*, 522 U.S. 52,

63–65 (1997); see also *United States v. United States Gypsum Co.*, 438 U.S. 422, 443 n.20 (1978) ("intent to agree ... and ... intent to effectuate the object of the conspiracy").

In rejecting petitioner's preserved claim of error on this point, the court below interpreted Rule 704(b)'s prohibition narrowly:

> "Expert testimony is admissible if it merely 'support[s] an inference or conclusion that the defendant did or did not have the requisite mens rea, so long as the expert does not draw the ultimate inference or conclusion for the jury and the ultimate inference or conclusion does not necessarily follow from the testimony.'" [*United States v. Watson*, 260 F.3d 301 (3d Cir. 2001)], at 309 (quoting *United States v. Bennett*, 161 F.3d 171, 183 (3d Cir. 1998)). "It is only as to the last step in the inferential process – a conclusion as to the defendant's mental state – that Rule 704(b) commands the expert to be silent." *Id.* (quoting *United States v. Dunn*, 846 F.2d 761, 762 (D.C. Cir. 1988)).

Appx. A, 55 F.4th at 229. If this Court rules, as it may for the reasons persuasively articulated by Diaz in her petition and briefing, that Rule 704(b), by its terms, bars more than just the "last step" in an expert's statement of an inferential opinion about a defendant's state of mind, then it will be appropriate to vacate the judgment and remand petitioner's case for further consideration. For this reason, the instant petition should at least be held pending the disposition of *Diaz*, No. 23-14.

CONCLUSION

For the foregoing reasons, petitioner prays that this Court grant his petition for a writ of certiorari, and reverse the judgment of the United States Court of Appeals for the Third Circuit affirming his convictions and sentence.

Respectfully submitted,

PETER GOLDBERGER
Counsel of Record
50 Rittenhouse Place
Ardmore, PA 19003-2276
(610) 649-8200
peter.goldberger@verizon.net

Attorney for Petitioner

November 15, 2023.