

No. 23-6087

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IN THE SUPREME COURT OF THE UNITED STATES

RONELL WHITEHEAD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

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**PETITIONER'S REPLY TO MEMORANDUM
FOR UNITED STATES IN OPPOSITION**

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**PETITIONER'S REPLY TO MEMORANDUM
FOR UNITED STATES IN OPPOSITION**

Ronell Whitehead has petitioned this Court for a writ of certiorari to review the Third Circuit's judgment and opinion upholding his conviction and lengthy sentence. The petition presents two substantial questions worthy of this Court's consideration. One involves a split in the Circuits over how the jury is to determine the applicable minimum and maximum sentence in a federal controlled substances conspiracy case. The other is a question on which this Court has already granted certiorari in another case for decision later this Term. See *Diaz v. United States*, No. 23-14, *cert. granted* 11/13/2023 (set for argument, March 19, 2024).

In response to the petition, the Solicitor General has filed a two-page Memorandum in Opposition ("Opp."). On the first Question Presented, the government proposes to waive response entirely. Opp. 2 n.*. On the second Question, the respondent contends that Mr. Whitehead's petition need not be held pending disposition of *Diaz* because the court below included a conclusory assertion that any error on that issue would be harmless. Opp. 2, *citing* Pet.App. 7a. This Court should not accept the government's position on either point. The Court should request a full response to the petition on the first question, and should in any event hold the petition on the second issue pending its decision in *Diaz*.

1. The court below, following circuit precedent, rejected petitioner's challenge to his sentence. The court relied for its affirmance on an entirely untenable interpretation of 21 U.S.C. § 846 that is in no way based on the words of that statute. The result was a 22-year sentence for selling (and allegedly agreeing with other dealers in his neighborhood to sell) user quantities of cocaine and crack. As explained in detail in the petition, if petitioner Whitehead's text-based construction of the governing statute is correct, his sentence exceeds the statutory maximum and

is illegal. Hundreds of other cases are prosecuted in federal courts throughout the nation under this statute every year, resulting in numerous lengthy sentences that would be recognized as unlawful if petitioner's straightforward analysis is correct. The circuits are badly split on the proper interpretation of § 846 for sentence-setting purposes. Pet. 17–18. The importance of the issue is self-evident, the deviation from this Court's precedent governing the proper construction of federal criminal statutes is egregious, and the existence of a deep and persistent circuit split cannot be denied.

Petitioner urges the Court to reject the government's proffered waiver and to request a full response to the petition's first Question Presented.

2. The government pins its opposition to petitioner's request to hold his petition pending *Diaz* on the contention that any error at his trial under Fed.R. Evid. 704(b) was harmless. Opp. 2. In the court of appeals, petitioner Whitehead, as appellant, had broached the point and explained why any error could not properly be deemed harmless. Brief for Appellant, No. 19-3935 (3d Cir., 5/7/21), at 22–23. But the government, in response, did not even mention harmless error as a basis for affirmance, thus apparently conceding the point. See Brief for Appellee, No. 19-3935 (3d Cir., 7/23/21), at 12–19; Appellant's Reply Brief (3d Cir., 8/27/21), at 5. Yet the court below *sua sponte* concluded that “any error was harmless in light of the other evidence” at trial. Pet.App. 7a.

Perhaps because the point had not been litigated on appeal, the Third Circuit opinion did not mention the high standard that this Court has set for the government to meet its burden of establishing a harmless error conclusion under Fed.R. Crim.P. 52(a). See *Davila v. United States*, 569 U.S. 597, 607 (2013) (where timely objection was made, government has burden to show harmless error); *Kotteakos v. United States*, 328 U.S. 750, 776 (1946) (absence of “substantial and injurious effect

or influence” on the verdict). The issue at trial of the conspiracy count was whether any such confederation as the “Rose and Upland Drug Trafficking Group,” as alleged in the indictment, had even existed. None of the government’s trial witnesses said that it did, and nothing in the recitation in the opinion of the court below shows otherwise. Accordingly, even if the government is not held to have forfeited a harmless error disposition by failing to advance or brief the point in the court below, it should not be permitted to rely on that approach now to avoid the application of whatever decision this Court may reach in *Diaz*. Instead, this Court should follow its usual practice of holding the instant petition pending the ruling in that case, and then “grant, vacate and remand” for further consideration (including whether a harmless error disposition is appropriate) in light of the Court’s opinion.

CONCLUSION

This Court should call for a response to the first Question Presented, and then grant the petition for a writ of certiorari and reverse the judgment of the United States Court of Appeals for the Third Circuit affirming petitioner Whitehead’s convictions and sentence. At least, the instant petition should be held pending the disposition of *Diaz v. United States*, No. 23-14.

Respectfully submitted,


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