FILED: May 24, 2023

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-4725
(3:18-cr-00958-JMC-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

JASON DIX

Defendant - Appellant

O R D E R

The court denies appellant's petition for rehearing en banc.

A requested poll of the court failed to produce a majority of judges in regular active service and not disqualified who voted in favor of rehearing en banc. Chief Judge Gregory and Judges King, Wynn, Diaz, Thacker, Harris, and Benjamin voted to grant the petition. Judges Wilkinson, Niemeyer, Agee, Richardson, Quattlebaum, Rushing, and Heytens voted to deny the petition.

Judge King wrote an opinion dissenting from the denial of rehearing en banc in which Chief Judge Gregory and Judges Wynn and Thacker joined.

Judge Wynn wrote an opinion dissenting from the denial of rehearing en banc in which Judge Thacker joined.

Entered at the direction of Judge Niemeyer.

For the Court

/s/ Patricia S. Connor, Clerk

KING, Circuit Judge, with whom Chief Judge GREGORY, Judge WYNN, and Judge THACKER join, dissenting from the denial of rehearing en banc:

Federal Rule of Appellate Procedure 35(a) authorizes a rehearing en banc where such "consideration is necessary to secure or maintain uniformity of the court's decisions," or "the proceeding involves a question of exceptional importance." As explained more fully below, each of those prerequisites is readily satisfied in this appeal. Regrettably, however, our evenly-divided Court has denied rehearing en banc. With great respect, I am compelled to dissent from the 7-7 denial by our equipoise Court.[1]

I.

As related in my dissent from the panel majority's revised opinion, this appeal concerns whether a court-recognized due process sentencing error is to be deemed harmless. *See United States v. Dix*, 64 F.4th 230, 238-43 (4th Cir. 2023) (King, J., dissenting).[2] For background, Dix pleaded guilty in 2019 to a felon-in-possession firearm offense. The PSR recommended a serious four-level enhancement on the ground that the

[1] Chief Judge Gregory, along with Judges King, Wynn, Diaz, Thacker, Harris, and Benjamin, voted to grant rehearing en banc. Judges Wilkinson, Niemeyer, Agee, Richardson, Quattlebaum, Rushing, and Heytens voted to deny rehearing en banc.

[2] It is worth mentioning that two published opinions have already been filed in this appeal. The majority's initial opinion was filed on February 14, 2023, and is published at 60 F.4th 61 (4th Cir. 2023). On February 28, 2023, Dix filed a petition for rehearing en banc from that decision. By order of April 5, 2023, a divided panel *sua sponte* ordered a circumscribed panel rehearing for the sole purpose of filing — without briefing or argument — a revised opinion, which is published at 64 F.4th 230 (4th Cir. 2023). Dix filed a second petition for rehearing en banc on April 13, 2023. And our Court — by its 7-7 split — has summarily denied rehearing en banc.

firearm was "used and possessed . . . in connection with another felony offense." *See* USSG § 2K2.1(b)(6)(B). The PSR identified only two possible predicate felony offenses — those being "[1] Possession of a Stolen Vehicle or [2] Grand Larceny" — to support the recommended enhancement. For his part, Dix timely objected to the PSR's reliance on each identified predicate offense. The government, on the other hand, interposed no objections with respect to the PSR. *See* Fed. R. Crim. P. 32(f) (providing that "[w]ithin 14 days after receiving the [PSR], the parties must state in writing any objections, including objections to material information . . . [and] sentencing guideline ranges").

During Dix's sentencing proceedings in September 2019, the district court promptly expressed doubt about whether either of the two noticed predicate offenses could provide support for the four-level enhancement. When it became apparent that the recommended enhancement was in jeopardy, the prosecutors asserted orally that a theretofore unnoticed predicate offense — that is, a state law offense of failing to stop for a police car's blue light — could provide support for the four-level enhancement (the "blue-light theory"). Dix's lawyer was not accorded any opportunity to prepare against that tardily interposed blue-light theory of support for the enhancement, however, and the prosecutors did not seek a continuance or postponement of the sentencing proceedings. And the court briefly questioned the lawyers (mainly the prosecutor) about the blue-light theory.

Notwithstanding the lack of required notice — mandated by Federal Rule of Criminal Procedure 32 and constitutional due process principles — to Dix and his lawyer, the sentencing court adopted the prosecution's tardy blue-light theory and applied the four-level enhancement against Dix solely on that basis. Absent the enhancement, Dix's

Guidelines range would have been 70 to 87 months in prison. As a result of the enhancement, however, Dix's Guidelines range was 100 to 120 months (that is, an additional prison term of two-and-a-half to three years). The court then imposed on Dix a below-Guidelines sentence of 99 months.

Against this backdrop, the panel majority correctly recognized that a procedural error for lack of required notice had occurred when the sentencing court relied on the prosecution's tardy blue-light theory as the sole basis for the four-level enhancement. Nevertheless, the majority ruled that the error was harmless. More specifically, the majority resolved that, although Dix was not afforded the notice required by Federal Rule of Criminal Procedure 32 — which "embodies the congressional intent to assure a defendant's due process rights in the sentencing process," *see United States v. Curran*, 926 F.2d 59, 61 (1st Cir. 1991) — his lawyer had an opportunity at sentencing (without notice or time for preparation) to cobble together an impromptu argument against the tardy blue-light theory. And the majority reached that conclusion in spite of the government's failure — intentionally or by oversight — to raise or argue harmless error in its appellate briefing.

II.

En banc review of the panel majority's troubling decision was warranted for two primary reasons. First, an en banc rehearing was necessary in order to secure and maintain the uniform application of our Court's precedent, insofar as the majority's decision directly conflicts with an abundance of circuit precedent. Second, an en banc rehearing was essential because the majority has ignored — at every step — the actual prejudice that has

been and will continue to be suffered by Jason Dix.

A.

First, an en banc rehearing was warranted in order to "secure [and] maintain uniformity" of circuit precedent. *See* Fed. R. App. P. 35(a).

1.

Recently, our Court explained how we should proceed when the government is the "beneficiary" of an error and thus "bears the burden of establishing that the error was harmless," but has not otherwise made any effort to argue harmlessness in its appellate brief. *See United States v. Brizuela*, 962 F.3d 784, 789 (4th Cir. 2020) (Quattlebaum, J.). More specifically, we recognized in our *Brizuela* decision that, "[w]hile we may address the issue on our own initiative, . . . we should avoid doing so when, as here, the question of harmless error is close." *Id.* at 789. Because "reasonable minds could differ on the question of harmless error" in *Brizuela* — and because the government had failed to raise harmless error on appeal — we "decline[d] to find [that] the error was harmless on our own initiative." *Id.* In so ruling, our Court refused to "relieve the government from the consequences of its failure to raise the issue of harmlessness on appeal." *Id.*

Put simply, the *Brizuela* principle applies here with full force and should readily control the outcome of the *Dix* case. By its decision, however, the panel majority has directly contravened the *Brizuela* precedent and created a novel and unprecedented framework for assessing a question of harmless error. Pursuant to the majority's attenuated decision, a court of appeals can *sua sponte* raise a question of harmless error, assume unto itself the executive branch role of prosecutor, and then identify and pursue new arguments

on behalf of the prosecutors (despite those arguments being wholly absent from the appellate briefing). At that juncture, as my friends in the majority have concluded, the appeals court can summarily resolve that the prosecution has satisfied its burden and thus deem any constitutional due process notice error — even one that was intentionally waived or otherwise ignored by the government — to be harmless.

In *Brizuela*, however, a different precedential framework for analyzing a question of harmless error is set forth: "the government — as the beneficiary of the error — bears the burden of establishing that the error was harmless." *See* 962 F.3d at 798. And although a court of appeals can address harmless error "on [its] own initiative," when the government has failed to raise the issue on appeal, a court should "avoid doing so when" — as is plainly the situation here — "the question of harmless error is close." *Id.* at 799.[3]

Further circumventing the framework articulated in *Brizuela*, the panel majority has sanitized the mandate of Federal Rule of Criminal Procedure 52(a), which provides that "[a]ny error, defect, irregularity, or variance that does not affect substantial rights must be disregarded." Contrary to the majority, the inclusion of the word "must" in Rule 52(a) does not mean that a court of appeals can *sua sponte* deem an error to be harmless when the prosecution — as "beneficiary of the error" — has failed to satisfy its burden of showing why the error should be disregarded. *See Brizuela*, 962 F.3d at 798. Put

[3] Faced with the "irreconcilable conflict" between *Brizuela* and *Dix*, any future panel of our Court will be obliged to adhere to the *Brizuela* precedent. *See McMellon v. United States*, 387 F.3d 329, 334 (4th Cir. 2004) (en banc) (explaining that "when there is an irreconcilable conflict between opinions issued by three-judge panels of this court, the first case to decide the issue is the one that must be followed, unless and until it is overruled by this court sitting en banc or by the Supreme Court").

differently, an error must be disregarded only if the government can satisfy its burden.

In relieving the government of its burden, the panel majority has also provided the prosecution — which is always held to the highest of standards — preferential treatment over other litigants. *See Berger v. United States*, 295 U.S. 78, 88 (1935) (recognizing that "[t]he United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done"). Yet we have routinely held parties other than the government to account when they waive arguments on appeal. *See United States v. Hudson*, 673 F.3d 263, 268 (4th Cir. 2012) (Niemeyer, J.) (recognizing that argument not raised by criminal defendant in opening brief is "properly considered waived"); *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").

2.

Moving on, not only does the panel majority flout the *Brizuela* precedent, it has sidestepped other circuit precedents and applicable due process principles. As Judge Butzner emphasized more than 40 years ago, "[t]he fundamental requisites of due process are adequate notice and the opportunity to be heard." *See Amstar Corp. v. S/S ALEXANDROS T.*, 664 F.2d 904, 910 (4th Cir. 1981) (relying on long-standing Supreme Court authority in *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 313-16 (1950), and *Hagar v. Reclamation Dist. No. 108*, 111 U.S. 701, 708 (1884)). Resisting the *Amstar*

precedent, the majority has surprisingly endorsed the proposition that, if a defendant has been afforded some semblance of an "opportunity to be heard" — even immediately prior to imposition of the sentence and without providing the defense lawyer with an opportunity for preparation — the due process mandate of "adequate notice" is a nullity. *Id.* Moreover, the majority's decision will destabilize our Court's recent due process decisions in *United States v. Hodge*, 902 F.3d 420 (4th Cir. 2018) (ruling that defendant must receive adequate notice — in the PSR itself — of any predicate offense that might support a sentence enhancement), and *United States v. Benton*, 24 F.4th 309 (4th Cir. 2022) (same).

B.

Second, an en banc rehearing was warranted because this appeal involves "a question of exceptional importance." *See* Fed. R. App. P. 35(a). In that regard, the panel majority consistently ignored — at every step — the actual prejudice that was suffered by Jason Dix. More specifically, the majority ignored the fact that 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.[4]

Recently, in *United States v. Cisson*, our Court explained that "the erroneous application of a Guidelines sentencing enhancement is harmless and does not warrant vacating the defendant's sentence [only] if the record shows that (1) the [sentencing] court

[4] My determination that Dix is serving at least 12 additional months in prison is predicated on the fact that the sentencing court accorded Dix a downward departure and imposed a sentence of 99 months — 12 months greater than the high end of his otherwise proper Guidelines range (70 to 87 months). Applying the proper Guidelines range of 70 to 87 months, a similar departure would result in a sentence of 69 months. In that event, Dix's sentence would be 30 months less than the sentence he is serving.

would have reached the same result even if it had decided the guidelines issue the other way, and (2) the sentence would be reasonable even if the guidelines issue had been decided in the defendant's favor." *See* 33 F.4th 185, 190 (4th Cir. 2022) (internal quotation marks omitted). Disregarding the *Cisson* precedent, the panel majority has summarily concluded that the due process notice error suffered by Dix was harmless. But we know for certain that the recognized error was not harmless. Put simply, absent the tardy blue-light theory first interposed by the prosecutors during the sentencing proceedings, there was no basis for imposition of the four-level enhancement recommended by the PSR. In other words, the sentencing court could never have reached the same result.

Similarly, the panel majority has ignored the fact that Dix has been prejudiced because his 99-month sentence is "longer than that to which [he] would . . . be subject" absent imposition of the four-level enhancement. *See United States v. Stokes*, 261 F.3d 496, 499 (4th Cir. 2001); *see also United States v. Hargrove*, 701 F.3d 156, 161 (4th Cir. 2012) (concluding that "sentencing error is harmless if the resulting sentence was not longer than that to which the defendant would otherwise be subject"). For its part, 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.

III.

At bottom, this is an exceptionally important appeal which strikes at "the [very] heart of 'due process' in our American legal system." *See United States Tr. v. Delafield*,

57 F.4th 414, 420 (4th Cir. 2023) (King, J., concurring). On that score, it is worth emphasizing that the phrase "due process of law" was not included in the Constitution as a subterfuge, but was "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." *See Bank of Columbia v. Okely*, 17 U.S. 235, 244 (1819).

In this situation, rehearing en banc was vital to "secure the individual from the arbitrary." *See Okely*, 17 U.S. at 244. But today, we inexplicably prioritize "the arbitrary" over "the individual." And our Court's refusal to grant rehearing en banc is likely to have serious adverse consequences for the fair application of due process principles.

With great respect, I dissent from the denial of rehearing en banc.

* * *

I am honored that Chief Judge Gregory, Judge Wynn, and Judge Thacker join in this dissenting opinion.

WYNN, Circuit Judge, with whom Judge THACKER joins, dissenting from the denial of rehearing en banc:

I'm pleased to join Judge King's well-written opinion dissenting from the denial of rehearing en banc. For the reasons he gives, I believe the panel opinion conflicts with this Court's precedent and results in actual prejudice to Jason Dix. I write separately to emphasize two points.

First, it appears to be an increasing practice in our Court to give special dispensation to prosecutors. We are quick to excuse the government's abandonment of an issue, address issues not raised by the government, or, as here, deem "harmless" a government's recognized noncompliance with its obligations when the government itself did not even argue that we should do so. But as I have noted before, "our role as judges is to remain as neutral arbiters and resist taking on the role of prosecutor in criminal cases." *United States v. Robinson*, 55 F.4th 390, 408 (4th Cir. 2022) (Wynn, J., dissenting) (government confesses error three days prior to oral argument regarding the legal basis for defendant's conviction for certain drug charges; majority nevertheless exercises "'inherent authority' to assess the government's confession" itself); *see also United States v. Waters*, 64 F.4th 199, 206–07 (4th Cir. 2023) (Wynn, J., concurring) ("Judges are not prosecutors. But increasingly, the line that divides the roles of appellate judges and government prosecutors is all too often ignored.") (majority sua sponte raises possible procedural default of defendant's claim, an issue the government waived by not raising it on appeal). And we certainly do not afford the same leniency to criminal defendants. *See Robinson*, 55 F.4th at 408 (collecting cases); *Waters*, 64 F.4th at 205–06 (same). It is hard to imagine that if Dix

failed to comply with deadlines set forth in the Federal Rules of Criminal Procedure, as the government did here, we would be quite so forgiving.

Second, I cannot help but notice a rather glaring difference in our treatment of certain criminal defendants. Judge King is right to point to this Court's decision in *United States v. Brizuela*, in which we clarified that it is the *government*, when it is the "beneficiary" of an error, who bears the burden of showing that the error was harmless. *United States v. Brizuela*, 962 F.3d 784, 798 (4th Cir. 2020). In that case the defendant was a doctor of osteopathic medicine and a board-certified neurologist. *Id.* at 787. We correctly declined to "relieve the government from the consequences of its failure to raise the issue of harmlessness on appeal," vacated Brizuela's convictions, and remanded for a new trial. *Id.* at 799 (quoting *United States v. Giovannetti*, 928 F.2d 225, 227 (7th Cir. 1991)). Here, of course, Dix was a convicted felon found in possession of a firearm. And yet his sentence, with a four-level enhancement predicated on a theory raised by the government for the first time at sentencing, stands. It does not take a neurosurgeon to note the stark difference in treatment these two defendants received from our Court.

Another recent example: in the case of Kenneth Ravenell, an African American defense attorney from Baltimore, this Court denied Ravenell's motion for release from jail pending appeal. *See* Doc. 18, *United States v. Ravenell*, No. 22-4369 (4th Cir. Aug. 12, 2022). But when it came to the disgraced former Governor of Virginia, we granted the exact same motion. *See* Doc. 39, *United States v. McDonnell*, No. 15-4019 (4th Cir. Jan. 26, 2015). "Try as one might, one can point to no discernible difference that justifie[d] granting release pending appeal to Governor McDonnell and denying it to Ravenell."

United States v. Ravenell, 47 F.4th 882, 883 (4th Cir. 2022) (Wynn, J., dissenting from the denial of rehearing en banc).

To be sure, I do not assail or even insinuate that my colleagues are engaging in preferential treatment of some litigants over others. I surely do not believe that to be the case. But it has at least the "appearance" of being so. And even the appearance of such "preferential treatment," as Judge King rightfully calls it, of some litigants over others has no place in our judicial system.

Accordingly, I dissent.