No. _____

IN THE

Supreme Court of the United States

IVY T. TUCKER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether trial counsel's failure to make an argument that courts of appeals outside the circuit have accepted (and the circuit has not addressed) may amount to constitutionally deficient assistance of counsel or, instead, whether only directly controlling precedent is relevant.

II. When a defendant and the Government have agreed that the court will address at sentencing a factual question for purposes of imposing a statutory mandatory-minimum sentence, whether they have also implicitly agreed that the defendant's "offense of conviction" has "established" the factual finding for purposes of the Sentencing Guidelines.

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PETITION FOR A WRIT OF CERTIORARI

Ivy T. Tucker respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The Seventh Circuit's opinion is reported at 889 F.3d 881. The District Court's opinion is not published, but it is available at 2016 WL 6637957.

JURISDICTION

The Seventh Circuit entered judgment on May 10, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense."

INTRODUCTION

The Seventh Circuit rejected Ivy T. Tucker's ineffective-assistance-of-counsel claim on two grounds—and on each ground the court created a circuit split. Further, the Seventh Circuit erred with respect to each ground. As a result of the Court of Appeals' errors, Tucker will likely spend the rest of his life behind bars.

First, the Seventh Circuit created a circuit split regarding whether trial counsel's failure to make a meritorious argument may constitute ineffective assistance of counsel where, at the time of counsel's failure, out-of-circuit courts of appeals had accepted the argument but the court of appeals for the relevant circuit had yet to address it. According to the Seventh

Circuit, Tucker's counsel was not required to research or make an argument that had been endorsed by three separate federal courts of appeals because the law "was not established in th[e governing] Circuit." Pet. App. 7a. But the Third and Fifth Circuits disagree with that standard. *See United States v. Otero*, 502 F.3d 331, 336 (3d Cir. 2007); *United States v. Franks*, 230 F.3d 811, 814 (5th Cir. 2000). And the Seventh Circuit provided no explanation why effective counsel would refuse to identify or cite readily available and persuasive appellate authority.

Second, the Seventh Circuit created a circuit split regarding the impact of a defendant's agreement with the Government that the sentencing court will make a particular factual finding. According to the Seventh Circuit, such an agreement bars counsel from arguing that the sentencing judge's factual finding is not a part of the "offense of conviction" for the purposes of the Sentencing Guidelines. Pet. App. 7a. By contrast, according to the Sixth Circuit, not only may counsel argue that the finding is not part of the "offense of conviction," but the argument will be successful. *See United States v. Rebmann*, 226 F.3d 521, 522 (6th Cir. 2000) ("*Rebmann I*"); *United States v. Rebmann*, 321 F.3d 540, 544 (6th Cir. 2003) ("*Rebmann II*"). The split is crucial: The "offense of conviction" is a central part of sentencing; indeed, the phrase "offense of conviction" appears almost 100 times in the Sentencing Guidelines Manual. And the Seventh Circuit's rule—unlike the Sixth Circuit's approach—binds defendants to terms to which they never agreed.

Both of the Seventh Circuit's errors are significant. The Seventh Circuit's unduly broad conception of agreements between defendants and the Government

threatens to undermine the expectation that such agreements will be reasonably interpreted and enforced. And the Seventh Circuit's *per se* narrowing of the potential grounds for ineffective assistance of counsel leaves criminal defendants with the prospect that their attorneys will conduct significantly less legal research. This Court should grant certiorari and should vacate the decision below.

STATEMENT OF THE CASE

1. In 2009, Ivy Tucker and others were indicted for violating 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), and 846. C.A. Supp. App. 1-2. Section 841(a)(1) prohibits the knowing and intentional distribution of a controlled substance. Section 841(b)(1)(A) provides that where a violation of § 841(a)(1) involves "1 kilogram or more of a mixture or substance containing a detectable amount of heroin," and where "death or serious bodily injury results from the use of such substance," the sentence "shall be not less than 20 years or more than life." Section 846 prohibits attempt and conspiracy to commit a drug-related offense.

The indictment charged Tucker and his co-defendants with violating 21 U.S.C. §§ 841 and 846 by "knowingly and intentionally conspir[ing] with each other . . . to distribute controlled substances." C.A. Supp. App. 2. It specified that "[t]he offense involved 1 kilogram or more of a mixture and substance containing heroin, a Schedule I controlled substance" and that "[o]n January 9, 2009, death resulted from the use of the heroin distributed by the conspiracy." *Id.*

2. On the first day of Tucker's jury trial, counsel for the Government asked to present evidence in support of the causation-of-death finding under 21 U.S.C. § 841(b)(1)(A) at sentencing rather than at trial. Counsel explained:

> The Government believes that [causation of death is] a sentencing factor and addresses the mandatory minimum sentence in this case, which would be 20 years. . . . The mandatory minimum of 20 years is still in play, and the Government believes it's even more of a sentencing factor than an element of the offense, and the Government and defense believe that it might be somewhat prejudicial to Mr. Tucker.

Pet. App. 37a. Counsel for the Government suggested: "[I]t may be appropriate for the case to be tried on the conspiracy, and to leave the issue of the causation of the overdose death" to the sentencing hearing, where the parties could address questions regarding whether the "asthmatic condition" of the victim "may have contributed to the death." *Id.* at 38a. The Government requested that the district court "remove the causing death aspect" from its recitation of the indictment to the jury and "[i]nclude that as part of . . . the sentencing phase of this case." *Id.* Defense counsel agreed with this proposal. *Id.*

The parties and the district court complied with counsel's agreement. The Government did not present to the jury any evidence regarding a death. *See* Trial Transcripts Vols. 1-3. Further, when the district court read the indictment to the jury, the district court omitted the allegation of death. C.A. Supp. App. 16-17. Thus, while the jury convicted

Tucker of the underlying offense and specially found that more than one kilogram was involved, it did not convict Tucker of causing a death—because the jury was entirely unaware of the allegation. *See* Trial Transcripts Vols. 1-3; C.A. Supp. App. 12-25.

3. Notwithstanding this course of the trial, the Presentence Investigation Report suggested that the district court apply U.S.S.G. § 2D1.1(a)(2) when calculating Tucker's Guidelines sentencing range. PSR 9. Section 2D1.1(a)(2) increases a defendant's base offense level "if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance."

At the time of Tucker's sentencing, three courts of appeals had concluded that a defendant's "offense of conviction establishes" that the defendant caused a death or serious bodily injury pursuant to § 2D1.1(a)(2) only when the defendant has been *convicted* of causing a death or serious bodily injury—and not when the finding of death or serious bodily injury has been made by a sentencing court. *See United States v. Greenough*, 669 F.3d 567, 572-75 (5th Cir. 2012); *Rebmann II*, 321 F.3d at 541-44; *United States v. Pressler*, 256 F.3d 144, 157 n.7 (3d Cir. 2001). No circuit had held the contrary. Despite this uniform authority, Tucker's counsel failed to object when the district court applied § 2D1.1(a)(2) based solely on the court's factual finding at sentencing. C.A. Supp. App. 34-41, 48. Counsel failed to make the textual arguments that had already been articulated by the Third, Fifth, and Sixth Circuits.

Because of counsel's failure, Tucker's Guidelines sentencing range was increased from a range of 210 to 262 months in prison to a range of 360 months to life imprisonment. *See* PSR 9-10; U.S.S.G. § 2D1.1(a)(2), (a)(5), (c)(4) (2011); U.S. SENTENCING GUIDELINES MANUAL ch. 5 pt. A, Sentencing Table (U.S. SENTENCING COMM'N 2011). Tucker, who was fifty-five years old at the time of sentencing, was sentenced to forty years of imprisonment. C.A. Supp. App. 47; PSR 2. His prison sentence was over eighteen years longer than the top of the Guidelines sentencing range that would have pertained had the sentencing court not erroneously applied § 2D1.1(a)(2). C.A. Supp. App. 47; PSR 9-10; U.S.S.G. § 2D1.1(a); U.S. SENTENCING GUIDELINES MANUAL ch. 5 pt. A, Sentencing Table (U.S. SENTENCING COMM'N 2011).

4. After Tucker was sentenced, an unrelated case presented to the Seventh Circuit the issue that Tucker's counsel had failed to raise. Counsel in that case argued that if a defendant "was not *convicted* of causing [a] death" then "§ 2D1.1(a)(2)—which by its text applies only when the 'offense of conviction establishes' that death resulted—does not apply." *United States v. Lawler*, 818 F.3d 281, 283 (7th Cir. 2016). The Seventh Circuit agreed, and the panel unanimously "join[ed] the Third, Fifth, and Sixth Circuits in holding that § 2D1.1(a)(2) applies only when a resulting death (or serious bodily injury) was an element of the crime of conviction, proven beyond a reasonable doubt or admitted by the defendant." *Id.* at 285.

5. After Tucker's conviction was finalized, he filed the instant action to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. Dist. Ct. Dkt.

Nos. 1, 20. As relevant here, Tucker alleged that he had been deprived of his Sixth Amendment right to effective counsel when his attorney failed to argue that U.S.S.G. § 2D1.1(a)(2) does not apply to a defendant who has not been convicted of causing a death. *See* Dist. Ct. Dkt. No. 20 at 1-3. Tucker explained that § 2D1.1(a)(2) is applicable only where the "offense of conviction establishes" that a death has occurred, and he observed that his "offense of conviction" did not "establish" a death. *Id.* at 2.

6. The district court summarily denied Tucker's motion. Pet. App. 35a. The district court rejected Tucker's ineffective-assistance-of-counsel claim regarding § 2D1.1(a)(2) on the basis that

> Tucker's case is distinguishable from *Lawler*. He did not plead guilty. Rather, the jury returned a verdict finding beyond a reasonable doubt that he was guilty of conspiring to distribute one kilogram or more of a substance containing heroin, with a resulting death. *Lawler* does not provide support for Tucker's ineffective assistance of counsel claim.

Pet. App. 29a. But the district court was factually mistaken. The jury did not return a verdict finding that there was "a resulting death." The jury heard no evidence whatsoever regarding a death, and the jury convicted Tucker based on a recitation of the indictment that omitted any allegation of death. *See* Trial Transcripts Vols. 1-3; C.A. Supp. App. 12-25.

7. On appeal, the Seventh Circuit did not repeat—and the Government did not defend—the district court's factual error. Instead, the Seventh Circuit

affirmed on two bases, without identifying either basis as independently determinative.

First, the Seventh Circuit addressed the out-of-circuit authority. It acknowledged: "It is true . . . that at the time of [Tucker's] sentencing, three of our sister circuits had either explicitly held or suggested that § 2D1.1(a)(2) applies only where the resulting death is established beyond a reasonable doubt (or as part of a plea agreement)." Pet. App. 7a. "However," the Seventh Circuit stated, the interpretation of § 2D1.1(a)(2) "was not established in this Circuit until *Lawler*, and we have held that a failure to anticipate a change or advancement in the law does not qualify as ineffective assistance." *Id.*

Second, the Seventh Circuit addressed the stipulation regarding 21 U.S.C. § 841(b)(1)(A). The court stated: "By agreeing to the stipulation, [counsel] made the reasonable calculation that his client would be better off if the jury did not hear any evidence regarding the resulting death." *Id.* The court stated that "[i]t would lead to an absurd result if Tucker were able to gain the benefit of taking that factual issue away from the jury, only to turn around and argue that the district court was also barred from resolving it." *Id.* The court concluded that Tucker's counsel had "made a strategic decision" not "to make the argument" that § 2D1.1(a)(2) did not apply.

The Seventh Circuit held: "Because the issue was not yet settled in this Circuit, and because Tucker's counsel made a reasonable tactical decision, we cannot say that the failure to object to the application of the enhancement constituted deficient performance." *Id.*

This petition followed.

REASONS FOR GRANTING THE PETITION

The Seventh Circuit's decision conflicts with decisions of the Third, Fifth, and Sixth Circuits on significant questions of law. First, in concluding that counsel must raise a legal argument only if "the issue [is already] settled in th[e governing] Circuit," the Seventh Circuit created a conflict with Third and Fifth Circuit decisions regarding the standard for constitutionally ineffective assistance of counsel. Second, in concluding that if the parties agree that the sentencing court will make a particular factual finding, that agreement precludes defense counsel from arguing that the sentencing judge's factual finding is not a part of the defendant's "offense of conviction," the Seventh Circuit created a circuit split with the Sixth Circuit regarding the implications of such agreements.

This Court's review is required to settle these important questions of law. The Seventh Circuit's decision regarding out-of-circuit appellate authority fundamentally reshapes the standard regarding the scope of research that a constitutionally effective lawyer must provide. And the Seventh Circuit's decision regarding the agreement between Tucker's counsel and the Government risks undermining defendants' confidence in—and willingness to enter into—stipulations with the Government. This Court should grant a writ of certiorari to address both questions presented.

I. The Circuits are Split Over the Important Question Whether an Attorney's Failure to Consider Out-of-Circuit Appellate Precedent May Amount to Deficient Assistance of Counsel.

"[T]he core purpose of the [Sixth Amendment's] counsel guarantee [is] to assure 'Assistance' at trial, when the accused [is] confronted with both the intricacies of the law and the advocacy of the public prosecutor." *United States v. Cronic*, 466 U.S. 648, 654 (1984) (quoting *United States v. Ash*, 413 U.S. 300, 309 (1973)). Accordingly, "[i]t has long been recognized that the right to counsel is the right to the *effective* assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970) (emphasis added). If counsel "fail[s] to render 'adequate legal assistance,'" a defendant is deprived of his Sixth Amendment right. *Strickland v. Washington*, 466 U.S. 668, 686 (1984).

Nonetheless, the Seventh Circuit held that Tucker's Sixth Amendment right to counsel was not violated here. Tucker's sentencing counsel failed to object to the application of § 2D1.1(a)(2) even though, as the Seventh Circuit recognized, "at the time of [Tucker's] sentencing, three . . . circuits had either explicitly held or suggested that § 2D1.1(a)(2) applies only where the resulting death is established beyond a reasonable doubt (or as part of a plea agreement)." Pet. App. 7a. The Seventh Circuit dismissed the out-of-circuit authority because the interpretation of § 2D1.1(a)(2) "was not established in th[e Seventh] Circuit until [later], and . . . a failure to anticipate a change or advancement in the law does not qualify as ineffective assistance." *Id.* And the Seventh Circuit affirmed the

district court's denial of Tucker's § 2255 motion in part "[b]ecause the [legal argument] was not yet settled in th[e Seventh] Circuit." *Id.*

But the Seventh Circuit's view of the scope of the right to counsel is anomalous. The Seventh Circuit's *per se* disregard of out-of-circuit appellate precedent conflicts with the more reasonable position taken by the Third and Fifth Circuits.

The Third Circuit "ha[s] specifically held that counsel's failure to cite favorable decisions from other courts of appeals indicates deficient performance." *Otero*, 502 F.3d at 336. Indeed, the Third Circuit has rejected the contrary reasoning adopted by the Seventh Circuit: Where out-of-circuit appellate decisions "were readily available to" counsel, the Third Circuit refused to find that a determination of ineffective performance was "based on hindsight." *Jansen v. United States*, 369 F.3d 237, 244 (3d Cir. 2004).

The Fifth Circuit, too, has held that failure to cite out-of-circuit appellate authority may constitute constitutionally deficient performance. Under circumstances strikingly similar to those at issue here, the Fifth Circuit held that "[c]ounsel's failure to object falls below [the] objective standard of reasonableness" where "counsel made no objection to the enhancement of [counsel's client's] sentence, in the face of three circuit court of appeals' decisions holding the enhancement to be improper." *Franks*, 230 F.3d at 814. The Fifth Circuit's conclusion directly conflicts with the Seventh Circuit's conclusion below.

That conflict is extraordinarily important. The circuit split relates to the very standard for deciding whether counsel has provided effective representation. The resolution of the split will determine whether counsel may in all cases restrict research to the decisions of the Supreme Court and of the court of appeals for the jurisdiction in which counsel is litigating. It will determine whether counsel will be excused from failing to raise clearly meritorious legal arguments that have not yet been addressed by the governing court of appeals, regardless of how many other appellate courts have already decided those arguments in counsel's client's favor. It will determine whether counsel may ignore persuasive reasoning in readily-available federal appellate opinions.

Further, the Seventh Circuit is on the wrong side of this circuit split. No "sound strategy [can] be discerned for failing to raise [a legal] issue" solely because the issue has not yet been settled by binding precedent. *Jansen*, 369 F.3d at 244. Under the Seventh Circuit's blanket rule, so-called "effective" counsel will frequently be unable to assist "when the accused [is] confronted with . . . the intricacies of the law." *Cronic*, 466 U.S. at 654 (quoting *Ash*, 413 U.S. at 309). And counsel may be deemed "effective" despite having made neither a "thorough investigation of [the] law" nor a "reasonable decision" showing that further "investigation[] [is] unnecessary." *Strickland*, 466 U.S. at 690-691. This conclusion is contrary to "counsel's duty to investigate." *Id.* at 690. It is contrary to this Court's rejection of "*per se* rule[s] as inconsistent with *Strickland*'s . . . circumstance-specific reasonableness

inquiry." *Roe v. Flores-Ortega*, 528 U.S. 470, 478 (2000). And it merits this Court's review.

II. The Circuits Are Split Over the Important Question Whether an Agreement That the Sentencing Judge Will Make a Finding is an Implicit Agreement That the Finding Is a Part of the "Offense of Conviction."

The Seventh Circuit's decision below also created an additional circuit split. Tucker's counsel and the Government agreed to defer to the sentencing phase the presentation of any evidence in support of the causation-of-death finding for the 20-year mandatory minimum in 21 U.S.C. § 841(b)(1)(A). Counsel for the Government explained: "The mandatory minimum of 20 years is still in play, and the Government believes it's even more of a sentencing factor than an element of the offense, and the Government and defense believe that it might be somewhat prejudicial to Mr. Tucker." Pet. App. 37a. The parties agreed that the trial court should omit from the jury instructions any mention of the allegations regarding causation of death. Pet. App. 38a. The Seventh Circuit concluded that this agreement precluded Tucker's counsel from arguing that § 2D1.1(a)(2) did not apply. Pet. App. 7a.

The Seventh Circuit's decision conflicts with a decision of the Sixth Circuit. In *United States v. Rebmann*, the defendant—like Tucker—faced charges under 21 U.S.C. § 841. *See Rebmann I*, 226 F.3d at 522. The defendant pleaded guilty to the underlying offense of distribution, but agreed to defer to the court the factual finding supporting the statutory mandatory-minimum for causation of death or serious bodily injury. *Id.* ("Th[e] agreement provided that Rebmann understood that her maximum term of

imprisonment was 20 years for her guilty plea of distribution, but that if the district court found that death resulted from the distribution, she would be sentenced to a term of 20 years to life."). Nonetheless, the Sixth Circuit did not bar counsel from arguing that Rebmann's base offense level should not be increased under § 2D1.1(a)(2). Instead, the Sixth Circuit *agreed* that § 2D1.1(a)(2) was inapplicable—because Rebmann (like Tucker) had not been convicted of causing a death. *See Rebmann II*, 321 F.3d at 544. The Sixth Circuit explained that "the term 'offense of conviction' describes only the precise conduct constituting the crime for which the defendant was convicted." *Id.*[1]

The split is important. Under the Sixth Circuit's rule, stipulations to defer particular factual findings to the sentencing phase will be construed according to their terms. But under the Seventh Circuit's rule, these stipulations will automatically be construed as agreements to treat the sentencing court's factual finding as part of the "offense of conviction." This rule has wide-reaching implications. The term "offense of conviction" appears almost 100 times in the Sentencing Guidelines Manual. Defendants will have difficulty predicting how the agreement to defer fact-finding to sentencing might impact their Guidelines sentencing ranges. They will have difficulty

[1] To be clear, the Sixth and Seventh Circuit do not disagree regarding the meaning of the Sentencing Guidelines. Indeed, the Seventh Circuit has explicitly followed the Sixth Circuit's interpretation of U.S.S.G. § 2D1.1(a)(2). *See United States v. Lawler*, 818 F.3d 281, 285 (7th Cir. 2016). Instead, the Sixth and Seventh Circuits are split regarding the implications of an agreement to defer fact-finding to the sentencing phase.

predicting how their stipulations will be construed and enforced. And this uncertainty will undermine the very purpose of permitting parties to make stipulations.

Further, the Sixth Circuit's rule is more sensible than the Seventh Circuit's. The Sixth Circuit refrained from inferring from the parties' actual agreement regarding 21 U.S.C. § 841 a second, non-existent agreement regarding U.S.S.G. § 2D1.1(a)(2). By contrast, the Seventh Circuit assumed that a stipulation regarding 21 U.S.C. § 841 somehow constituted a "strategic decision" on the part of defense counsel not to argue that § 2D1.1(a)(2) did not apply. Pet. App. 7a. But the record in Tucker's case hints at no such "strategic decision." The stipulation regarding 21 U.S.C. § 841 in no way constituted an agreement that counsel would not argue that U.S.S.G. § 2D1.1(a)(2) did not apply. Indeed, the Government's language describing the stipulation indicated the exact opposite—the Government characterized the finding as a "sentencing factor," not as part of the "offense of conviction." Pet. App. 37a; U.S.S.G. § 2D1.1(a)(2).

The Seventh Circuit's approach does not honor the actual agreement made by the parties. This Court should review the Seventh Circuit's significant—and troubling—rule.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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