No. 18-188

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**

## REPLY BRIEF FOR PETITIONER

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## INTRODUCTION

At sentencing following a jury trial and conviction, Petitioner Ivy T. Tucker's counsel failed to object to the district judge's application of U.S.S.G. § 2D1.1(a)(2). That section increases a defendant's base offense level if "the offense of conviction establishes" a death or serious bodily injury that "resulted from the use of [a controlled] substance." Yet the jury that convicted Tucker had not found any resulting death or serious bodily injury, and three circuits outside of the Seventh had concluded that, in such case, § 2D1.1(a)(2) does not apply.

In rejecting Tucker's argument that this failure deprived him of his constitutional right to effective assistance of counsel, the Seventh Circuit disagreed with two other circuits on whether counsel can be deficient for failing to consider authority from other circuit courts. The Seventh Circuit also disagreed with another circuit in holding that if a defendant and the Government agree to defer to sentencing (rather than resolve at trial) a factual question that determines whether a statutory mandatory minimum applies, this also automatically amounts to an agreement to redefine the phrase "offense of conviction" in the Sentencing Guidelines.

The Seventh Circuit conflated a decision at trial (to stipulate that the sentencing court would make a finding for the purposes of determining the statutory mandatory minimum) with a decision at sentencing (not to object to the application of § 2D1.1(a)(2)). The Seventh Circuit supposed it would be "absurd" if a defendant could "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." Pet. App. 7a. The Government, too, denies the distinction between these two issues.

But as the Sixth Circuit has recognized, "that factual issue" and "it" are not the same thing, so an agreement on one is not automatically an agreement on the other. The former is the purely factual question (for purposes of a statutory mandatory minimum) whether death or serious bodily injury resulted from certain conduct; the latter is the legal question (for purposes of applying the Sentencing Guidelines) whether any finding on that factual issue amounts to part of the "offense of conviction." The Sixth Circuit has recognized that an agreement on the former does not necessarily include an agreement on the latter. But the Seventh Circuit ignored that distinction, imposing a blanket rule for interpreting such an agreement and dismissing as irrelevant the authority of other circuits that Tucker's counsel failed to consider and use.

The Seventh Circuit's errors threaten to undermine both agreements between defendants and the Government and the Sixth Amendment's guarantee of effective counsel. This Court should grant certiorari with respect to both questions presented.

## ARGUMENT

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

The Seventh Circuit acknowledged "that at the time of [Tucker's] sentencing, three of [its] 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. But the court disregarded the out-of-circuit authority on the ground that the interpretation of § 2D1.1(a)(2) "*was not established in th[e Seventh] Circuit until Lawler, and . . . a failure to anticipate a change or advancement in the law does not qualify as ineffective assistance*." *Id.* (emphasis added). The Seventh Circuit concluded that it "c[ould] not say that the failure to object to the application of the enhancement constituted deficient performance" for two reasons, one of which was "[b]ecause the issue was not yet settled in th[e governing] Circuit." *Id.*

The Seventh Circuit thus diverged from the Third and Fifth Circuits, which have "held that counsel's failure to cite favorable decisions from other courts of appeals indicates deficient performance." *United States v. Otero*, 502 F.3d 331, 336 (3d Cir. 2007); *see also United States v. Franks*, 230 F.3d 811, 814 (5th Cir. 2000). This extraordinarily important split governs whether counsel may in all cases restrict research to decisions issued by directly controlling authorities. It controls whether defendants will benefit from the "thorough investigation of [the] law" to which they are constitutionally entitled. *Strickland v. Washington*, 466 U.S. 668, 690 (1984).

The Government argues that there is no split because the Third and Fifth Circuit "decisions did not provide an opportunity to consider a circumstance where, as in this case, counsel's failure to object was the result of a 'reasonable tactical decision' intended to improve the defendant's chances of an acquittal." Opp'n Br. at 9 (quoting Pet. App. 6a). But the Government conflates the decision to stipulate that

the sentencing court would make a finding with the decision not to object to the application of § 2D1.1(a)(2). The decision not to object to the application of § 2D1.1(a)(2) was made post-conviction (at sentencing) and could not have affected Tucker's chances of an acquittal. And neither the Government nor the Seventh Circuit provided any basis for believing that the decision not to object to the application of § 2D1.1(a)(2) might have been a "reasonable tactical decision."

Indeed, if counsel decided to halt research (or ignore out-of-circuit case law) because the issue counsel was considering had not yet been addressed by directly governing precedent, then this scenario would pose precisely the question presented here. Does this *per se* constitute a "reasonable tactical decision," or might it violate the Sixth Amendment's guarantee to effective counsel? May trial counsel's failure to make an argument that courts of appeals outside the circuit have accepted (and the circuit has not addressed) amount to constitutionally deficient assistance of counsel, or instead, is only directly controlling precedent relevant? The question is exceptionally important and is squarely presented here.

## II. The Circuits Are Split Over Whether an Agreement That a Sentencing Judge Will Make a Finding Implies a Second Agreement That the Finding Is a Part of the "Offense of Conviction."

The Seventh Circuit's second basis for refusing to "say that the failure to object to the application of the enhancement constituted deficient performance" was "[b]ecause Tucker's counsel made a reasonable tactical decision." Pet. App. 7a. The Seventh Circuit

quoted the Government's description of the parties' agreement at trial:

> The government believes that [the causation of death issue 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. Based upon the fact that we have a young female who died because of the distribution of this controlled substance—that it may be appropriate for the case to be tried on the conspiracy, and to leave the issue of causation of the overdose death . . . or remove the causing death aspect. Include that as part of any sentencing factor if the—or the sentencing phase of this case. (sic)

*Id.* at 2a-3a. The Seventh Circuit explained that Tucker's 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.* at 7a. And then it reasoned 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.*

This conclusion created a split with the Sixth Circuit. In *United States v. Rebmann*, the defendant agreed to present the causation-of-death issue to the sentencing judge; her plea "agreement provided that

[she] 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." *United States v. Rebmann*, 226 F.3d 521, 522 (6th Cir. 2000). Although the parties had agreed to take the factual issue of causation-of-death from the jury, the Sixth Circuit did not find it "absurd" when Rebmann then argued that § 2D1.1(a)(2) could not apply. Instead, the Sixth Circuit agreed with Rebmann. It held that § 2D1.1(a)(2) was inapplicable—because Rebmann (like Tucker) had not been convicted of causing a death. *See United States v. Rebmann*, 321 F.3d 540, 544 (6th Cir. 2003). The Sixth Circuit, unlike the Seventh Circuit, refused to construe a stipulation to defer a factual finding to the sentencing stage as an implicit agreement to treat the sentencing court's factual finding as a part of the "offense of conviction." The Sixth Circuit, unlike the Seventh Circuit, adhered to the terms of the parties' agreement and the unambiguous requirements of § 2D1.1(a)(2).

The Government contends that Tucker mischaracterizes the Seventh Circuit's decision. The Government does not believe that the Seventh Circuit read an agreement regarding the mandatory minimum under 21 U.S.C. § 841(b)(1)(A) to imply an additional agreement regarding the "offense of conviction" under § 2D1.1(a)(2). Opp'n. Br. at 10-11. But Tucker accurately describes the Seventh Circuit's clear reasoning. The Seventh Circuit stated: "By agreeing to the stipulation, [Tucker's counsel] made the reasonable calculation that his client would be better off if the jury did not hear any evidence

regarding the resulting death. It 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." Pet. App. 7a. According to the Seventh Circuit, if Tucker were to argue that § 2D1.1(a)(2) did not apply, this would be "absurd."

The Sixth Circuit did not draw the same conclusion. It did not find that the defendant had implicitly agreed not to challenge the application of § 2D1.1(a)(2) when the defendant agreed to defer the § 841(b)(1)(A) causation-of-death finding to the sentencing judge. It did not believe that by deferring the fact-finding regarding causation-of-death, the parties had agreed to re-define the phrase "offense of conviction." It did not second-guess the Government's decision to make a deal that would make a 20-year mandatory-minimum dependent on only a finding made by a preponderance of the evidence, instead re-writing the agreement to include a separate stipulation regarding § 2D1.1(a)(2).

The Sixth Circuit honored the terms of the agreement made by the parties. This Court should grant certiorari to ensure that the Seventh Circuit does the same and to bring uniformity to the law.

## CONCLUSION

For the foregoing reasons and those stated in Tucker's opening brief, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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