No. 19-6828

IN THE

SUPREME COURT OF THE UNITED STATES

ORIGINAL

Reginald J. Shaw — PETITIONER
(Your Name)

FILED
NOV 13 2019
OFFICE OF THE CLERK
SUPREME COURT, U.S.

vs.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Fourth Circuit Court of Appeals
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Reginald J. Shaw
(Your Name)

LSCI Butner, P.O. Box 999
(Address)

Butner, NC 27509-0999
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

1. Are the commentary and application notes in the Sentencing Guideline manual authoritative or left to the District Court's discretion.

2. Can the ignorance of the Sentencing Guidelines Commentary and application notes satisfy the deficient performance and prejudice prong under Strickland v. Washington or at least be debatably deficient in the context for an application of a Certificate of Appealability.

TABLE OF AUTHORITIES CITED

CASES PAGE NUMBER

STATUTES AND RULES

OTHER

LIST OF PARTIES

[✓] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[✓] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix B to the petition and is

[X] reported at Case No. 17-4211; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the United States district court appears at Appendix A to the petition and is

[X] reported at Case No. 5:18-cv-182-FDW; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[ ] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was August 22, 2019.

[ ] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: August 22, 2019, and a copy of the order denying rehearing appears at Appendix C.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

4th Amendment V:

No person shall be held to answer for a capitol or otherwise infamous crime, without due process of law.

Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right to assistance of counsel for his defense.

STATEMENT OF THE CASE

On September 20, 2016, a Grand Jury seated in Charlotte, North Carolina issued a two count indictment charging five individuals with a controlled substance offense, and Defendant Shaw with possession of a firearm in the furtherance of a drug trafficking crime in violation of Title 18, United States Code, Section 924(c). Shaw was named in Count 1, Methamphetamine trafficking, Conspiracy with the others, and was the sole defendant in Count 2 alleging a violation of 924(c).

Shaw's counsel negotiated a plea agreement to resolve the indictment.

- Shaw stipulated that there was a factual basis, as required by Fed. R. Crim. P. 11(b)(3) for the guilty plea to Count 1 in return for the government dropping count 2.
- Shaw reserved his right to argue whether he should receive a 2-level weapon enhancement pursuant to U.S.S.G.§2d1.1 (b)1.

The government conceded that after Shaw gave consent to search his property, a AR-15 hunting rifle was found in the attic of the residence away from the location of the drugs. There was no evidence of any ammunition being found with the hunting rifle.

At sentencing the government did not offer any further evidence concerning the hunting rifle other than the facts stated in the PSR and argued that because of the amount of drugs and money found in the house if it was likely the hunting rifle was involved. This Argument was simply accepted by the Court.

Nevertheless, no discussion occurred during the sentencing hearing about the Sentencing Guide Manual 2d1.1b1 commentary and application note #3 giving District Courts guidance when it is not likely probable the fire arm was connected to the offense most notably when "unloaded hunting rifle is found in a closet" in Shaw's case a "unloaded hunting rifle is found in a attic".

Shaw filed a 21 USC 2255 motion claiming his trial counsel was ineffective for not

arguing 2d1.1 b1's commentary and application notes in their entirety, most notably that application note 3 authority to enhance that "The 2d1.1b1 enhancement would not be applied if the defendant, arrested at his residence, had a unloaded hunting rifle in his closet".

The government responded in opposition to Shaw's claims, and the District Court instantly denied Shaw's motion giving him zero opportunity to file a response. Shaw filed a 59E motion, about the matter and the District Court ruled Shaw did not have an absolute right to file a response to the Governments position before ruling on his 2255 motion. Shaw Appealed, applied for a COA but was denied in the Fourth Circuit Court of Appeals.

ARGUMENT

The Sentencing Guidelines manual provides the rule and guidance when enhancing a criminal defendant's sentence. The case at bar identifies Constructively Possessing a Fire Arm in furtherance of drug crime. The Government argues that because of the amount of drugs and money found in the house it was likely the hunting rifle was involved. The Government argument does not fit the rubic of 2d1.1b1 but was simply accepted by the Court.

The Commentary, and applicable notes to the Guidelines are in question. The Sentencing Commission gave a circumstance when it is more likely than not the enhancement would not apply.

The issue is essentially whether the Sentencing Commission's commentary and application notes in the manual mean anything at all. The seeming distinctions between a closet addressed in 2d1.1b1 commentary, and an attic described in Shaw's PSR is not more than a Blue Herring to unjustifiably apply the enhancement for the sole purpose of denying Shaw from the benefits of the BOP's RDAP program, and sentence him to more time than Congress intended for the crime he actually committed. The Government in it's argument was not willing to accept the crime for what it was, nevertheless the Sentencing Commission did not intend for a defendants situation like Shaw's to be enhanced under 2d1.1b1, because they considered the distinction between a unloaded hunting rifle in the closet, and a loaded fire arm present potentially protecting drug proceeds would be illogical to enhanced

criminal defendants without considering the commentary, and application notes in the Guideline Manual. The proper measure of criminal responsibility generally is the harm that the defendant ..."U.S. v. McHan, 101 F. 3d 1027, 1042 (4th Cir. 1996).

While sentencing based upon uncharged conduct is broadly permitted when proved by a preponderance of evidence, the practice has garnered significant skepticism. See e.g. Gerald Leonard & Christine Dieter Punishment without Conviction. Controlling the use of unconvicted conduct in Federal Sentencing. Berkley J. Crim. L. 260, 261 (2012). The practice has survived in Federal Courts despite a variety of Constitutional challenges, and despite the Supreme Courts pronouncement that any fact (other than a drug conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilt or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt". U.S.A. v. Booker, 543 U.S. 220, 224, 125 S. Ct. 738. Highlighting the significance of commentary and application notes when giving the sentence commission instructions how to apply a sentencing enhancement not agreed upon by the parties in a plea agreement or found by a jury, as in the case at bar; whereby, sentences are imposed for crimes the government lacked evidence to prove beyond a reasonable doubt.

The same Courts have stubbornly declined to acknowledge the Courts now swollen catalogue of instructions emphasizing the centrality of a defendants Guidelines calculation in the sentencing process. See Gall v. U.S.A., 552 U.S. 38, 128 S.Ct. 586, 596 (2000) (Correct Guideline calculation essential beginning point for procedurally reasonable sentence). Rosales - Mireles, 585 U.S.___ (June 18, 2018) (an unintentional guideline error sufficiently determination of sentence to constitute plain error resulting in "reasonable probability that [defendant] would have been subject to a different sentence but for the error"). The credibility of the "mere advisory" nature of the Guidelines has frayed, as Federal Courts believe they have discretion to consider the commentary and application notes so carefully placed in the Guidelines Manual, more and more Federal Courts

acknowledge that they are more or less back to where they were before Booker.

The bottom line, at least as a descriptive matter, is that the Guidelines determine the final sentence in most cases....many key factors used to calculate the sentence are still being determined by the Judge under a preponderance of the evidence standard, not by a Jury beyond a reasonable doubt. The oddity of all this is perhaps best highlighted by the facts Courts are still using acquitted conduct to increase sentences beyond what the defendant would otherwise could have received - notwithstanding that five Justices in the Booker constitutional opinion stated that the Constitution requires that the facts used to increase a sentence beyond what the defendant otherwise could have received be proved by Jury beyond reasonable doubt. In short, we appear to be back almost where we were pre-Booker. U.S.A. v. Henry, 42 F.3d 910, 919-20, 34 U.S. App. DC. 149 (DC Circuit 2007) Kavanaugh, J. concurring).

Did the District Court abuse it's discretion when it failed to follow the Commentary and Application notes, questioning whether Shaw's enhancement was correctly applied, ending in a illegal enhancement. The Sentencing Commission's Commentary properly considered the circumstances of enhancing Shaw under 2d1.1b1, and selecting the appropriate punishment. McMillan, 447 U.S. at 92. This alone is enough to generally debate this "controversy"...and turns on Congressional intent, and the subject of Judiciary discretion. U.S.A. v. Bronaugh 895 F. 2d 247, 251 (6th 1990). The challenge is therefore directed to the attorneys, prosecutors and judges, not the sentencing commission.

If a District Court suffering from a disoriented moment found that the prosecution, satisfied some, but not all elements of a offense would never be deemed harmless. Worse the confusion resulting from the lack of respect for the Sentencing Commissions Commentary and application notes carefully placed in the Sentencing Guide Manual carries a different legal meaning depending on where in the United States, or even depending on the depth of description a specific Court believes he is afforded.

Subsequently the 11th Circuit acknowledges a circuit split on the topic further decided

the Court need not follow application notes because application notes only provide general guidance, and not binding on the Court, 175 Fed. 167 U.S.A. v. Demartino (1996). The only meaning opinioned by the Demartino Court can be construed to mean, the Sentencing Guideline Manual is advisory, not binding leaving the guilty or not guilty verdict based on a opinion, not any law at all. As a formal matter application notes are not part of the Guidelines 933 F.2d 1029 U.S.A. v. Shabazz 4-1-91. Commentary is not authoritative to Federal Statute 67 F.3d 1531 U.S.A. v. Richards 10-11-95 10th.

The Sentencing Guidelines Manual truly means nothing if the commentary and application notes are not correctly applied. Because some Federal Court consider the commentary and application notes advisory, the equivalence between uncharged conduct, as presented here, and the acquitted conduct questioned by Justice Kavnanaugh Sixth Amendment purposes is sufficient to permit the instant action to serve as the vehicle to re-impose the boundaries intended by Booker and guide lower courts away from the use of undirected or untried crimes in the Guideline calculations that are tied into the length of sentences actually imposed, where conveniently ignoring the commentary and application notes provided by the Guidelines.

ARGUMENT

I. SUMMARY

The case at bar features a "sentence enhancement with commentary and application notes, interpreting when the enhancement should not be applied. Shaw's counsel and the District Court failed to follow the commentary and application notes constituting an incorrect application of the Guidelines, subjecting Shaw's sentence to possible reversal on appeal. Shaw's sentencing transcripts contain no reference to 2d1.1b1's application note #3 supporting this argument that the Sentencing Enhancement did not apply to his circumstances. Accordingly Shaw's sentence was increased by 2 levels upon a sentencing enhancement that could not have been applied if the District Court had correctly followed the Sentencing Commission's guidance in the Sentencing Guidelines Manual.

To interpret the U.S. Sentencing Guidelines Manual, 2d1.1 b1 Courts must consider the commentary to the Guidelines, 966 F.2d 868 U.S.A. v. Rushner 11th 10-29-91. The commentary puts flesh on the bones of the Guidelines. 909 F.3d 671 U.S.A. v. Allen 10-18. The sentencing Guidelines and comments "must" be read together....the commentary is part of the Sentencing Guidelines Manual and as the Supreme Court has pointed out, it is written by the same body that is charged with drafting the Guidelines, the two are to be read together. 339 F.3d 1238 U.S.A. v. Torrealba 11th July 2003. Application notes to the Sentencing Guidelines play a central role in determining the sentence, and are binding in most circumstances. Stinson v. U.S.A. 508 U.S. 36, 43, S. Ct. (1993). Commentary which include the application notes should be treated as the agencies interpretation of its own legislation rule, and is authoritative.

Subsequently the 11th Circuit acknowledges a Circuit split on the topic further decided the Court need not follow application notes because application notes only provide general guidance, and are not binding on the Court. 175 F.R.D 167 U.S.A. v. Demartino (1996). The only reasoning that could be deciphered from the Demartino opinion would be the Sentencing Guidelines Manual is advisory, not binding on the Court and is not a law at all. As a formal matter application notes are not part of the Guidelines. 933 F.2d 1029 U.S.A. v. Shabazz 4-1-91. Commentary is not authoritative to Federal Statue. 67 F.3d 1531 U.S.A. v. Richards 10-11-95 10th.

In Dowell No: 19-5183 6th Appeals (2019 U.S. App. Lexis 4) the Court reasoned the Sentencing Commission's use of commentary to add attempted crimes to the definition of a controlled-substance-offense deserves no deterrence". Essentially tainting the Sentencing Guidelines Manual and the manner it is applied to Federal Sentencing. U.S.A. v. Havis, 927 F.3d 382 (6th Cir. 2019) (en banc) (per curiam).

The Court gives great consideration to issues accompanied with Circuit splits. When Circuits are divided and the (Bible) Sentencing Guidelines for which the World of Federal Sentencing Functions is tainted, it is time to write a new-testament, a task bestowed

upon the greatest law of the land, This Court.

II. THE COURT SHOULD ADDRESS THE SIGNIFICANCE OF COMMENTARY AND APPLICATION NOTES WHEN INTERPRETING THE GUIDELINES OR GIVING GUIDANCE TO WHICH A SENTENCING ENHANCEMENT IS APPROPRIATE.

The commentary that accompanies the Guideline sections serve a number of purposes. First, it may interpret the Guideline, or how a enhancement should be applied. Failure to follow such commentary could constitute an incorrect applications of the Guidelines, subjecting the sentence to possible reversal on Appeal. See 18 U.S.C. § 3742. Second, the commentary may suggest circumstances which, in the view of the Sentencing Commission, may warrant departures from the Guidelines. Such commentary is to be treated as the legal equivalent of a policy statement. Finally, the commentary may provide background information, including facts considered in promulgating the Guidelines or reasons underlying promulgation of the Guidelines. As with a policy statement, such commentary may provide guidance is assessing the reasonableness of any departure from the Guideline. Commentary in the Guidelines manual that interprets or explains a guideline, or Sentencing Enhancement is authoritative unless it violates the Constitution or a Federal Statute, or is inconsistent with, or a plainly erroneous reading of that Guideline. 1.b1.7 significance of commentary." Stinson v. U.S.A. 508 U.S. 36, 38 (1993).

The Guidelines, Policy Statements, and Commentary set forth in the Guidelines manual, promulgated by the U.S. Sentencing Commission pursuant to Section 994(G) of Title 28, and (2) with respect to guidelines, policy statements, and Commentary promulgated or amended pursuant to specific Congressional direction, pursuant to the authority contained in that direction in addition to the authority under Section 994(a) of Title 28 United States code. 1A3.1 Authority

III. THE HABEAS POSTURE OF THE PRESENT ACTION DOES NOT UNDERMINE ITS QUALIFICATION FOR CERTIORARI.

In Hohm v. U.S.A., the Supreme Court held, notwithstanding in opposite prior authority,

that it posses jurisdiction under 28 U.S.C. 1254 (1) to review the denial of an application for a Certificate of Appealability by a Circuit Judge or Panel. 524 U.S. 236, 118 S. Ct. 1969 (1998). In reaching its conclusion, the Court construed the Anti-Terrorism and Effective Death Penalty Act by broadly rejecting a literal interpretation that would have deprived the Court of jurisdiction over petitions such as the one at bar and thereby denied habeas corpus petitioners at least one full (three-court) round of Federal Post-conviction review. Therefore, NO JURISDICTIONAL bar is present here.

Following the holding in Rosales-Mireles, there remains no real question over whether a counseled Guideline error satisfies the Strickland prejudice prong. The Court has now determined that just such a error is, in the normal course of affairs, one that is likely to result in different sentence and one that impugns the integrity of proceeding in a District Court. Nearly the same standard is dictated for a prejudicial error by Counsel Glover v. U.S.A., 531 U.S. 198, 121 S. Ct. 696 (2001) (increase in sentence of at least six months was prejudicial in relation to an ineffective assistance of Counsel claim under Strickland because "any amount of actual jail time has Sixth Amendment significance"). United States v. Vazquez, 271 F. 3d 93 (3rd Cir. 2001) (en banc) (Sloviter J. dissenting) (substantial rights always impaired where counsel error yields higher sentencing range).

The only remaining consideration is whether Shaw should have been afforded the opportunity to show deficient performance by Counsel. In this respect, it is important to note that a "Certificate of Appealability" should be granted if reasonable jurists could reach opposing conclusions on the matter raised. It is not even necessary for jurists to lack unanimity so long as the matter is debatable.

Shaw raised enough question in the Courts below to render an oversight by his lawyer of the fact that he was enhanced in spite of the Guideline Manuals commentary directing the Court that he should not be enhanced under 2d1.1 b1 debatably deficient. A Defendant's right to effective assistance of Counsel includes the period of his representation during the plea process as well as during trial. Hill v. Lockhart, 474

U.S. 52, 58, 106 S. Ct. 366, 307 (1985). In that context an attorney is "deficient" under Stricklands performance prong if he "made errors so serious that Counsel was not functioning as the "Counsel" guaranteed by the Sixth Amendment..." 466 U.S. at 68. Ignorance of Sentencing Law can satisfy the deficient performance test, See e.g., Meyers v. Gillis, 142 F. 3d 664 (3rd Cir. 1998), as can ignorance of the content of Sentencing Guideline Manual. The confluence of those two probabilities presented by Shaw, therefore falls well within the zone of deficiency necessary to render the Constitutional adequacy of Shaws legal advice "debatable". Because the Certificate of Appealability context requires no more, the case at bar favors Certiorari because of its post-conviction posture.

CONCLUSION

The apparent conflicts facing Circuit and District Court struggling to apply Congress and the Sentencing Commission's directive manifest in two forms, both of which are present by the instant fact pattern. First, District Courts have reached opposite conclusions concerning the degree to which Commentary and Application notes, of the Sentencing Guideline Manual must be followed when applying Sentencing Enhancements, going as far to suggest the Sentencing Guidelines Manual is tainted. Here a clear and obvious disconnect is present between the Sentencing Commission Authority and the Commentary and Application notes when the District Court applied the enhancement to Shaw, if only because the Sentencing Guideline Manual spells out in special detail the circumstances when a 2d1.1 b1 enhancement is "not" to be applied through relevant conduct. A side-by-side comparison of the Sentencing Commission direction of when not to enhance under 2d1.1 b1, lacking any consideration from the Court that the hunting rifle was unloaded and stored way from the drugs in a attic places the District Court's defiance to the Sentencing Commissions Commentary, while simply accepting the Government's argument.

The District Courts abuse of discretion which lacks only consideration that the hunting rifle was unloaded and stored away from the drugs in a attic places the District Court's reasoning front and center that the Sentencing Guidelines Manual is not authoritative in

its entirety or he is a "law unto himself". As the Sixth Circuit Court of Appeals reasoned in Havic, the members of the Sentencing Commission acted deliberately to ad attempt crimes to enhance criminal defendant under 4b1.1, tainting the Sentencing Guidelines Manual with authority not approved by Congress.

The case at bar brings the District Court discretion front and center. What is the Courts discretion governed by, something or nothing. Whether the controlling facts in a Courts discretion is the "value" of substantial assistance in sentencing reductions, or "nothing" when a defendant is denied his due process to respond to a advisorys. Is the District Courts discretion great or absolute without any Constitutional consideration to the Sentencing Guidelines Manual or the Constitution of the U.S.A. It's time for this Court to determine the boundaries of a Court's discretion, unless its the goal of the Supreme Court to allow District Courts to become a law unto each ones self governed by a tainted Sentencing Guidelines Manual promoting such conduct.

Respectfully Submitted,

Reginald J. Shaw

Reginald Shaw

Nov. 12, 2019

Date

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Reginald L. [illegible]

Date: Nov. 12, 2019