

21-6749
No.

IN THE SUPREME COURT
OF THE UNITED STATES

MATTHEW G. SULLIVAN,
Petitioner,

vs.

DAN SPROUL,
Respondent,

FILED
DEC 20 2021
OFFICE OF THE CLERK
SUPREME COURT, U.S.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI

Matthew Sullivan

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QUESTIONS PRESENTED FOR REVIEW

1. May a criminal defendant attack the validity of his guilty plea when a post conviction clarification in law reveals that he was misinformed regarding the statutory penalty attached to his charged offense?
2. May this Court's decision in Bousley v United States, 523 U.S. 614 (1998), which created an exception to this Court's earlier holding in Brady v United States, 397 U.S. 742 (1970), be extended to include challenges to the validity of a guilty plea when a post conviction clarification in law reveals that the defendant is actually innocent of a mandatory sentencing enhancement and is misinformed of the relevant circumstances surrounding the plea and the direct consequences of the plea?
3. Does this Court's holding in Brady foreclose a defendant's challenge that his plea agreement is voidable under contract law principles?

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PARTIES TO THE PROCEEDINGS

All parties appear in the caption of the case on the cover page

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OPINIONS BELOW

The decision of the Court of Appeals is unreported. The decision of the District Court is unreported.

JURISDICTION

The decision of the Court of Appeals was entered on June 9, 2021. Because the Petitioner requested Panel Rehearing, thus filing timetable for Writ of Certiorari was tolled under Sup. Ct. R.13(3). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Fifth Amendment, United States Constitution, provides:

No person shall be held to answer for a capital, otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself; not be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without compensation.

U.S. Const. Amend. V

2. Sixth Amendment, United States Constitution, provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

U.S. Const. Amend. VI

STATUTORY PROVISION INVOLVED

1. The statute under which Petitioner sought post conviction relief was 28 U.S.C. § 2255:

Federal Custody: Remedies on Motion Attacking Sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such a sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant him a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

STATEMENT OF THE CASE

The facts necessary to place in their setting the questions now raised can be briefly stated.

I. Course of Proceedings in the Section 2241 Case Now Before This Court.

Sullivan was indicted on August 22, 2012, for conspiring to manufacture, distribute, and possess with intent to distribute more than 280 grams of crack cocaine (CDIL Case No. 1:12-cr-10115, Doc. 38).

On September 4, 2012, the Government gave notice to Sullivan of its filing of information pursuant to 21 U.S.C. § 851. The grand jury returned a superceding indictment in February 2014 that also charged Sullivan with conspiracy to distribute and possess with intent to distribute at least 280 grams of crack cocaine (CDIL Case No. 1:12-cr-10115, Doc. 136).

On March 6, 2014, according to the terms of a plea agreement authorized by Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure (CDIL Case No. 1:12-cr-10115, Doc. 143, and Plea Tr. contained at Doc. 252, p. 1-23), the plea agreement provided that Sullivan agreed to a sentence of 26 years imprisonment and in exchange, the Government agreed to enhance his sentence based on only one of his prior felony drug convictions (CDIL Case No. 1:15-cv-01280, Doc. 10, pp. 1-2). Sullivan was subsequently sentenced to 312 months of imprisonment on July 10, 2014.

On July 8, 2015, Sullivan filed an unsuccessful motions pursuant to 28 U.S.C. § 2255, collaterally attacking his

STATEMENT OF THE CASE (cont)

conviction. On November 2, 2015, the Central District of Illinois denied said motion.

In June of 2016, this Court decided Mathis v United States, 136 S.Ct. 2243 (2016); which promulgated how lower courts should determine whether a prior state conviction can be relied upon to enhance a federal defendant's sentence pursuant to the ACCA.

On June 20, 2017, Sullivan filed his second post-conviction petition pursuant to 28 U.S.C. § 2241 before the District Court. The petition alleged that Sullivan was misclassified as a career offender when originally sentenced. Relying on Mathis, Sullivan argued that his two prior Illinois drug convictions should not qualify as controlled substance offenses for the purpose of the career offender enhancement under U.S.S.G. § 4B1.2. The Court dismissed the petition in light of Hawkins v United States, 706 F.3d 820 (7th Cir. 2013), and because the plea waiver contained within Sullivan's plea agreement prevented such an argument.

On August 15, 2018, the Seventh Circuit Court of Appeals explained that a court must employ the categorical approach set forth in Taylor v United States, 495 U.S. 575 (1990); and Mathis to analyze whether a prior drug conviction qualifies as a "felony drug offense" under 21 U.S.C. § 802(44). See: United States v Elder, 900 F.3d 491 (7th Cir. 2018);

In June of 2019 the Seventh Circuit ruled that Illinois' Controlled Substance Act "covers many different controlled substances...that are not controlled substances under federal law." Najera-Rodriguez v Barr, 2019 U.S. App. LEXIS 16796 (7th Cir. 2019);

STATEMENT OF THE CASE (cont)

In December of 2019, Sullivan filed his second § 2241 petition in the wake of Mathis and Elder. In that petition, he claimed that his Illinois priors should not have been used (1) to increase his statutory minimum from ten to twenty years, (2) by the Government to file an § 851 notice to seek a mandatory life sentence, which was employed to induce him to plead guilty, and (3) that his guilty plea was constitutionally invalid and must be voided.

The Respondent subsequently filed a Motion to Dismiss based on the erroneous premise that (a) Sullivan was attacking his career offender designation, (b) Sullivan's claims did not satisfy the Savings Clause requirement, and (c) that the collateral attack waiver contained in Sullivan's plea agreement bars his petition. Sullivan replied, however, the District Court agreed with the Respondent and denied Sullivan's petition. Sullivan filed a Motion to Reconsider, but was again denied.

On April 4, 2021, Sullivan filed an appeal brief before the Seventh Circuit Court of Appeals. Sullivan asserted that the District Court erred in dismissing his petition because 1) the waiver contained within his plea agreement cannot bar a claim that both the plea of guilt and the waiver were entered into involuntarily and unknowingly, 2) The waiver could not bar a claim that his plea agreement is both the result of and based upon a mutual mistake, and 3) that he could not attack the validity of his guilty plea despite relying on decisions that were decided subsequent to his conviction becoming final. The Respondent moved

STATEMENT OF THE CASE (cont)

for summary affirmance, again employing Sullivan's plea waiver in an attempt to foreclose his claims. On June 9, 2021, the Circuit Court granted the Respondent's motion. Sullivan filed a timely motion for a panel rehearing, which was denied.

II. Existence of Jurisdiction Below.

Petitioner was convicted in the Central District of Illinois on 1 count of Conspiracy to Distribute 280 grams of cocaine base under 21 U.S.C. § 846, and for possessing a prior felony drug conviction which subjected him to an enhanced statutory sentencing range pursuant to 21 U.S.C. § 841(b). A Section 2241 motion was appropriately made before the District Court for the Southern District of Illinois because the Petitioner is currently confined in a United States Penitentiary located in the Southern District of Illinois. The District Court's decision was duly applied to the Seventh Circuit Court of Appeals.

III. The Questions Presented Concerns an Issue of Exceptional Importance.

This is a coerced guilty plea case. At the time that the Petitioner entered his guilty plea, prior Illinois convictions for trafficking in cocaine qualified federal defendants to enhanced statutory penalties if the government's attorney filed a timely Section 851 information, notifying the defendant that he was subject to such an enhancement. In the case of Sullivan, the government filed an information charging that his prior convictions

STATEMENT OF THE CASE (cont)

244 n. 7 (1970); In all of the cases cited by both Seventh Circuit and the government, the defendants were advised of the correct statutory sentence at the time they pleaded guilty; the subsequent changes in law in each case (if any) had no bearing on the statutory sentence the defendant faced at the time of pleading guilty and thus did not render the plea knowing and involuntary. The same is not true here. See: Bousley, 523 U.S. at 620-21 (Stevens, J. concurring in part and dissenting in part)(explaining that retroactive statutory decisions do not "change the law" but "explain [] what [the statute] had meant ever since the statute was enacted.")

This issue concerns the practice by which federal criminal defendants surrender "the most fundamental of all rights." Carafas v LaVallee, 391 U.S. 234, 238 (1968), and its resolution will affect many prisoners through the federal system. After all, the inclusion of habeas waivers in plea agreements has become an increasingly wide-spread practice. See: Samuel R. Wiseman, Waiving Innocence, 96 Minn. L. Rev. 952, 966-67 (2012)(describing the history of the expansion of habeas waivers); Anup Malani, Habeas Settlements, 92 Va. L. Rev. 1, 8-9 (2006)(nationwide survey of federal public defenders and prosecutors found that habeas waivers are used in over 75% of federal judicial districts.)

2. This Court should grant Certiorari to decide whether a claim of actual innocence to a mandatory sentencing enhancement can qualify a criminal defendant for Bousley's exception to Brady. There is no dispute that Sullivan has brought an actual innocence

STATEMENT OF THE CASE (cont)

under Illinois law were "felony drug offenses" mandating that he face a mandatory life sentence upon a finding of guilt after a trial by jury. Faced with a looming mandatory life sentence, Sullivan decided to plead guilty, and in exchange the government amended its § 851 filing to reflect that only one of Sullivan's Illinois convictions would be used to enhance his statutory sentencing range. After Sullivan's conviction became final, the Seventh Circuit held that Illinois cocaine convictions could not be employed to either subject a defendant to an enhanced statutory penalty, or enhance a defendant's actual statutory penalty. United States v Ruth, 966 F.3d 642 (7th Cir. 2020); Subsequent to the Seventh Circuit's holding in Ruth the Court held that in the event that the government files an erroneous § 851 information, subjecting a defendant to a mandatory life sentence, and the defendant pleads guilty in light of this misinformation he does so involuntarily and unknowingly and thus the guilty plea is constitutionally invalid. See: United States v De La Torre, 940 F.3d 938, 949-50 (7th Cir. 2019);

1. This Court should grant Certiorari to resolve the circuit split concerning whether an intervening decision that retroactively construes the statutory sentence a defendant faced at the time he pleaded guilty goes to establishing whether the defendant was advised of what this Court has said is one of the consequences that he certainly must be apprised of before pleading guilty: the applicable statutory penalty that awaits him upon a finding of guilt after a jury trial, and the District Court's sentencing authority. Brady, 397 U.S. at 749; Boykin v Alabama, 395 U.S. 243,

STATEMENT OF THE CASE (cont)

claim. Nor is there a contention that the Seventh Circuit characterizes challenges to mandatory sentencing enhancement s as claims of actual innocence. The only open question that must be resolved is whether an actual innocence claim to a mandatory sentencing enhancement satisfies Bousley's definition of actual innocence, according to the Ninth Circuit Court of Appeals, it does. The Seventh Circuit had the occasion to refute Sullivan's actual innocence claim, but chose to ignore it. Thus the question is ripe for resolution before this Court.

3. This Court should grant Certiorari to resolve whether Brady's holding forecloses a claim that a criminal defendant's plea agreement (and not his guilty plea) is the result of a mutual mistake. Plea agreements are contracts. Thus, they are governed by contract principles. As a result a valid claim that a plea agreement is either the product of, or is based on, a mutual mistake would result in the voidance of that agreement. Moreover, under contract principles criminal defendants do not bear the burden of a mutual mistake. Especially one in which all parties misapprehended the law and its effect on a plea agreement.

REASONS FOR GRANTING THE WRIT

I. Mr. Sullivan's Prior Illinois Convictions Are Not Felony Drug Offenses.

Sullivan possesses two prior convictions pursuant to 720ILCS §§ 570/401(c) and 401(d), that are not felony drug offenses under 21 U.S.C. § 841(b). In his petition before the Southern District of Illinois, Sullivan argued that § 401(d) is analogous to 720ILCS § 570/402(c) and is thus indivisible and categorically overbroad because, like § 570/402(c), § 570/401(d) does "cover [] many different controlled substances...that are not controlled substances under federal law." Najera-Rodriguez, at *5. Namely, these substances are: Salvinorin A, Saliva Divinorum, Diacetylmorphine (Dihydroherion), and even cocaine itself, 720 § 570/204(c)(8); (d)(10.1); and (d)(10.5). Aside from cocaine, none of these substances are included in the five federal schedules of controlled substances; 21 U.S.C. §§ 802(6) and 812. Thus, it is possible to violate both § 570/401(d), and all other subsections of Section 401 in ways that do not fit the federal drug offense trigger in § 851.

Id.

While Sullivan's case was pending, the Southern District held in Clay v True, 2020 U.S. dist. LEXIS 98087 (S.D. IL. June 4, 2020); that § 570/401(d) is analogous to § 402(c) (the statute involved in Najera-Rodriguez), and thus, convictions pursuant to § 401(d) would also be categorical mismatches for felony drug offenses pursuant to §§ 841(b) and 851, which is a departure from the Seventh Circuit's pre-Mathis holding in United States v Brooks, 468 Fed. Appx. 623 (7th Cir. 2012)(unpublished)(holding that § 570/401(d) was divisible and employed the modified categorical

approach in deciding whether "a defendant's underlying felony possession with intent to deliver less than one gram of cocaine" qualified for enhancement purposes. Id. at 628; see also: United States v Fife, 624 F. 3d 441 (7th Cir. 2010)(same).

Also while Sullivan's § 2241 petition was languishing in the Southern District of Illinois, the Seventh Circuit rendered its ruling in Ruth, holding that Illinois defines cocaine broader than the federal definition of cocaine and as a result, prior Illinois cocaine convictions are not felony drug offenses. What is clear is that Sullivan's prior convictions under Illinois law do not now, (and never did) constitute felony drug offenses.

II. The Seventh Circuit Decided A Federal Question That Conflicts With This Court: That A Federal Defendant's Decision To Enter A Guilty Plea Must Be Intelligent And Voluntary In Order To Be Valid.

"It has always been the case that when entering a plea--and when negotiating for that plea--the defendant's fear of punishment were limited to that which the law provides." Judge Andrew Napolitano; Constitutional Chaos, p. 51. A plea of guilt loses its character as voluntary if it is entered without sufficient understanding, and fair and accurate notice of the relevant circumstances and likely circumstances. McMann v Morgan, 426 U.S. 637 (1976). "Included in [an] informed decision is knowledge regarding the comparative sentence exposure between the accused's various options." Boyd v Warden, 579 F. 3d 330, 353 (3rd Cir. 2007);

In Brady, this Court confirmed this, that included in the relevant circumstances and likely consequences that a criminal defendant

must be accurately informed of are the nature of the offense (which includes the elements of crime), and the applicable statutory penalty that awaits him if he elects to proceed to trial and is found guilty. 377 U.S. at 749.

This Court has also held that the direct consequences of a defendant's plea is the limits of a district court's sentencing authority (which includes both the statutory maximums and minimums). See: Boykin, 395 U.S. at 244 n.7 (advising trial courts to conduct a colloquy to satisfy itself that "the defendant understands...the permissible range of sentences." See also Alleyne v United States, 570 U.S. 99, 112 (2013)(The "floor and ceiling of sentencing ranges [] define the legally prescribed penalty.")

In the past, the Seventh Circuit has not hesitated to vacate a guilty plea - even on plain error review - where, as here, proceedings were predicated on the erroneous application of a sentencing enhancement under 21 U.S.C. § 841(b) and an erroneous government notice filed pursuant to § 851. See: De La Torre, 940 F. 3d at 949-50. No one disputes that Sullivan was misinformed of the correct statutory penalty when he pleaded guilty and waived his right to collaterally challenge his sentence. Based on the information filed by the Government, the sentencing court told Sullivan the incorrect statutory minimum at each step in his criminal proceedings, and at the change-of-plea hearings. Sullivan was thus misadvised of the statutory minimum penalty and his waiver was not knowing and voluntary.

The Seventh Circuit nevertheless rejected this argument solely on the ground that "[a] defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted

that his calculus misapprehended...the likely penalties attached to alternative courses of action." Brady, 397 U.S. at 757; As the Seventh Circuit explained, "[A] primary purpose of express collateral - attack waivers...is to 'account in advance for unpredicted future developments in law.' (Panel's order dismissing Sullivan's § 2241)(quoting Oliver v. United States, 951 F. 3d 841, 847 (7th Cir. 2020); The Seventh Circuit was wrong for reasons warranting this Court's review.

III. This Court's Brady Decision Is Inapplicable To The Facts Of This Case.

While it may be true that this Court has supported the notion that a guilty plea is valid and not subject to challenge based on subsequent developments in law, this ideology is only applicable if, when pleading guilty, a criminal defendant is sufficiently aware of the relevant circumstances and direct consequences surrounding the plea, and only if the defendant is accurately informed of the then-applicable law in relation to the facts of the case. Exceptions to Brady exist when subsequent clarifications of law reveal that the defendant is denied these rights. That is precisely what occurred in the instant case.

A. The Contours Of Brady's Holding.

In Brady, the petitioner challenged the voluntariness of his guilty plea, arguing it was coerced by a now-unconstitutional criminal statute. Id. 397 U.S. at 746 (citing United States v. Jackson, 390 U.S. 570 (1968)). Brady plead guilty to kidnapping

(18 U.S.C. § 1201(a)) and received a sentence of 50 years, later reduced to 30 years. Nine years later, this Court invalidated this provision, holding that it discouraged the assertion of a defendant's constitutional right to plead not guilty and demand a jury trial. Jackson, 390 U.S. at 583. Relying upon Jackson, Brady challenged his guilty plea to kidnapping, claiming, among other things, that his plea was not intelligent because his counsel wrongfully advised him that the jury had the power to condemn him to death. This Court disagreed.

The Brady Court first concluded that the defendant's plea had been voluntary. This Court began by clarifying that Jackson did not hold that "every defendant who enters a guilty plea to a charge under the Act [automatically] does so involuntarily." Id. 397 U.S. at 747 (citing Jackson, 390 U.S. at 583; This Court then proceeded to examine the circumstances surrounding Brady's plea, looking for evidence that Brady was "fully aware of the direct consequences" of his plea. 397 U.S. at 755. In its analysis, this Court placed great weight upon the fact that Brady decided to plead guilty after his codefendant confessed and agreed to testify against him. Id. at 749. See Parker v North Carolina, 397 U.S. 790, 815 (1970)(affirming this notion).

Although this Court acknowledged the possibility that facing the death penalty may have influenced Brady's decision, this Court reasoned that it was only one of several factors to consider. Brady, 397 U.S. at 749. This Court also considered other factors, finding no evidence that Brady pled guilty due to "actual or threatened physical harm or mental coercion," that he had competent

counsel; and was able to "rationally weigh the advantages of going to trial against [those] of pleading guilty;" and that his plea was entered in open court before a trial judge who twice questioned its voluntariness. Id. at 754-55. In addition, this Court concluded that Brady's plea was intelligently made. This Court found no evidence that Brady was "incompetent or otherwise not in control of his faculties" at the time he entered his guilty plea. Id. at 756. This Court went on to explain that "absent a misinterpretation or other impermissible conduct by state agents, a voluntary plea of guilty intelligently made in light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty promise." Id. at 757

This phrasing (repeated three times within two paragraphs) clarifies the import of the more general proposition. This Court decided that "[t]he fact that Brady did not anticipate Jackson ...does not impugn the truth or reliability of his plea." Id.

B. **Brady Was Properly Informed, Sullivan Was Not**

Brady's guilty plea was both voluntary and intelligent because he was "fully aware of the direct consequences" of his plea. 397 U.S. at 755. Moreover, Brady was able to "rationally weigh the advantages of going to trial against [those] of pleading guilty." Id. at 754-55. The Brady Court was not faced with a situation where "[a] post conviction clarification of law has rendered the sentencing court's decision unlawful," Narvaez v. United States, 674, F. 3d 624, 627 (7th Cir. 2011); or that

revealed that the plea bargaining stage of the defendant's criminal prosecution violated due process. Nor was the Brady Court confronted with a situation in which a defendant is actually innocent, based upon a clarification of law, of the sentencing enhancement to which he pled. Neither does Brady govern the inquiry of whether a plea agreement violates contract law principles.

The Seventh Circuit was wrong in concluding that Brady foreclosed Sullivan's claims. The Brady Court stated that "a voluntary plea of guilty, intelligently made in light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise," 397 U.S. at 757; but the "faulty premise" in Brady was that the defendant "did not anticipate" a future favorable decision of constitutional law, not that he was affirmatively misinformed of the minimum penalty he faced under existing law at the time he decided to plead guilty, as was the case here.

The Seventh Circuit appears to hang its hat on the statement that, "[a] defendant is not entitled to withdraw his plea merely because he discovers long after the plea has become accepted that his calculus misapprehended...the likely penalties attached to alternative courses of action." Id. This statement, when read in context, is puzzling. The word "misapprehended" connotes understanding a fact incorrectly. Brady was properly informed that, had he gone to trial and lost, the law provided that his sentence would have been death. Brady was also "correctly informed as to the essential nature of the charge against him." Bousley, 523 U.S. at 619. Stated simply, Brady did not "misapprehend"

the likely penalty, and the Seventh Circuit's application of that term to the instant case is misplaced. The question of whether Brady misapprehended the likely penalty was not before the Court. See: Rhodes v Stewart, 488 U.S. 1, 7 (1988) ("[O]ur pronouncements lose their controlling authority when they attempt to decide questions not before the court at the time.")

Sullivan, on the other hand, did not "misapprehend" the law or the likely penalties. He was affirmatively misinformed of the mandatory minimum sentence he faced under the existing law at the time he pled guilty. The same was true for the defendants in De La Torre. The Circuit Court's Order conflicts with De La Torre.

Sullivan concedes that Brady would be applicable had he been provided accurate information regarding the mandatory minimum sentence he faced. Even the Seventh Circuit's precedent is clear: "When all parties involved in a plea hearing misapprehend the law, [the Court] will not place the burden of the mutual mistake on the defendant." United States v Schaul, 962 F. #d 917, 924 (7th Cir. 2020)(emphasis added); In the instant case, by granting the Respondent's Motion to Dismiss, the Panel ignored its own articulated principle by placing the burden of a shared misapprehension squarely on Sullivan's shoulders.

Aside from these anomalies, unlike Brady, Mr. Sullivan's motivation for pleading guilty was distorted by the (erroneous) belief that a mandatory life sentence was the proper penalty for his charged offense had he lost at trial. His motivation to plead guilty had little to do with the fact that his co-defendants

decided to plead guilty and cooperate with the Government. Moreover, Sullivan (unlike Brady) was denied the "opportunity to assess the advantages and disadvantages of trial compared with those attending a plea of guilty." Brady, 397 U.S. at 755. Brady's claim revolved around his failure to anticipate this Court's decision in Jackson. Here, on the other hand, Sullivan claims not merely that the law changed, but that Mathis and Elder reflect that he never actually faced a life sentence.

In the wake of Brady, this Court has held that a variety of other "misapprehensions" insufficiently important to invalidate a guilty plea, but none of those cases involve something as central to a defendant's constitutional rights to an informed and intelligent guilty plea as the prescribed statutory penalty. The statute under which Sullivan was convicted and sentenced under (§ 841(b)) failed to reach his prior conduct. Brady is inapplicable.

IV. Because Sullivan's Actual Innocence Claim Fits This Court's Exceptions To Brady. The Circuit Court's Decision Is Wrong.

Since the promulgation of Brady, this Court has articulated two exceptions to the oft-referred to "Brady trilogy". The facts fit snugly within both exceptions.

A. The Bousley And Fiore Exceptions.

In Bousley, this Court held that, if a plea is to counts arising under a statute later found not to reach the defendant's conduct, that plea is constitutionally invalid. The facts in Bousley included a petitioner's challenge to his plea of guilty to "using" a firearm in violation of 18 U.S.C. § 924(c)(1). The

Petitioner argued that because the district court failed to inform him at the time of his plea that the statute required "active employment of the firearm," (as this Court later clarified in Bailey v United States, 516 U.S. 137 (1995)), his plea was not knowing or intelligent. Id. at 616. This Court did not reach the merits of Bousley's claim (rather, it remanded for clarification of whether Bousley could factually make out a claim of "actual innocence" to excuse procedural default); however, in strongly worded dictum this Court stated the following:

The fact that all of his advisors acted in good faith reliance on existing precedent does not mitigate the impact of that erroneous advice. Its consequences for the petitioner were just as severe, and just as unfair as if the court and counsel had knowingly conspired to deceive him in order to induce him to plead guilty to crime he did not commit. Our cases make it perfectly clear that a guilty plea based on such misinformation is constitutionally invalid. Id. at 626.

Bousley makes it abundantly clear that Brady is only applicable to situations in which a criminal defendant is "correctly informed." Id. at 619. That is not the situation that this Court finds itself in. Illinois cocaine convictions never actually constituted felony drug offenses pursuant to §§ 841 and 851. "Thus in [2014] when [Sullivan] was advised by the trial judge, by his own lawyer, and the prosecutor that [he possessed the requisite felony drug offenses subject him to a mandatory life sentence] he received critically incorrect legal advice." Id.

When confronted with a constitutional challenge, pursuant to a retroactive case of statutory interpretation, this Court's precedent dictates that "Fiore [v White, 531 U.S. 255 (2002)] controls." Bunkley v Florida, 538 U.S. 835, 840 (2003).

In Fiore, a Pennsylvania prisoner attempted to have his conviction set aside on the basis that Pennsylvania's Supreme Court had decided a statutory interpretation case which made it clear that the conduct underlying his conviction was no longer criminal. This decision was decided subsequent to the defendant's case becoming final. In deciding whether or not Fiore's claim was cognizable, this Court asked "Pennsylvania's Supreme Court whether its interpretation was a new interpretation, or whether it was, instead, a correct statement of the law when the defendant's conviction became final." Id. at 226. The State of Pennsylvania responded that the new interpretation "did not announce a new rule of law" and that it "merely clarified the plain language of the statute," or more accurately, "the proper statement of the law at the date" that the defendant's conviction became final. Id. at 228.

This Court went on to hold that (1) the new interpretation "merely clarified" the statute and was the proper interpretation when the conviction became final, (2) that there presented no issue of retroactivity, and (3) that the Federal Due Process Clause demands that the conviction and sentence be vacated. Id. at 228.

B. The Seventh Circuit Erred In Dismissing Sullivan's § 2241 Petition.

The Seventh Circuit resisted Sullivan's application of Fiore and Bousley based upon the fact that Sullivan did not purport to be innocent of conspiracy to distribute cocaine and the Court failed to comprehend the importance of the distinction between

relying on a true change in law to challenge the validity of a guilty plea as opposed to doing so because of a clarification in law.

But the Seventh Circuit's holding ignores the fact that both Mathis and Elder are decisions of statutory interpretation clarifying the Circuit's application of the categorical approach for purposes of a sentencing enhancement under a federal statute. Additionally, both Elder and Mathis apply retroactively because they are substantive "decisions that narrow the scope of a criminal statute by interpreting its terms." Schriror v. Summerlin, 542 U.S. 348, 351-52 (2004)(citing Bousley, 523 U.S. 614 at 620-21; Their holdings reveal that Sullivan's prior convictions should never have been employed to subject him to a statutory penalty in which was not applicable to him. More importantly, the Circuit Court's denial ignores the fact that Sullivan did not claim actual innocence of a mandatory sentencing enhancement.

Because Mathis and Elder fail to constitute either a true change in law, or a new rule of constitutional law, Brady does not control the facts of this case. It is clear that true changes in law are not the same as clarifications in law. See: Pope v Shalala, 998 F. 2d 473 (7th Cir. 1992).

The Seventh Circuit made the distinction between a true change in law and a clarification in law. The Circuit Court held that "[a] rule simply clarifying an unsettled or confusing area of the law...does not change the law, but restates what the law [] has always been." Id. at 483. The Court also went on to illustrate that a substantive change in law cannot be the same as a "new

interpretation" or "clarification." Id.

Although Pope was overruled in part and overruled on other grounds by Johnson v Apfel, 189 F. 3d 561 (7th Cir. 1999)(en banc), the principles pronounced within are still sound and have been employed by the Circuit Court in Clay v Johnson, 264 F. 3d 744, 749 (7th Cir. 2001) and Beller v Health Hosp. Corp., 703 F. 3d 388, 391 (7th Cir. 2012);

This Court's precedent supports the Seventh Circuit's position. See: Bousley, 523 U.S. 614 (stating that "[a] judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction.") citing Rivers v Roadway Express, Inc., 511 U.S. 298, 312-313 (1994);

Thus, the distinction between true changes in law should be clear and easy to understand. The legal significance for petitioners such as Sullivan are apparent: in light of a case of statutory interpretation, it is now clear that Sullivan was misinformed regarding the statutory sentence for his crime. Had the law truly changed subsequent to Sullivan's conviction becoming final, this standard wouldn't be true and Sullivan's claim, that his plea was unintelligent and uninformed, would be meritless.

C. Like Bousley, Sullivan Presents A Claim Of Actual Innocence.

As of the drafting of this brief at least four Circuit Court of Appeals have held that a criminal defendant's challenge to a misapplied mandatory sentencing enhancement as a claim of actual innocence.

See: Perrone v United States, 889, F. 3d 898, 904 (7th Cir. 2018);
See also: Allen v Ives, 950 F. 3d 1184, 1188 (9th Cir. 2020);
United States v Wheeler, 886 F. 3d 415, 429 (4th Cir. 2018);
Hill v Masters, 836 F. 3d 591, 600 (6th Cir. 2016); In each of
Sullivan's habeas briefs, and more specifically in his petition
for panel rehearing, Sullivan has challenged the misapplication
of the felony drug offense enhancement under § 841(b). For the
reasons stated in this petition, "[U]nder Bousley this is a
claim of actual innocence of the mandatory increase in [Sullivan's]
Federal Sentence" and as a result Sullivan's challenge to the
validity of his plea fits Bousley's exception to Brady.

1. Sullivan Was Convicted Of Possessing A Prior Drug Offense.

Count 1 in Sullivan's Rule 11 plea agreement includes both the
§ 846 conspiracy charge and the § 841(b) enhancement. (Case No.
12-cr-10115-JES-JEH; Doc. 171, Rule 11 Plea Agreement). It is
without question that Sullivan is innocent of the § 841(b) conviction.
In addition to this fact, since both plea agreements and sentence
are package deals, a valid claim of actual innocence to the
§ 841(b) enhancement also invalidates the guilty conviction to
the § 846 conviction as well. See: United States v Uriate, 975
F. 3d 596, 600 (7th Cir. 2020); See also: United States v Bradley,
381 F. 3d 641, 647 (7th Cir. 2004)(highlighting the fact that
actual innocence of one conviction contained in a plea agreement
"taints the guilty plea" of any other conviction contained within
the plea agreement.)

2. Bousley's Exception Met.

Under Alleyne, a fact that increases a mandatory minimum sentence is an "element of the offense." Id. at 107-08. If an element of an offense is not established, a defendant is necessarily innocent of that offense. See: Bousley, 523 U.S. at 614. According to Seventh Circuit precedent Sullivan is actually innocent of the mandatory element of his sentence and thus his claim fits Bousley's exception to Brady.

According to this Court's Bousley holding, a petitioner's claim of actual innocence must mean factual innocence, not mere legal insufficiency. 523 U.S. at 263. In order to prove actual innocence, a petitioner must show on an open record, that he is actually innocent. Such a claim of actual innocence differs from alleging mere legal insufficiency in the sense used in Bousley. "Mere legal insufficiency," as used by this Court in Bousley means insufficiency of the evidence that points to a defendant's guilt in the existing record.

Sullivan does not claim "mere legal insufficiency" as the term is employed by this Court in Bousley. Sullivan is not challenging the sufficiency of the evidence that support his state cocaine convictions. Rather, Sullivan contends that he does not possess the predicates that qualify as felony drug offenses. According to the existing record, this contention is valid and the federal habeas court need not look beyond it. In order to determine whether Sullivan's state cocaine convictions qualify as felony drug offenses the Court need only look at the definition of the crime

under § 570/401(c) and (d) and apply the analysis set forth in Taylor, clarified in Mathis, and extended in Elder. The Government is devoid of any further evidence to present.

Although Bousley claimed of innocence of the crime of conviction, and Sullivan claims actual innocence of a mandatory sentencing enhancement, "for purposes of 'actual innocence' under Bousley, the difference does not matter." Allen v. Ives, 976 F. 3d 863, 867 (9th Cir. 2020); As stated previously. [A] fact that increases a mandatory sentence is an "element of the offense" "Id. (citing Alleyne, 570 U.S. at 108). In order to discover whether Sullivan's predicates are felony drug offenses requires a legal analysis. Such an analysis leads to a determination of fact. That fact being that Sullivan is actually innocent of the mandatory sentence enhancement bestowed upon him.

The Seventh Circuit itself recognizes claims of actual innocence with regards to mandatory sentencing enhancements. See: Perrone, 889 F. 3d at 905. Thus, the question as to whether Sullivan presented a claim of actual innocence in an attempt to fit within the contours of the Bousley exception is not debateable. Sullivan did seek to clarify this point in his petition for panel rehearing. The Seventh Circuit did not refute this point. Sullivan's petition was denied because no member of the Panel elected to vote for rehearing. Thus, the question that this Court must decide is whether the Seventh Circuit overlooked the fact that Sullivan's challenge to the sentencing court's employment of his state predicates was in actuality a claim of actual innocence. And, whether a claim of actual innocence to a mandatory sentencing

enhancement qualifies Sullivan for Bousley's exception to Brady.

D. **Being Accurately Informed Of Statutory Penalty As Important As Being Accurately Informed Of A Charge's Elements.**

Being sufficiently apprised of the penalty one faces upon a finding of guilt after trial, and the direct consequences of a guilty plea, is of equal importance as a defendant being sufficiently aware of the elements of the offense. Even the Seventh Circuit's precedents make clear that two of the essential terms of a guilty plea are (1) the nature of the charge (elements) to which the defendant pleads, and (2) the limits of the district court's sentencing authority (including minimum and maximum sentences). United States v White, 597 F. 3d 863, 867 (7th Cir. 2010). See also: United States v Musa, 946 F. 2d 1297 (7th Cir. 1991); Alleyne, 570 U.S. at 112.

This is why, before accepting a plea of guilty, a sentencing court must address a defendant personally in open court, inform him or her of the direct consequences, and determine whether the defendant understands both the nature of the charge and the mandatory minimum and maximum possible sentence provided by law. See: Fed. R. Crim. P. 11(c). Furthermore, in order to be constitutionally valid, the defendant must be sufficiently aware of the relevant circumstances surrounding his or her decision to plead guilty and the direct consequences of the plea. Brady, 387 U.S. at 755. See also: Boykin, 395 U.S. at 244 n.7.

In the instant case, the relevant circumstances included the possibility of a mandatory life sentence upon a finding of guilt after trial. The direct consequences of the plea, as well

as the District Court's sentencing authority, were based solely upon an erroneous 20-year statutory minimum sentence. In both Bousley and Fiore, the relevant circumstances were that, due to a subsequent clarification of law, the defendant's were unaware of the elements of the charged offenses. Both this Court and the Seventh Circuit precedents make clear that a defendant must be accurately informed of the possible sentences, the mandatory sentencing ranges, and the elements of the charges. Dansberry v Pfister, 801 F. 3d 863 (7th Cir. 2015); See also: Bradley, 381 F.3d at 648; United States v Cruse, 805 F. 3d 785, 806 (7th Cir. 2015)(placing a misunderstanding about the substantive elements of an offense on par with a misunderstanding about the "applicable penalties."); White, 597 F. 3d at 867 (finding that the nature of the charge as being just as "essential" to a defendant's plea as the district court's sentencing authority)(citing Bousley and Fiore.)

Due to the equal importance of the validity of a defendant's decision to plead guilty, there is no quantifiable reason to treat misinforming a defendant about an erroneous sentencing enhancement any different than misinforming a defendant about the elements of the charged offense. Narvaez, 674 F. 3d at 628 (characterizing the difference between the two as "one of degree, not one of a kind.")

Moreover, knowledge of the elements of the crime charged and proper knowledge of the "respective consequences of a conviction after trial and by plea" are equally essential to a criminal defendant because they allow for "adequate preparation" to satisfy the Due

Process clause of the Fifth Amendment; See: Lee v United States, 137 S. Ct. 1958, 1966 (2017); See also: United States v Mackin, 793 F. 3d 703, 711 (7th Cir. 2015); United States v Dooley, 578 F. 3d 582, 589 (7th Cir. 2009); After all, the articulated purpose for timely filing a § 851 Notice is to assist in "better informed decisions" when deciding "whether to proceed to trial." Kelly v United States, 29 F. 3d 1107, 1109 (7th Cir. 1994). As was the case in Bousley and Fiore, a subsequent clarification of law revealed that Mr. Sullivan was denied due process. Further, he fits Bousley's exception to Brady, *supra*.

E. Several Courts Refuse To Apply Brady.

Since this Court's Brady decision, (aside from Bousley) several other Circuit Courts have refused to apply the holding to foreclose challenges to both sentences and conviction in light of subsequent decisions that apply retroactively.

In United States v Ochoa, 861 F. 3d 1010 (9th Cir. 2016) the defendant pled guilty to conspiracy to export defense articles without a license in violation of 18 U.S.C. § 371 and 22 U.S.C. § 2778. While in federal prison, Ochoa was served with a notice to appear, charging him with removability on the grounds that his conviction was an aggravated felony and a conviction of a firearms offense. Ochoa, 861 F. 3d at 1013-14. At the hearing before an IJ, Ochoa appeared without a lawyer. The IJ offered Ochoa more time to obtain representation and also advised him that he could appeal any decision rendered. The IJ also provided Ochoa with a document correctly explaining his appellate rights.

Ochoa, 861 F. 3d at 1014. After reviewing the certified indictment and judgment and talking to Ochoa about the conviction, the IJ found Ochoa was removable due to his aggravated felony and firearm convictions. The IJ concluded:

"I don't see that there is any relief available to you... Now, you can accept that decision but if you disagree with it, you would have 30 days to appeal it. Did you want to accept my decision or reserve your right to appeal?" Ochoa, 861 F. 3d at 1014.

Ochoa accepted the decision and did not appeal. After serving the remainder of his federal prison sentence, Ochoa was removed to Mexico. A number of years later, federal agents discovered Ochoa in California and he was indicted for illegal reentry. Ochoa moved to dismiss the indictment, arguing that the underlying removal proceeding had violated his due process rights because his prior convictions constituted neither an aggravated felony nor a firearms offense. The district court denied the motion and Ochoa appealed. The Ninth Circuit ruled that Ochoa's conviction could not serve as a proper predicate for removal as either an aggravated felony or a firearms offense. The Court then reversed the district court ruling "under our circuit's law, if [Ochoa] was not convicted of an offense that made him removable under the INA to begin with, he is excused from proving the first two requirements [of 8 U.S.C. § 1326(d).]" Ochoa, 861 F. 3d at 1015, citing United States v Camacho-Lopez, 450 F. 3d 928 (9th Cir. 2003) and United States v Pallares-Galan, 359 F. 3d 1088 (9th Cir. 2004).

In United States v Hogg, 723 F. 3d 730 the Sixth Circuit did not hesitate to allow a defendant to withdraw his guilty plea when a post-conviction change in law altered the defendant's

statutory sentencing range. The Sixth Circuit stated:

"Although the penalty range set forth in Defendant's plea agreement and identified by the district court at Defendant's plea hearing was correct under then-current law of this Circuit, we agree that this penalty range must now be viewed as mistaken in light of the Supreme Court's supervising decision in Dorsey [v United States, 132 S. Ct. 2321 (2012)] ...with the result that Rule 11 was violated in the course of taking Defendant's guilty plea."

Again in Waucaush v United States, 580 F. 3d 251 (6th Cir. 2004), the Sixth Circuit addressed a Racketeer Influenced and Corrupt Organization Act ("RICO") claim, 380 F. 3d at 254. There, the Petitioner, pled guilty to a RICO offense based on a legally erroneous understanding of an element of the offense. Id. The Supreme Court later clarified what the element meant. The Sixth Circuit explained that "[t]his type of misunderstanding - a misconception about the statute's legal scope that results in the defendant pleading guilty to conduct which was not a crime - typifies an unintelligent guilty plea." Id. Therefore, the court held, the Petitioner had established actual innocence to excuse his procedural default. Id. at 258 ("Because a reasonable jury could not conclude that Waucaush's enterprise, the CFP, affected interstate commerce, Waucaush is actually innocent of violating RICO. His actual innocence excuses his failure to challenge [] his plea on direct appeal, such that we may consider the challenge now.") By way of example, the Sixth Circuit explained:

"Contrary to the positions of the Government and the district court, Waucaush may be actually innocent even though he admitted as part of his plea that his activities "affected interstate commerce." To illustrate: imagine that Waucaush had admitted to stealing apples from the Post Office, was advised by his counsel and the court

that apples were vegetables, and pled guilty to "stealing vegetables from a federal building." If the Supreme Court later held that, as a matter of law, apples were not vegetables, Waucaush would be actually innocent of "stealing vegetables." Just as Waucaush's misinformed admission of a legal conclusion would not have turned apples into vegetables, his guilty plea in today's case could not have created an effect on commerce that the law did not otherwise recognize." Id. at 255

In the Third Circuit's holding in Kelsey v United States, 484 F. 2d 1198 (1973), with facts similar to those in this case, the court held that Brady was inapplicable because the defendant was misinformed about the statutory penalty he faced. In that case, the court was asked whether a post-conviction clarification in law rendered a defendant's plea invalid. The Post-conviction decision, United States v Conway, 415 F. 2d 158 (3rd Cir: 1969), was a clarification of a Supreme Court holding, that was decided years before the defendant entered into his plea agreement. The Third Circuit went on to conclude:

"We deem inapplicable to these proceedings the doctrine of Brady [], that a subsequent change in the law which greatly reduces the possible sentence which might be imposed does not violate a previously entered guilty plea. The clarification of the law did not originate in Conway, it stemmed from Prince [v United States, 352 U.S. 322 (1957)]. Kelsey, 484 F. 2d at 1200."

See also: Malvo v Mathena 893 F. 3d 265 (4th Cir. 2018) (refusing to employ Brady to foreclose a challenge to a defendant's sentence following a post-conviction change in law that this Court held to be retroactive.) In each of these cases, the government attempted to employ Brady to foreclose the petitioner's claims. Much like the Seventh Circuit did in this case. Sullivan believes that the decisions cited make the distinction between Brady and the instant case apparent. In this case, Mathis applied the rules

of settled law originally promulgated in Taylor. At the time Mr. Sullivan's conviction became final, the Seventh Circuit had already misapplied Taylor's modified categorical approach to at least one of his prior statutes of conviction, under § 570/401(d). See: Brooks, 468 F. Appx. at 628. The Seventh Circuit confirmed that it employed the modified categorical approach to § 570/401(d) in Fife.

The issue is not whether prior cocaine convictions under Illinois law no longer constitute "felony drug offenses" pursuant to §§ 841 and 851, (Mathis, Elder, and Ruth tell us they don't), but the key issue is whether they ever did to begin with. If they never did, then Mr. Sullivan never faced the seemingly real possibility of spending the rest of his natural life in prison, and the statutory minimum of 20 years stipulated in his plea is erroneous. It is in light of these facts that the District Court never possessed the jurisdiction to impose the sentence that it did, and Mr. Sullivan's continued incarceration violates due process and his conviction is constitutionally invalid.

Mathis did not change the modified approach, nor did the Great State of Illinois amend § 570/401(d), or change its definition of cocaine subsequent to Mr. Sullivan entering into his plea agreement. Mathis, Elder, and Ruth instead provide "authoritative statement[s] of what the [modified categorical approach, the term 'felony drug offense,' and Illinois' definition of cocaine] meant before, as well as after, the decision of the case giving rise to [those] construction[s]."Rivers, 511 U.S., at 312-13 n. 12. The fact that the interpretation pursuant to which Sullivan

entered into his plea was generally shared in the legal community does not make the mistake less egregious.

F. Sullivan Fits Within The Other Exceptions To Brady.

The Supreme Court has recognized another exception to the general waiver rule, in which "a court has no power to enter a conviction." United States v Broce, 488 U.S. 563, 569 (1989).

See also: United States v Brown, 973 F. 3d 667, 715 (7th Cir. 2020)(Stating that guilty pleas should only be withdrawn "where the defendant shows actual innocence or legal innocence, and where the guilty plea was not knowing and voluntary.")

Appellant Sullivan is challenging the Government's power in the instant case to file the § 851 Notice, criminalizing his prior conduct. See: Class v United States, 138 S. Ct. 798, 805 (2018). Sullivan's Illinois priors fail to qualify as felony drug offenses for enhancement purposes under § 841(b). As a result, the District Court lacked the authority to enter the conviction and impose the increased statutotry penalty. Mr. Sullivan fits within the exception articulated in Blackledge v Perry, 417 U.S. 21 (1974); and Broce, supra.

V Sullivan's Conviction And Sentence Are Unconstitutional.

Petitioner Sullivan is challenging both his conviction and the statutory penalty, on the grounds that they were both rendered retroactively unconstitutional under the rules announced by the Supreme Court in Mathis and by the Seventh Circuit in Elder. Thus, where Brady sought to use a new sentencing law as a sword

to attack the validity of his guilty plea, the Government in the instant case is seeking to use Sullivan's unlawful guilty plea as a shield to insulate the illegal sentence from judicial review. Brady does not provide such a shield.

The purpose of Section 841(b) is to "provide the applicable sentencing enhancement provisions." United States v Arango-Montoya, 61 F. 3d 1331, 1339 (7th Cir. 1995). A sentence is considered unlawful when it is "contrary to the applicable statute." See: United States v Litos, 847 F. 3d 906, 911 (7th Cir. 2017). Sullivan's sentence is unlawful because it was erroneously enhanced pursuant to a prior drug conviction that was not a felony drug offense. The mandatory life sentence he faced was unlawful. His sentence was not authorized by law, because the statutory minimum fails to comply with that which is "provided by the statute of conviction." United States v Cieslowski, 410 F. 3d 353, 364 (7th Cir. 2005).

Both the sentence Sullivan faced and the one he actually received are unconstitutional. He has a constitutional right not to be sentenced upon inaccurate information. See: Roberts v United States, 445 U.S. 552, 556 (1980). Due process is violated when the sentencing court fashions a sentence "founded at least in part upon misinformation of constitutional magnitude," even when a defendant remains ineligible for the same sentence. See: United States v Tucker, 404 U.S. 443, 447-48 (1972) (resentencing required where the sentencing court relied upon a defendant's prior convictions later held invalid). See also: Townsend v Burke, 334 U.S. 736, 741 (1948) (holding that even when a sentence falls "within the limits set by the statute," it may still be

"unconstitutionally invalid.") Furthermore, under the Constitution's separation of powers, "fixing penalties" is a "legislative not jurisdiction, function[]." United States v Evans, 333U.S. 483, 486 (1948).

The Seventh Circuit previously held that in rare circumstances "a sentence that violates a defendant's due process rights to a fair trial is one imposed in violation of the law." See: United States v Lopez, 974 F. 2d 50, 53 (7th Cir. 1992). As the Circuit Court held in United States v Pacheco-Diaz, 513 F. 3d 776 (7th Cir. 2008), the filing of an § 851 Notice allows a defendant to develop a trial strategy. The government and the District Court clearly deprived Sullivan of his rights by way of the erroneous § 851 filing. A prisoner is "in custody in violation of the constitution if any [] sentence[] was imposed as a result of a deprivation of constitutional rights." Payton v Rowe, 391 U.S. 54, 64-65 (1968). As was the case in Adame-Hernandez v United States, 763 F. 3d 818 (7th Cir. 2014), the Court's acceptance of Sullivan's guilty plea completed the violation of his constitutional rights. Id. at 629. This case is one of the rare ones that violates both due process and the law.

VI. Contract Principles Serve To Invalidate Sullivan's Plea Agreement.

In the event that all parties to a plea agreement misapprehend the law, Seventh Circuit precedent dictates that the burden of the mutual mistake will not be placed on the defendant. Schaül, 962 F. 3d at 924. Despite this clearly articulated principle,

the Panel has placed the burden of an erroneous statutory enhancement, and its effects on the essential terms of the plea agreement, squarely on Sullivan's shoulders. Moreover, since plea agreements are contracts, they are interpreted, and are governed by, ordinary contract principles, United States v Barnes, 83 F. 3d 934, 938 (7th Cir. 1996), a plea agreement may be invalidated if they are based upon a mutual mistake that affects one of the essential terms of the contract, White, 597 F. 3d at 867, or if they are based upon an unfulfillable promise. United States v Cook, 668 F. 2d 317, 321 (7th Cir. 1982);

The instant case presents a situation in which the plea agreement in question is both the result of mutual mistake, and based upon an unfulfillable promise. That fact that the plea agreement contains a broad collateral attack waiver did not preclude the Circuit Court from reviewing the claim. This is particularly true where, if successful, it "would result in setting aside the plea agreement as a whole." Cieslowski, 410 F. 3d at 361. As the facts below will show, Sullivan's plea agreement should be voided.

A. Neither Sullivan's Collateral Attack Waiver Nor Brady Foreclose His Mutual Mistake Claim.

The Circuit Court has routinely entertained petitioner's claims that their plea agreements were the result of mutual mistake, despite a valid and enforceable waiver. United States v Haslam, 833 F. 3d 840, 844-45 (7th Cir. 2018); See also: White, 597 F. 3d at 865 n. 1; Cieslowski, 410 F. 3d at 361-62. The reasoning behind this ethos is that a claim that a plea agreement is the

result of mutual mistake, if successful, would invalidate the plea agreement in its entirety. White, 597 F. 3d at 865 n. 1. The fact that the Rule 11 plea agreement at issue in this appeal is both based upon, and the result of, a mutual mistake is at the heart of Sullivan's § 2241 petition. Contrary to the Panel's assertion, the District Court erred in holding that Sullivan's collateral attack waiver foreclosed his claim.

This Court's holding in Brady cannot foreclose Sullivan's mutual mistake claim, because plea agreements (as contrasted with guilty pleas) are governed by contract law. Barnes, 83 F. 3d at 938. In Brady, this Court was asked to decide if the petitioner's guilty plea accorded with the Fifth Amendment. Id. 397 U.S. at 753. This Court was not asked to decide if Brady's plea agreement violated contract law, or whether there existed a mutual mistake that affected the essential terms of the plea agreement. The instant case is distinct because the mutual mistake is manifest, and affected the material terms of the plea agreement. It is, therefore, voidable by the adversely affected party. See: Restatement (Second) of Contracts, § 152 ("Where a mistake of both parties at the time a contract was made as to the basic assumption on which the contract was made has a material effect on the agreed exchange of performances, the contract is voidable by the adversely affected party unless he bears the risk of the mistake.")

B. The § 841(b) Enhancement In The Plea Agreement Is Invalid; The Agreement Is Unenforceable.

When confronted with Rule 11 plea agreements, the Circuit

Court's precedent dictates that, if "some provision of the plea agreement is invalid, [the Court] must discard the entire agreement and require [the defendant] and the government to begin their bargaining all over again." Barnes, 83 F. 3d at 941. In Ruth, the Circuit Court held that Illinois' definition of cocaine is a categorical mismatch with the federal definition of cocaine, and that prior Illinois cocaine convictions do not constitute felony drug offenses for the enhancement purposes. As a result, the 20-year statutory enhancement provision in Sullivan's plea agreement is invalid. Accordingly, the entire agreement must be discarded. Barnes, 83 F. 3d at 941.

1. The presence of the § 841(b) enhancement in Sullivan's plea agreement reflects that fact that it is both an essential parameter of the agreement, and that the agreement is based upon mutual mistake. The District Court's sentencing authority is one of the essential parameters of a plea agreement. White, 597 F. 3d at 867. This sentencing authority is limited by the § 841(b) enhancement contained within the plea agreement. See Alleyne, 570 U.S. at 112-13 (describing both the "floor and ceiling of sentencing ranges [] define the legally prescribed penalty," and that an increased mandatory minimum heightens the loss of liberty and alters the court's sentencing authority.) The § 841(b) enhancement provision is also an essential term of the agreement, because it was bargained for. See: General Motors v Romein, 503 U.S. 181, 188-89 (1992). This Court has declared that if something is central to the bargained-for exchange between the parties,

then it must be deemed a term of the contract. 503 U.S. at 188-89.

The prior felony drug offense enhancement in the instant case was a valuable bargaining chip possessed by the Government. This essential term and provision has been invalidated by Ruth. Thus, it must be stricken from the plea agreement because, under Seventh Circuit precedent, "the whole plea agreement stands or the whole thing falls." United States v Peterson, 268 F. 3d 533, 534 (7th Cir. 2001); Furthermore, since Mr. Sullivan entered into the Rule 11 plea agreement, the striking of the § 841(b) enhancement results in voiding the entire agreement. Gibson, 356 F. 3d at 765.

2. Because Elder and Mathis are both statutory interpretation cases (as opposed to changes in the law) their holding merely explain the meaning and scope of the term "felony drug offense" from the enactment of § 841(b), and that cocaine conviction under Illinois law never qualified as predicates under the statute. See: Rivers, 511 U.S. at 312 ("Judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction.")

At the time the plea agreement was entered into, there was a mutual mistake regarding the prior felony drug offenses. This mistake formed the basis for the agreement. Moreover, the contract is based upon an unfulfillable promise to amend the § 851 Notice. The Government possessed neither the power to make such a promise, nor to seek the enhanced statutory range. The plea agreement must be voided in its entirety.

Under general provisions of the contract law, a contract based

upon a mutual mistake, shared by both parties to the contract, is voidable. Restatement (Second) of Contracts, § 152. The party wishing to void the contract "must show that the resulting imbalance in the agreed exchange is so sever that he cannot be required to carry it out. Ordinarily, he will be able to do this by showing that the exchange is not only less desirable to him but more advantageous to the other party!" Id. at cmt. C. If Sullivan had known that facing a mandatory life sentence was a lie, then at minimum, he would have negotiated a more favorable plea agreement. He certainly would not have entered such a lop-sided agreement; surrendering a quarter-century of his life. The erroneous statutory enhancement created a significant imbalance in the agreed exchange.

The mutual mistake about the prior felony drug offense enhancement caused Sullivan to accept a worthless promise. Where a mistake affects a basic assumption on which the bargain is based, rescission of the contract is the preferred remedy; reformation is appropriate only when the mistake "is one as to expression." United States v Williams, 198 F. 3d 988, 994 (7th Cir. 1999)(quoting Restatement (Second) of Contracts, § 155 cmt. a.) See also: United States v Sandles, 80 F. 3d 1145, 1148 (7th Cir. 1996)("Where there is a mutual misunderstanding as to the material terms of a [plea agreement], the appropriate remedy is rescission, not unilateral modification.") See also: Williston on Contracts, § 70.35 (4th Ed.) ("Reformation must yield to rescission where the error is in the substance of the bargain, not in its expression.")

Where the parties are mistaken as to the nature of the bargain, the agreement should be set aside and the parties given the

opportunity to renegotiate on the basis of the true value of the bargained-for promises, particularly where a mistake as to the nature of the bargain is of constitutional significance. This case fits the bill, and must be voided.

VII. CONCLUSION

For the reasons set forth above, the petition for a Writ of Certiorari should be granted.

Respectfully Submitted,

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