

22-5640

IN THE

SUPREME COURT OF THE UNITED STATES

FILED

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

ORIGINAL

LARRY E. STARKS JR.,

PETITIONER-PLAINTIFF,

VS

U.S. SENTENCING COMMISSION AND THE UNITED STATES.,
RESPONDENTS'-DEFENDANTS'.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA.

HONORABLE JUDGE AMY BERMAN JACKSON
DISTRICT COURT CASE NO 1:21-CV-02422(UNA)
DISTRICT OF COLUMBIA CIRCUIT CASE NO. 21-5281

WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER THE SENTENCING REFORM ACT OF 1984 COMMANDS CONGRESSIONAL INTENT, THAT WHEN THE U.S. SENTENCING COMMISSION VIOLATES THE NOTICE AND COMMENT REQUIREMENT UNDER THE ADMINISTRATIVE PROCEDURE ACT AND COMMITS AN EGREGIOUS SEPARATION OF POWERS VIOLATION BY ADDING OFFENSES TO THE GUIDELINE THROUGH THE COMMENTARY OF 4B1.2(b); RATHER THAN, SEEKING AN AMENDMENT FROM CONGRESS. THEY MUST BE SUBJECTED TO JUDICIAL REVIEW UNDER THE ADMINISTRATIVE PROCEDURE ACT AS A SAFEGUARD...

LIST OF PARTIES

ALL PARTIES 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 PROCEEDINGS IN THE COURT WHOSE JUDGMENT IS THE SUBJECT OF THIS PETITION IS AS FOLLOWS:

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statutes and rules

28 U.S.C § 991 and 994(p)(x)
5 U.S.C § 553,556,557,581

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

[x] For cases from Federal Courts:

The opinion of the United States Court of Appeals at **Appendix A-1** to the Petition and is

[] reported at or,

[] has been designated for publication but is not reported; or,

[x] is unpublished

The opinion of the United States District Court appears at **Appendix A-2**

[x] reported at 1:21-CV-02422(UNA); District of Columbia

[] has been designated for publication but is not yet reported; or,

[] is unpublished

JURISDICTION

[x] Cases from Federal Courts:

The date on which the United States District Court for the District of Columbia decided Petitioner's case for Civil Action was on September 27th, 2021.

The Jurisdiction of the Court is invoked under 28 U.S.C § 1254(i) and 1331, and 28 U.S.C § 1291.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C § 991 and 994(p)(x)

5 U.S.C § 553

5 U.S.C § 556

5 U.S.C § 557

5 U.S.C § 581

CONSTITUTIONAL PROVISIONS INVOLVED

FIFTH AMENDMENT, UNITED STATES CONSTITUTION

TENTH AMENDMENT, UNITED STATES CONSTITUTION

ARTICLE I, SECTION I, UNITED STATES CONSTITUTION

STATEMENT OF THE CASE

On July 23rd, 2010, Petitioner was sentenced to the Career Offender Enhancement, and he received 234 months to be served with the Bureau of Prisons. The Sentencing Court invoked the Career Offender Enhancement on the basis that his instant offense for attempted manufacture of methamphetamine qualified as a Controlled Substance Offense under § 4B1.2(b).

which means: "an offense under Federal or State law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a Controlled Substance (or counterfeit substance) or the possession of a Controlled Substance (or counterfeit substance) with intent to manufacture, import, export, distribute, or dispense. The Sentencing Commission's Commentary to 4B1.2(b) states that a Controlled Substance Offense "includes the offense of aiding and abetting, conspiracy, and attempting to commit such offenses."

Through research Petitioner discovered that five United States Court of Appeal's decisions revealed that his instant offense was not suppose to be used to invoke his Career Offender Enhancement; because the U.S. Sentencing Commission exceeded their scope of authority when they added legislative rules (offenses) to the Commentary without seeking an Amendment through Congress. The legislative rules were not in the Guideline Text of 4B1.2(b); causing a Separation of Powers violation.

In October 2020, Petitioner wrote the U.S. Sentencing Commission advising them that their unlawful conduct of adding legislative rules (offenses) to the Commentary, that are not consistent with the Guideline Text; has caused him to suffer a legal wrong. On February 9th, 2021, the U.S. Sentencing Commission responded but failed to act and correct their unlawful conduct.

Petitioner filed a Complaint under the Administrative Procedure Act against the U.S. Sentencing Commission and the United States for their unlawful conduct of violating the Administrative Procedure Act rulemaking procedure

in accordance with the Sentencing Reform Act; that rises to the level of a Separation of Powers violation, and they should and must be held accountable through Administrative proceedings.

On September 27th, 2021, the District Court dismissed the Complaint on the grounds of want for jurisdiction, indicating that Petitioner needed to seek consent or permission to file suit against the United States. On or about October 25th, 2021, Petitioner filed a 59(e) motion to alter or amend judgment, due to an error of law and to prevent a manifest injustice; on the grounds that the Sentencing Reform Act gives the District Court subject-matter jurisdiction under the Administrative Procedure Act to adjudicate his claims against the U.S. Sentencing Commission and the United States.

Congress "unequivocally expressed" and commands that if the U.S. Sentencing Commission violates its directives under the Sentencing Reform Act, regarding the requirements of notice and comment procedures; they violate the Administrative Procedure Act rulemaking procedure under 5 U.S.C § 553, and are subjected to suit under the Adimintrative Procedure Act (APA).

On February 2nd, 2022, Petitioner Appealed and submitted a brief to the United States Court of Appeals for the District of Columbia Circuit.

On June 15th, 2022, the Court of Appeal's affirmed the District Court's judgment on the grounds that the U.S. Sentencing Commission is exempt from suit under the Administrative Procedure Act because they are considered a Court of the United States and part of the Judicial Branch.

REASONS FOR GRANTING THE PETITION

First, Petitioner contends that this Honorable Court's supervisory power is warranted because the United States Court of Appeal's for the District of Columbia Circuit affirmed the District Court's judgement under their Precedent Circuit case law that clearly violates this Court's decision in Mistretta, 488 U.S. 361(1989). See Wash. legal found v. U.S. Sentencing Commission, 17 F.3d 1446, 1450 (D.C. Cir. 1994); "the Circuit held that the U.S. Sentencing Commission was exempt from suit and Judicial Review under the Administrative Procedure Act, because they are a "Court of the United States" * 5 U.S.C § 551(1); they are part of the judicial branch.

Petitioner contends that this case law from the District of Columbia Circuit violates this Court's decision in Mistretta, when the Supreme Court held that the promulgation of the U.S. Sentencing Commission does not violate the Separation of Powers Doctrine, because the Commission is not a Court, does not exercise judicial power, and is not controlled by the judiciary branch. Petitioner further contends that the Commission is clearly not a part of the judicial branch. Congress clearly expressed this when they referred to the Commission as an independent entity; which clearly means that the Commission is separate from the judicial branch.

Secondly, the United States Court of Appeals for the District of Columbia Circuit has already determined that the U.S. Sentencing Commission actions in this matter were unlawful, and a modification of the 4B1.2(b) Guideline Text, not an interpretation of that Guideline. See United States v Winstead, 890 F.3d 1082 (D.C. Cir. 2018)(explaining that § 4B1.2(b)'s Text definition "clearly excludes inchoate offenses" like attempt and conspiracy).

ARGUMENT

I. WHETHER THE SENTENCING REFORM ACT OF 1984 COMMANDS CONGRESSIONAL INTENT, THAT WHEN THE U.S. SENTENCING COMMISSION VIOLATES THE NOTICE AND COMMENT REQUIREMENT UNDER THE ADMINISTRATIVE PROCEDURE ACT AND COMMITS AN EGREGIOUS SEPARATION OF POWERS VIOLATION BY ADDING OFFENSES TO THE GUIDELINE THROUGH THE COMMENTARY OF 4B1.2(b); RATHER THAN, SEEKING AN AMENDMENT FROM CONGRESS. THEY MUST BE SUBJECTED TO JUDICIAL REVIEW UNDER THE ADMINISTRATIVE PROCEDURE ACT AS A SAFEGUARD.

A. ANALYSIS OF WHETHER THE U.S. SENTENCING COMMISSION IS EXEMPT FROM JUDICIAL REVIEW UNDER THE ADMINISTRATIVE PROCEDURE ACT AS A "COURT OF THE UNITED STATES" *
5 U.S.C § 551(1).**

The United States Court of Appeals for the District of Columbia Circuit affirmed the District Court's judgement citing: Wash. legal found v. U.S. Sentencing Commission, 17 F.3d 1446, 1450 (D.C. Cir. 1994). In this case the Circuit held that, "Congress decided that the United States Sentencing Commission would not be an "Agency" under the Admininitrative Procedure Act (APA), 5 U.S.C § 551(1), when it established the Commission as an independent entity in the judicial branch. 28 U.S.C § 991(a)(1), Section 994(x) of the Sentencing Reform Act of 1984 (SRA) provides that the provisions of 5 U.S.C § 553, relating to publication in the Federal Register and public hearing procedure, shall apply to the promulgation of Guidelines pursuant to this section, 28 U.S.C § 994(x). By explicitly including the APA, notice and comment provisions in the SRA, Congress implicitly recognized that the rest of the APA would not apply to the Commission because it is a part of the judicial branch. Virtually every case interpreting the Administrative Procedure Act, 5 U.S.C § 551(1), exemption for "the Courts of the United States" has held that the exemption applies to the entire judicial branch--at least to entities within the branch that perform

functions that would otherwise be performed by Courts."

Petitioner asserts that this above mentioned precedent caselaw from the District of Columbia Circuit violates this Court's decision in *Mistretta*, when the Supreme Court held that "the promulgation of the U.S. Sentencing Commission does not violate the Separation of Powers Doctrine, because the Commission is not a Court, does not exercise judicial power, and is not controlled by the judiciary branch." *Mistretta v. United States*, 488 U.S. 361, 109 S. Ct. 647, 102 LED2D 714 (1989), it was held that (1) the SRA does not grant the Commission excessive legislative discretion in violation of the Constitutionally based nondelegation doctrine, since Congress, though granting the Commission substantial discretion in formulating Guidelines, has legislated a full hierarchy of punishment and has stipulated the most important offense and offender characteristics; (2) Congress's decision to combine functions of rule making and substantive judgment as to Sentencing in the Commission and to locate it within the judicial branch does not violate the Constitutional principle of Separation of Powers, since (a) both of those functions have been considered appropriate for the judicial branch, (b) the Commission is not a Court, does not exercise judicial power, is not controlled by the judiciary, and so does not improperly unite political and judicial power, and (c) the placement of the Commission does not expand the power of the judiciary, because the Commission's powers as to Sentencing were previously exercised by the judiciary as an aggregate; (3) Congress's decision to require at least three federal judges to serve on the Commission along with non-judges does not undermine the integrity and independence of the judicial branch in violation of Separation-of-Powers Principles; and (4) the President's power to appoint and remove members of the Constitution, including those selected from the federal judiciary, does not give the President such influence over the functions of the judicial branch or over its members as to violate the Separation-of-Powers Principles, since the President is given no authority

to effect the tenure of compensation of the judges as judge and only limited authority to affect their tenure as commission members.

First, petitioner asserts that the Commission is clearly not part of the judicial branch, because it does not exercise judicial power, and is not controlled by the judiciary branch. Secondly, Congress "unequivocally expressed" this when they referred to the Commission as an "independent entity". See **Appendix B-1.** Dictionary definition of both words cited: independent-1: self-governing; also: not affiliated with a larger controlling unit. 2: not requiring or relying on something else or somebody else. 3: not easily influenced: showing self-reliance and personal freedom. 5: not committed to a political party. entity-1: Existence, being 2: something with separate and real existence.

The Sentencing Reform Act of 1984 did not exhibit a definition or meaning for those two words. See *Smith v. United States*, 508 U.S. 223, 127 LED2D138, 113 S. Ct. 2050(6), " A word in a statute is normally construed in accord with the words ordinary or natural meaning, where the word is not defined by the statute."

Lastly, Petitioner has established through his analysis and breakdown of the statute and the meaning of the word's in those statutes, that Congress did not express the intent of the U.S. Sentencing Commission being exempt from judicial review under the administrative procedure act, as a " Court of the United States " pursuant to 5 U.S.C § 551(1). If Congress had meant to exclude the entire judicial branch, it would have said "the judicial branch of the United States" instead of "the Court of the United States." The U.S. Sentencing Commission is an administrative agency that's located within the Judicial branch, a self-governing agency. Petitioner asserts that when the Senate Committee reported that Section 994(x) is an exception to the general inapplicability of the administrative procedure act...to the judicial branch; Congress clearly "unequivocally expressed" that if the U.S. Sentencing Commission violates the notice and comment requirement they are subjected to the entire (APA) procedure;

not that the Commission's rulemaking was not subjected to any other provision of the (APA). The Sentencing Reform Act of 1984 does not bar "judicial review" for notice and comment requirement violations.

**B. ANALYSIS OF WHETHER THE SENTENCING REFORM ACT
COMMANDS THAT THE U.S. SENTENCING COMMISSION
SHOULD BE SUBJECTED TO JUDICIAL REVIEW UNDER
THE (APA) FOR RULEMAKING NOTICE AND COMMENT
REQUIREMENT VIOLATIONS.**

The United States Court of Appeals for the District of Columbia Circuit affirmed the District Court's judgment citing: Wash. legal found v. U.S. Sentencing Commission, 17 F.3d 1446, 1450 (D.C. Cir. 1994); Petitioner cites the relevant portion of the Circuit's decision pertaining to the above mentioned issue. The Circuit held, "By explicitly including the (APA) notice and comment provisions in the SRA, Congress implicitly recognized that the rest of the (APA) would not apply to the Commission because it is a part of the judicial branch."

Petitioner asserts that the District of Columbia Circuit has presumpuously made the incorrect determination that because Congress only cited 5 U.S.C § 553 rulemaking notice and comment requirement in the (SRA), that the U.S. Sentencing Commission was not subjected to other portions of the administrative procedure act. Congress was not required to cite all (APA) statutes in the (SRA); because when the notice and comment requirement is required by statute (the SRA), 5 U.S.C § 553 directs a party to 5 U.S.C § 556 and 557; and when there is a dispute 5 U.S.C § 556 and 557 directs a party to 5 U.S.C § 581 "Judicial Review" for dispute resolution. **See Appendix B-2.**

This demonstrates that Congress has "unequivocally expressed" through the Sentencing Reform Act of 1984, that when and if the U.S. Sentencing Commission violates their directives for the rulemaking notice and comment requirement, they are subjected to suit for judicial review under the administrative

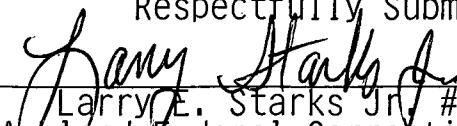
procedure act, so that they follow Congress's directives and obey Congress's will. See *Hampton, jr. & Co. v. United States*, 276 U.S. 394, 409 (1928); "Congress passed the Administrative Procedure Act (APA) to ensure that agencies follow constraints even as they exercise their powers. One of these constraints is the duty of Agencies to find and formulate policies that can be justified by neutral principles and a reasoned explanation. To achieve that end, Congress confined agencies discretion and subjected their decisions to judicial review. See *Stewart & Sunstein, Public Programs and Private Right's*, 95 Harv. L. Rev. 1193, 1248 (1982)(the APA was a "working compromise in which broad delegations of discretion were tolerated as long as they were checked by extensive procedural safeguard"). If agencies were permitted unbridled discretion, their actions might violate important Constitutional principles of Separation-of-Powers and checks and balances. To that end the Constitution requires that Congress's delegation of lawmaking power to an agency must be "specific and detailed." *Mistretta v. United States*, 488 U.S. 361, 371, 109 S. Ct. 647, 102 L. Ed. 2d 714 (1989). Congress must "clearly delineate the general policy" an agency is to achieve and must specify the "boundaries of the delegated authority." *Id* at 372-373. Congress must "lay down by legislative acts an intelligible principles; and the agency must follow it."

The U.S. Sentencing Commission was permitted to commit an egregious Separation of Powers violation, because Congress does not review the rules implemented in the Commentary; this a flaw in the statutory framework of the (SRA). Congress should and must review the policies and rules implemented in the Commentary to safeguard that the policies and rules implemented are consistent with the laws enacted by Congress.

CONCLUSION

Wherefore, Petitioner prays that this Honorable Supreme Court grants this Writ of Certiorari, and sets forth order remanding the case back to the District Court, so that the Defendants' can answer Plaintiff's claims.

Respectfully Submitted,


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