No. 22-5816

ORIGINAL

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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

TONY LAM — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

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

PETITION FOR WRIT OF CERTIORARI

Tony Lam # 28266-034
(Your Name)

F.C.I. - Pollock, P.O. Box 4050
(Address)

Pollock, LA 71467
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

Did trial counsel provide ineffective assistance to his client upon his failure to research, investigate, and object to his client's career offender classification predicated on two prior convictions of conspiracy to commit a violation of 21 U.S.C. §841?

Has Congress delegated it's legislative authority to the Sentencing Commission to modify its statutory directive and include conspiracy offenses to the definition of "controlled substance offense" through commentary?

PARTIES TO THE PROCEEDINGS

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

RELATED CASES

UNITED STATES v. Lam, Case No. 17-169

UNITED STATES v. LAM, Case No. 21-30670

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OTHER

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

The petitioner, Tony Lam, respectfully prays that this Honorable Court will issue a writ of certiorari to review the judgement and opinion of the United States District Court and Court of Appeals for the Fifth Circuit. The lower courts' decisions conflict with four sister Circuit Court of Appeals, interrupts the legal principles of federal practices and procedures developed and reaffirmed by this court going back 75 plus years, and has digressed from sound principles of the Constitutional pillars of due process and separation of powers. This court's guidance is sorely needed to bring uniformity back to the practice of sound principles of law.

OPINIONS AND ORDERS IN CASE

The opinion and order of the United States District Court for the Eastern District of Louisiana denying the petitioner's §2255 motion is attached hereto as Appendix "A".

The opinion and order of the United States Court of Appeals for the Fifth Circuit is attached hereto as Appendix "B".

The denied petition for rehearing en banc of the Fifth Circuit Court of Appeals is attached hereto as Appendix "C".

JURISDICTIONAL STATEMENT

The judgement of the United States Court of Appeals for the Fifth Circuit was entered on June 7, 2022. A timely petition for rehearing and rehearing en banc was filed and subsequently denied on July 18, 2022. The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment of the United States Constitution provides:

> "No person shall be... deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation."

2. The Sixth Amendment of the United States Constitution provides:

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

3. The statute under which the Petitioner sought habeas corpus relief was 28 U.S.C. §2255 which states in pertinent part:

> §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 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 sentence.
>
> Unless the motion and the files and records of the case conclusively show that the petitioner is entitled to no relief, the court shall cause notice 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 judgement 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 judgement vulnerable to collateral attack, the court shall vacate and set aside the judgement and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

4. 28 U.S.C. §994 Duties of the Commission states in pertinent part:

> The Commission, by affirmative vote of at least four members of the Commission, and pursuant to its rules and regulations and consistent with all pertinent provisions of any Federal statute shall promulgate and distribute to all courts of the United States and to the United States Probation System
>
> (1) guidelines, as described in this section, for use of a sentencing court in determining the sentence to be imposed in a criminal case.

5. 28 U.S.C. §994(h) is the statutory directive upon which the petitioner was enhanced as a career offender:

> The Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years old or older and -
>
> (1) has been convicted of a felony that is -
>
> (A) a crime of violence; or
>
> (B) an offense described in section 401 of the Controlled Substance Act(21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substance Import and Export Act(21 U.S.C. 952(a), 955, and 959), and chapter 705 of title 46[46 U.S.C.S. §§70501 et. seq.]; and
>
> (2) has previously been convicted of two or more prior felonies, each of which is -
>
> (A) a crime of violence; or
>
> (B) an offense described in section 401 of the Controlled Substance Act(21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substance Import and Export Act(21 U.S.C. 952(a), 955, and 959), and chapter 705 of title 46[46 U.S.C.S. §§70501 et. seq.]

UNITED STATES SENTENCING GUIDELINES INVOLVED

1. United States Sentencing Guidelines Manual §4B1.1

2. United States Sentencing Guidelines Manual §4B1.2

3. United States Sentencing Guidelines Manual Amendment 528

STATEMENT OF THE CASE

On August 22, 2018, the petitioner pleaded guilty to one count of distributing 40 grams or more of a mixture or substance containing a detectable amount of fentanyl in violation of 21 U.S.C. §841 and §841(b)(1)(B). Due to a prior conviction for a "felony drug offense", the prosecutor filed a bill under 21 U.S.C. §851 to enhance the petitioner's mandatory minimum term of imprisonment from 5 years to 10 years. While preparing the Presentence Report, the United States Probation Officer determined that the drug quantity involved in the petitioner's offense placed him on offense level 26. After the deduction of 3 level for acceptance of responsibility, combined with his criminal history, placed him on level 23, category IV, with a guideline range of (70-87 months) of imprisonment, restricted to 120 months due to the statutory minimum.

The U.S. Probation Officer, however, determined that petitioner qualified as a career offender under the United States Guidelines Manual(USSG) §4B1.1(a), based on two prior convictions for "conspiracy to possess with intent to distribute" controlled substances. As a result of this enhancement, the petitioner's offense level increased by 11 to level 37 and his criminal history category increased to the highest category of VI. See USSG §4B1.1(b)(1). After the deduction of 3 levels for acceptance of responsibility, the petitioner's career offender enhanced range decreased to level 34, category VI, (262-327 months) of imprisonment. Defense counsel did not file an objection nor present a defense to this enhancement and absent counsel's objections, the district court on December 12, 2018, adopted the report submitted by the Probation Officer and sentenced the petitioner to 327 months.

On appeal, the petitioner, through new counsel appointed by the court, attempted to present to the Fifth Circuit Court of Appeals for review the use of the petitioner's two prior conspiracy convictions as predicates for the career offender enhancement. In particular, the petitioner through counsel stated that the statutory directive for the career offender section of the guidelines stems

from 28 U.S.C. §994(h), which explicitly enumerates numbered sections of the statute that qualify for this enhancement that does not include section §846 of title 21 within its scope. However, the Court of Appeals for the Fifth Circuit stated that since trial counsel did not object to the career offender enhancement at sentencing, that the court could only review for plain error. The Court of Appeals affirmed the sentence under that standard of review. A petition for writ of certiorari was filed with this Honorable Court, but unfortunately was denied review.

The petitioner, proceeding pro se, timely filed a motion under §2255 to present trial counsel's violation of his Sixth Amendment duty to provide effective assistance of counsel to his client. Because of trial counsel's deficient performance of not conducting an investigation into his client's career offender classification by the Probation Officer and his failure to object to the enhancement to present his findings for the court to review, thereby preserving the issue for review by the higher court barred his client from entitlement to de novo review by the Court of Appeals. The district court denied the constitutional claim stating that due to the Fifth Circuit precedential case on the matter, counsel was not ineffective for not raising a foreclosed issue. The district court also denied a Certificate of Appealability(COA). A timely notice of appeal and a motion for issuance of COA was filed to the Court of Appeals and was denied. A timely filed motion for rehearing and rehearing en banc was filed with the Court of Appeals, which was also denied.

COURSE OF PROCEEDINGS IN THE SECTION 2255 CASE BEFORE THE COURT

On May 24, 2021, the petitioner filed a 28 U.S.C. §2255 motion to vacate, set aside or correct sentence challenging the constitutionality of the career offender enhanced sentence, which asserted that: (1) counsel provided ineffective assistance for failing to research, investigate, and object to the career offender classification by the Probation Officer to raise the issue for the court to review.

On May 26, 2021, the district court issued a Briefing Order directing the government to file a response conveying its position on the merits of the petitioner's §2255 motion by July 7, 2021.

On July 7, 2021, the United States filed a response to the petitioner's §2255 motion.

On August 26, 2021, the petitioner filed a traverse reply to the United States response to the petitioner's §2255 motion.

On October 6, 2021, the district court issued an order to deny the §2255 motion and issuance of COA, which is attached hereto as Appendix "A".

A timely notice of appeal and a motion for issuance of a Certificate of Appealability was filed with the Court of Appeals.

On June 7, 2022, the United States Court of Appeals for the Fifth Circuit delivered its opinion affirming the dismissal of the petitioner's §2255 motion and Certificate of Appealability, which is attached hereto as Appendix "B".

A timely motion for rehearing and rehearing en banc was filed with the Court of Appeals for the Fifth Circuit.

On July 18, 2022, the United States Court of Appeals for the Fifth Circuit entered an order denying rehearing en banc, which is attached hereto as Appendix "C".

REASONS FOR GRANTING WRIT

I. Did trial counsel provide ineffective assistance to his client upon his failure to research, investigate, and object to his client's career offender classification predicated on two prior convictions of conspiracy to commit a violation of 21 U.S.C. §841?

One of the reasons this petition is before the court, is whether the petitioner's trial counsel provided ineffective assistance to his client upon his failure to conduct a reasonable substantial investigation into his client's designation as a career offender by the Probation Officer predicated on two prior convictions of conspiracy to commit a violation of narcotic laws. Counsel's failure to research and investigate this classification ultimately lead to counsel's failure to file an objection to the career offender enhancement during the petitioner's sentencing hearing and present this question of law for the sentencing court to review. Counsel's deficient performance not only prejudiced the petitioner of the deprivation of the due process right to be heard afforded by the Constitution, it foreclosed entitlement to de novo review by the Court of Appeals to address the legal question and subjected the unobjected issue, to a standard of plain error review.

The legal question of whether prior convictions of conspiracies - a violation of 21 U.S.C. §846 - qualify as predicates for enhancement purposes under the career offender section of the U.S.S.G. §4B1.1, which derived from its pertinent federal statute at 28 U.S.C. §994(h), should have been presented to the court for review by counsel operating under his duty to the Sixth Amendment guarantee. As the evidence existed more than six months prior to the petitioner's sentencing hearing, counsel's due diligence to research facts and law relevant to the petitioner's case would have uncovered a sufficient amount of a preponderance of the evidence to present a persuasive defense against the career offender enhancement that is grounded upon legal principles developed and established well over 75 years ago that is contrary

to the Probation Officer's application of the law. Two Circuit Court of Appeals have already addressed the question(D.C. and Fourth Circuit) and held that inchoate offenses are not included in the plain text of the term "controlled substance offense" defined at U.S.S.G. §4B1.2(b) and another circuit(Sixth Circuit) was well on its way to fall in line with this reasoning. Most recent, in light of this court's reinforcement on the proper method of deference to an agency's interpretation of an ambiguous provision adopted by agencies from its relevant federal statute, the Third Circuit joined with this growing circuit conflict on the matter by overturning thirty(30) years of its precedent.

Claims of ineffective assistance of counsel are governed by the two prong test set forth by this court on Strickland. "(1) that counsel's performance was deficient... and (2) that the deficient performance prejudiced the defense." Strickland v. Washington, 466 U.S. 668(1984). The petitioner asserted in his §2255 as a ground for relief that counsel provided ineffective assistance, because counsel failed to research and investigate into his client's career offender classification determined by the Probation Officer that compiled the Presentence Report submitted to the district court. "In representing a criminal defendant, counsel owes the client a duty of loyalty, ... a duty to advocate the defendant's cause, a duty to keep defendant informed of important decisions, a duty to keep defendant informed of important developments in the course of the prosecution, and a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Id at 688. On the petitioner's case, however, counsel has done none of the above mentioned, and one of the most damaging aspects of counsel's deficient performance that severely prejudiced the petitioner is rooted in counsel's failure to conduct a "reasonable substantial investigation" into whether his client qualified as a career offender, predicated upon two prior convictions of conspiracy. This substandard performance fell below the objective standard of reasonableness as is required by Strickland's interpretation of the Sixth Amendment guarantee that

the accused shall enjoy the assistance of counsel for his defense and 18 U.S.C. §3006A's requirement of this assistance to be effectively provided.

"If there is only one plausible line of defense, ... Counsel must conduct a reasonable substantial investigation into that line of defense, since there can be no strategic choice that renders such an investigation unnecessary." Id at 680-81 As the defense against the petitioner's career offender enhancement being the only plausible line of defense the petitioner "had in the entire case," United States v. Winstead, 890 F.3d 1082, 1090(D.C. Cir. 2018), the unreasonableness of counsel's failure to investigate is more than sufficient to establish a violation of the Sixth Amendment. See Strickland v. Washington, 466 U.S. 668(1984)

Paramount to this court's decision regarding the effectiveness of the assistance that counsel provided at the petitioner's sentencing phase, is whether the guidelines provision term "controlled substance offense" defined at U.S.S.G. §4B1.2(b) is a proper reflection of its statutory directive at 28 U.S.C. §994(h) and whether commentary application note 1 of §4B1.2 is a proper interpretation of its pertinent directive and is owed deference. Because "[t]he words of a governing text are of paramount concern, and what they convey, in their context, is what the text means." Reading Law: The Interpretation of Legal Texts, Antonin Scalia & Bryan Garner(2012). This question of law, is a purely legal question that counsel, that is operating within the bounds of his duty to the Sixth Amendment guarantee, should have presented to the court for review. The controlled substance offense definition of §4B1.2(b) that derived from 28 U.S.C. §994(h) states:

> 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 the intent to manufacture, import, export, distribute, or dispense. USSG §4B1.2(b)

Furthermore, the Commission created commentary application note 1 for §4B1.2 to state:

> For purposes of this guideline -
> "crime of violence" and "controlled substance offense" includes the offenses of aiding and abetting, conspiring, and attempting to commit such offenses. USSG §4B1.2 Comm. App. Note 1

Contrary to well established legal principles of federal practices and procedures of a court's application of its traditional tools of statutory construction to ascertain the meaning of a statutory provision adopted by an agency charged with the administration of Congress' intent, counsel failed to raise a challenge to the Sentencing Commission's authority to modify the congressionally mandated statute it was supposed to adopt. The Sentencing Commission does not make legislative policy, but rather is suppose to synthesize congressionally mandated sentencing policy into format to assist judges in aid of judicial sentencing function. See United States v. Ruiz-Villanueva, 680 F. Supp. 1411(S.D.Cal. 1988), aff'd, 914 F.2d 264(9th Cir. 1990). "[W]hen 'the statute's language is plain, the sole function of the courts... is to enforce it according to its terms.'" Earl v. Boeing Co., 515 F. Supp. 3d 589, 621-22(5th Cir. 2021)(quoting Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1,6(2000))(quoting United States v. Ron Pair Enters., Inc., 489 U.S 235, 241(1989)). Counsel's expertise on the proper procedures of the application of the law were not employed to uphold the integrity of the adversarial testing process to prevent "the risk of injustice to [his client]" and "the risk of undermining the public's confidence in the judicial process." Liljieberg v. Health Services Acquisition Corp., 486 U.S. 847, 863-864(1988). As a result, basic fundamental rights that were afforded the petitioner were forfeited. When an agency, such as the Sentencing Commission, is charged with the administration of federal statutes, proscribes a regulation not directed by Congress to capture and dispense "significant, legally binding prescriptions governing application of governmental power against private individuals," Mistretta v. United States, 488 U.S. 361, 413(1989), it risks offending the twin constitutional pillars of due process and separation of powers doctrine. It further "increas[es the Commission's]

power, allowing it to both write and interpret rules that bear the force of law." Kisor v. Wilkie, 139 S. Ct. 2400, 2440-41(2019). The Commission cannot "invoke its general interpretive authority via commentary," Winstead, 890 F.3d 1082, 1092 to twist or bypass these constitutional constraints to serve its own interests. And counsel's failure to challenge this authority rendered his performance below an objective standard of reasonableness set forth on Strickland by this court. See Strickland, 466 U.S. 668. Counsel's deficient performance on this aspect allowed the Commission's commentary "to impose such a massive impact on the defendant with no grounding in the guidelines themselves." Winstead, 890 F.3d at 1092.

Prior to the petitioner's sentencing hearing, the D.C. Circuit decided United States v. Winstead, 890 F.3d 1082(D.C. Cir. 2018). The court there recognized that this court "has made clear that the Guidelines are to be the sentencing court's 'starting point and... initial benchmark.'" Molina-Martinez v. United States, 136 S. Ct. 1338, 1345(2016)(quoting Gall v. United States, 552 U.S. 38, 49(2007)). That such an enormous difference in the potential term of imprisonment that the petitioner faced should "have appeared as a crucial [issue] to effective counsel." Winstead, 890 F.3d at 1089-90. "Counsel's failure to raise this obvious legal argument... means [the court's] standard of review is plain error, and [the court] would not reverse the district court's decision on the guidelines issue under that standard." Id at 1090. But unlike the Fifth Circuit, the D.C. Circuit panel moved to address the legal question to determine whether counsel provided ineffective assistance for not raising the argument at sentencing. As the court explained that "[t]he textual issue is a purely legal question" and that "it was an obvious legal argument to make(at the least, to preserve for appeal.)" Ibid. Because of the great disparity in the sentence the petitioner would receive absent this enhancement, compared with the sentence the petitioner did receive absent counsel's objections, (more than 17 years), "there was no conceivable tactical reason... for not making it. Id.

Addressing the legal question that counsel should have raised at sentencing,

the D.C. Court found that commentary application note 1 indeed adds a crime "not included in the guideline." Winstead, 890 F.3d at 1090-91. The Court there turned to this court's instruction that commentary should "be treated as an agency's interpretation of its own legislative rule." Stinson v. United States, 508 U.S. 36, 44-45(1993). But by purporting to add to the guideline rather than interpret what is in the guideline, commentary in this instance, is inconsistent with the guideline. The Circuit panel agreed that "4B1.2(b) presents a very detailed 'definition' of controlled substance offense that clearly excludes inchoate offenses. Expressio unius est exclusio alterius." Winstead, 890 F.3d at 1091. Anchoring its reasoning with this court's holding that "[a]s a rule, [a] definition which declares what a term 'means'... excludes any meaning that is not stated." Burgess v. United States, 553 U.S. 122, 130(2008)(quoting Colautti v. Franklin, 439 U.S. 379, 392-393, n. 10(1979); See also Groman v. Commissioner, 302 U.S. 82, 86(1937).

Counsel's extensive knowledge and experience of principle practices and procedures that court's follow in "presum[ing that] the legislature chose a statute's language with care, including each word chosen for a purpose while purposely omitting words not chosen." Hallmark Mktg. Co., LLC v. Hegar, 488 S.W. 3d 795, 798(Tex. 2016). See Russello v. United States, 464 U.S. 16, 23(1983)("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion). Understanding the principle rule that "[t]he power to make law cannot be exercised by anyone other than Congress," Mistretta v. United States, 488 U.S. 361, 416-417(1989), counsel's duty to advocate for his client obligated counsel to challenge the Guidelines commentary's authority to expand that which it was created to interpret. This court has instructed that when determining whether an agency's interpretation "accurately reflects Congress' intent," courts are to turn "to the statutory language." United States v. LaBonte, 520 U.S. 751, 757(1997). And "if [the language of] a statute is unambiguous the

statute governs." Stinson, 508 U.S. at 44-45(quoting Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837(1984). The plain language of 28 U.S.C. §994(h) is unambiguous and the Sentencing Commission's interpretation is owed no deference. See Labonte, 520 U.S. 751, 757. In drafting this statutory directive to the Sentencing Commission, "Congress said what it meant." Id. Section 994(h)(1)(B) specifically enumerates numbered sections of the statute that do not include defendants convicted of conspiracy to violate 21 U.S.C. §841 - i.e. an offense described at 21 U.S.C. §846, which criminalizes the mere act of agreeing to commit a substantive drug offense. See e.g., United States v. Davis, 903 F.3d 483, 485 (5th Cir. 2018), aff'd in part, vacated in part, 139 S. Ct. 2319(2019)("conspiracy to commit an offense is merely an agreement to commit an offense); See also United States v. Reece, 938 F.ed 630(5th Cir. 2019)("conspiracy is a crime distinct from the objective of the conspiracy.")

Counsel's reasonable investigation would have uncovered many of these factual findings that either alone or collectively would have provided sufficient evidence to support counsel's defense against the Probation Officer's determination that the petitioner qualified as a career offender. There were already two circuit Court of Appeals that have held that inchoate offenses like conspiracy and attempt offenses cannot be annexed into the "controlled substance offense" definition through commentary. See United States v. Winstead, 890 F.3d 1082(D.C. Cir. 2018) (controlled substance offense clearly excludes inchoate offenses.); see also United States v. Whitley, 737 Fed. Appx. 147(4th Cir. 2018)(prior conspiracy charge under §846 was not categorically a "controlled substance offense" despite commentary stating otherwise.) A Sixth Circuit dissent by Honorable Judge Thapar that further widens the gap and eventually paved the Sixth Circuit path to an en banc decision elevating its holding as a pillar of the Circuit on the matter. See United States v. Havis, 907 F.3d 439(6th Cir. 2018)("one does not interpret a text by adding to it. Interpreting a menu of hotdogs, hamburgers, and bratwursts to include pizza is

nonsense.") In light of this court's holding on Kisor reinforcing the principles of deference to an agency's interpretation of the statute it is charged with the administration of, the Third Circuit has joined this growing circuit conflict by overturning thirty(30) years of its precedent. See United States v. Nasir, 982 F.3d 144(3rd Cir. 2020)("[I]n light of Kisor's limitations on deference to administrative agencies, we conclude that inchoate crimes are not included in the definition of 'controlled substance offense' given in section 4B1.2(b) of the Sentencing Guidelines" and "we too agree that separation-of-powers concerns advise against any interpretation of the commentary that expands the substantive law set forth in the guidelines themselves.")

Even the Fifth Circuit noted its agreement with the Third Circuit's ruling. See United States v. Goodin, 835 Fed. Appx. 782, n.1(5th Cir. 2020)(If [the Fifth Circuit] were not constrained by Lightbourn, [its] panel would be inclined to argee with the Third Circuit.) Anchored upon an obiter dicta holding on Lightbourn, the Fifth Circuit invokes stare decisis to adhere to a ruling that interrupts the well developed and established legal principles of practices and procedures of the court dating back 75 plus years, See United States v. Lightbourn, 115 F.3d 291(5th Cir. 1997), and upon which it still employs the practice of today. See Earl v. Boeing Co., 515 F.Supp. 3d 589(5th Cir. 2021); see also Bowles v. Seminole Rock & Sand Co. 325 U.S. 410(1945). Although stare decisis is "the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles," Payne v. Tennessee, 501 U.S 808, 827(1991) and "[c]onsiderations of stare decisis have special force in the area of statutory interpretation," Patterson v. MeLean Credit Union, 491 U.S. 164, 172-173(1989), this court has "felt less constrained to follow precedent where, as here, the opinion was rendered without full briefing or argument." Hohn v. United States, 524 U.S. 236, 251-252(1998). On the petitioner's issue, the Fifth Circuit precedent's opinion was rendered in dicta and without the benefit of full briefing on the issue. See United States v. Lightbourn, 115 F.3d

291(5th Cir. 1997)(Because the Sentencing Commission amended the Background Commentary to alter the statement of the source of authority for 4B1.1 from strict reliance on 28 U.S.C. §994(h) to reliance upon the 'general promulgation authority' found in 28 U.S.C. §994(a)-(f), the Commission has now lawfully included drug conspiracies in the category of crimes triggering classification as a career offender under 4B1.1 of the Sentencing Guidelines.) Because the court states that the issue is foreclosed due to these passing comments, it held that counsel did not provide ineffective assistance for not raising an argument foreclosed by precedent. But the principles of law teaches us that "[a] case is only an authority for what it actually decides." Quinn v. Leathem, A.C. 495, 1 B.R.C. 197(1901). See Senator Mike Lee, Confirmation hearing on the Nomination of Honorable Brett M. Kavanaugh to be Associate Justice of the Supreme Court of the United States (Sept. 4, 2018)("The judiciary's decisions are legitimate only if they are based on sound legal principle.") The judiciary on the Lightbourn court did not decide the question of commentary's authority to make additions to the guidelines it was created to interpret. It only assumed that the invocation of the Sentencing Commission's general promulgation authority on Amendment 528 allows the Commission to modify its statutory directive of 994(h) as it deems fit. This issue was not addressed or fully briefed and as this court instructs that courts are less constrained to follow a precedent on an issue without the benefit of full briefing because it would "undermine rather than promote, the goals that stare decisis is meant to serve." Johnson v. United States, 576 U.S. 591, 606(2015).

An attorney has a duty to investigate all avenues leading to facts relevant to the merits. See Rompilla v. Beard, 545 U.S. 374, 387(2005). Had counsel presented the merits for the court to review, "[n]either the government nor any circuit court to address the question has identified any 'textual hook' in the guidelines to anchor the addition of conspiracy offenses." United States v. Lewis, 963 F.3d 16, 28(1st Cir. 2020); See United States v. Soto-Rivera, 811 F.3d 53, 60(1st Cir. 2016)

Counsel's failure to even raise the question prejudiced the petitioner in a sense that there was no adversarial issue for the court to compare the Probation Officer's determination with. The court might as well have been a one sided hearing since counsel did not even attempt to challenge the only merit the petitioner had in his entire case. See Winstead, 890 F.3d 1082. It is a well established rule among all circuits that the interpretation of the Sentencing Guidelines is subject to the ordinary rules of statutory construction. See United States v. Boudreau, 250 F.3d 279, 285(5th Cir. 2001). If the language of the guideline is unambiguous, the court's inquiry begins and ends with an analysis of the plain meaning of that language. See Id. As this rule is uniform among all the circuits, counsel's failure or his decision not to raise an adversarial application to ensure the principle of statutory interpretation used by the Probation Officer rested upon a sound foundation constitutes ineffective assistance. Respect for due process and separation of powers suggests a court may not construe a criminal statute to penalize conduct it does not clearly proscribe. See United States v. Davis, 139 S. Ct. 2319(2019) For, applying an expansive interpretation of commentary to an unambiguous statutory provision "contravenes the Constitution." Thomas v. Collins, 323 U.S. 516, 542(1944) Even Congress, in passing the First Step Act, was careful not to contravene well established sentencing practices. See Concepcion v. United States, Case No.20-1650 (June 27, 2022) Because a constitutionally protected right "is not small when it is considered what is restrained. The right is a national right, federally guaranteed." Thomas v. Collins, 323 U.S. 516, 543(1944). As is counsel's duty to ensure the government upholds and adheres to the very laws it enforces. For "it is from the petty tyrannies that large ones take root and grow. This fact can be no more plain than when they are imposed on the most basic rights of all. Seedlings planted in that soil grow great and , growing, break down the foundations of liberty." Thomas v. Collins, 323 U.S. 516, 543(1944)

The Fifth Circuit holds that since Kisor was decided after the petitioner

was sentenced, therefore, counsel did not have the benefit of Kisor's reasoning at the petitioner's sentencing hearing. The district court first notes that counsel is not expected to "anticipate changes in the law or raise meritless objections." United States v. Fields, 565 F.3d 290, 296(5th Cir. 2009); See Appendix A, p. 8. However, Kisor is not a new rule of law nor is its principle of deference a meritless reason to anchor counsel's objection. See Kisor v. Wilkie, 139 S.Ct. 2400(2019). Kisor is a reiteration of the fundamental principle of deference to an agency's interpretation of ambiguous federal statutes it adopts and administers. See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837(1984). That principle counsels that courts must first exhaust all the tools in the statutory construction toolbox to ascertain the meaning of a law before it elects to defer to the agency's interpretation. Kisor is but one case, in "a long line of precedents - each one reaffirming the rest and going back 75 years or more." Kisor, 139 S.Ct. 2400, 2422(citation and internal quotation marks ommited). And the principle requirement for its deference is "ambiguity" found in regulations that are vague and lack precision. For example, this court in 1993, elaborated on the authoritative effects of commentary in an instance where deference is warranted due to the ambiguity found in the residual clause of the "crime of violence" definition defined at USSG §4B1.2(a). See Stinson v. United States, 508 U.S. 36(1993). Since this holding, judicial surgery has been done to the opinion as portions of Stinson has been taken out of its context to justify the authoritative effects of commentary in all instances, while forgetting the factors this court relied on for its deference in that instance. First, the determining factor that this court relied on for the deference to commentary of the Stinson court is the ambiguous residual clause of the "crime of violence" definition that this court, 22 years subsequent to the ruling, has held unconstitutionally void for vagueness. See Johnson v. United States 576 U.S. 591(2015). Second, absent this residual clause, Stinson counsels that it is not "helpful to treat commentary as a contemporaneous statement of intent by

the drafters or issuers of the guidelines, having a status similar to" the guideline themselves. Stinson, 508 U.S. 36, 43. Commentary is different from the legislative rule the agency adopts because, unlike the legislative rule, commentary is not a product of legislative intent and must yield to the clear meaning of the statute. See Id. at 44. Under the Chevron principle, "if a statute is unambiguous the statute governs." Ibid.(quoting Chevron, 467 U.S. 837, 842-843)

The "controlled substance offense" definition of 4B1.2(b) is neither vague nor does it lack precision. Since its governing statute is unambiguous, the Sentencing Commission's adoption of its directive cannot be anything but unambiguous. See LaBonte, 520 U.S. 751, 757(declining to address whether the Commission's interpretation of 994(h) is owed deference "inasmuch as 994(h) is unambiguous.") "The rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law. Rather, it is the power to adopt regulations to carry into effect the will of Congress as expressed by the statute." Ernst & Ernst v. Hochfelder, 425 U.S. 185, 213-214(1976) (quoting Dixon v. United States, 381 U.S. 68, 74(1965)). A regulation which does not do this is a nullity. See Dixon, 381 U.S. 68(1965)

It was counsel's duty to research facts and law and raise meritorious arguments anchored upon directly controlling precedent on sound principles of law. And when a court decides a case without the benefit of full briefing to arrive at a decision that interrupts the principles of the prior precedent, the court's duty is not to simply replace the old with the new, but to apply the old principle to the new application to see if it is workable. This method is highlighted on this court's 38 year old pillar of the administrative state, instructing that the judiciary is final authority and must reject an administrative construction of the statute that is not in harmony with it. See Chevron, 467 U.S. 837. As this cardinal principle of statutory construction has been well developed and established over 75 years and counting, counsel's knowledge and skill of these legal principles

should have lead effective counsel to urge the exercise of its use during the petitioner's sentencing hearing because "any amount of actual jail time has Sixth Amendment significance." Glover v. United States, 531 U.S. 198, 203(2001). "That a person who happens to be a lawyer is present at [sentencing] alongside the accused, however, is not enough to satisfy the constitutional command." Strickland v. Washington, 466 U.S. 668, 685-686(1984). "The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the necessary assistance to justify reliance on the outcome of the proceeding." Id. at 692. An imposed sentence that is sustained in violation of these constitutionally protected rights, "would, if condoned, result in a complete miscarriage of justice." United States v. Gaudet, 81 F.3d 585, 589(5th Cir. 1996). There is a reasonable probability that, had counsel objected to the petitioner's career offender enhancement at sentencing to raise these questions of law, the result of the proceeding would have been different. See e.g. Winstead, 890 F.3d 1082

II. Has Congress delegated its legislative authority to the Sentencing Commission to modify its statutory directive and include conspiracy offenses to the definition of "controlled substance offense" through commentary?

The conflict between the circuits is causing confusion and creating disparities among criminal defendants that are sentenced in one circuit compared with the other. This confusion and disparity created, stems from an agency operating beyond the ambit of the scope of its authority delegated by Congress through the congressional statutes, to promulgate interpretive rules, not directed by Congress, that bear the force of law to dispense significant terms of imprisonment with binding effect. This practice of the Commission has interrupted age old legal principles of federal practices and procedures instructed by this court and employed among all lower courts.

The Fifth Circuit reasoned in Lightbourn that since the Sentencing Commission

changed its Background Commentary of 4B1.1 to invoke upon its general rulemaking authority under §994(a)-(f), that it has lawfully included conspiracy offenses into the definition of "controlled substance offense" at §4B1.2(b) through commentary. See Lightbourn, 115 F.3d 291, 293. However, the same circuit also recently held that merely invoking "[a]n agency's general rulemaking authority does not mean that the specific rule the agency promulgates is a valid exercise of that authority." Earl v. Boeing Co., 515 F. Supp. 3d 589, 620(5th Cir. 2021)(quoting Colo. River Indian Tribes v. Nat'l Indian Gaming Comm'n, 466 F.3d 134, 139(D.C. Cir. 2006)). Because regardless of how broad the rulemaking power appears, this court has made it abundantly clear that the administration of a federal statute is not the power to make law. See Chemetran Corp. v. Business Funds, 682 F.2d 1149 (5th Cir. 1982)(quoting Ernst & Ernst v. Hochfelder, 425 U.S. 185, 213(1976)). This principle of law is anchored upon the Constitution's command that "[a]ll legislative powers herein granted shall be vested in a Congress of the United States." See The Constitution of the United States of America, Article One, Section 1. No agency within these constitutional limits can proscribe legislative laws other than Congress without contravening the Constitution's command. "The words of the Act are the law... Its clear meaning cannot be so altered. Nor can anything be thus added to it. Nor can putting an example into [Administrative] Regulation add to or change the law as passed." United States v. Ogilvie Hardware Co., 155 F.2d 577, 580(5th Cir. 1946). "Nothing is to be added to what the text states or reasonably implies. (Casus omissus pro omisso habendus est). That is, a matter not covered is to be treated as not covered." Reading Law: The Interpretation of Legal Texts, Antonin Scalia & Bryan Garner, p. 93(2012) Yet, this is what the Sentencing Commission admits to doing.

One of counsel's duties, as is a prosecutor's primary duty is "to seek justice," according to the American Bar Association. See United States v. Martinez-Mancilla, 1993 U.S. App. LEXIS 40982, 6(5th Cir. 1993). And justice cannot be

sought if rules and procedures are not enforced or followed. Here the Sentencing Commission has not adhered to its own rules nor has it followed its statutory directives that have granted its authority to promulgate those rules. The very first directive from Congress to the Commission in performing its duties is that the Commission "shall" promulgate guidelines "consistent with all pertinent provisions of any Federal statute." 28 U.S.C. §994(a). The Commission has openly admitted to not doing this at the inception of the promulgation of the Career Offender section of the U.S. Sentencing Guidelines Manual on its Report to the Congress, published over two years prior to the petitioner's sentencing hearing. 28 U.S.C. §994(h) is the Commission's governing authority for the Career Offender section promulgated at 4B1.1 of the Guidelines Manual and contrary to these specific directives, the Commission admits to adopting 18 U.S.C. §924(e)'s definition of "serious drug offense" to perform the work of 28 U.S.C. §994(h)(1)(B) at the inception of its promulgation of the term "controlled substance offense", defined at §4B1.2(b). Justifying its modified adoption by stating that 924(e)'s definition is preferable to 994(h)(1)(B), because 994(h)(1)(B) introduces a new drug law and listing by section number as 994(h)(1)(B) does will necessitate the continued review of new drug laws. See U.S. Sentencing Report to the Congress: Career Offender Sentencing Enhancements(2016)(Career Offender Report), Appendix A-9; Herein attached as Appendix "F". This was done at the insistence of the Commission's Office of General Counsel doubting that Congress would want a literalistic reading of the statute that would exacerbate prison impact and that the members of the legislative body would appreciate a less extreme, more flexible approach. See Career Offender Report, Appendix A-3; attached herein as Appendix "F". In 1995, the Commission took it a step further by invoking upon its general promulgation authority under 28 U.S.C. §994(a)-(f) to justify that its modification of the statute over time is in accord with Congress' directive to the Commission. See USSG Amendment 528. However, Congress' directive to the Commission at §994(a)-(f)

did not direct the Commission to modify the statute it was charge with the duty to administrate. To the contrary, Congress explicitly directs the Commission to promulgate its guidelines provisions consistent with the relevant statute. See 28 U.S.C. §994(a)-(f) And reading the Commission's commentary into the already modified 994(h)(1)(B) definition of the term "controlled substance offense" at §4B1.2(b) further expands the substantive reach of the elements of "controlled substance offense" and therefore, the Commission has under the guise of its interpretation, created a de facto, new, more expansive regulation that bears the force of law. See Christensen v Harris County, 529 U.S. 576, 588(2000). This offends the twin constitutional pillars of due process and separation of powers. Congress proscribed "the precision with which §994(h) includes certain drug offenses but excludes other indicates that the omission of §846 was no oversight." United States v. Knox, 573 F.3d 441, 448-449(7th Cir. 2009). There is "no reason for reading into the [statute] more than [the court] find there." United States v. Shabani, 573 U.S. 10,13(1994)(quoting Nash v. United States, 229 U.S. 373, 378(1913). As here, reading into the "controlled substance offense" definition to refer to "conspiracy" to commit a controlled substance offense "would vastly expand the statute's reach by sweeping in conduct" that Congress did not clearly proscribe. United States v. Taylor, 2022 U.S. LEXIS 3017, 18(2022). Reading the provision this way "would defy [the court's] usual rule of statutory interpretation that a law's terms are best understood by the company [they] kee[p]." Id. (quoting Gustatson v. Alloyd Co., 513 U.S. 561, 575(1995). And as the Honorable Justice Gorsuch reminds on his opinion on Taylor, "we do not presume that Congress adopts two different statutes to perform the same work." "[T]hat simply is not the law we have." United States v. Taylor, 2022 U.S. LEXIS 3017, 15(2022).

CONCLUSION

Ultimately, the Sentencing Commission's adoption of 18 U.S.C. §924(e)'s definition of "serious drug offense" to perform the work set forth by Congress at 28 U.S.C. §994(h) and its further expansion of the term "controlled substance offense" through commentary application note 1 of §4B1.2 caused the petitioner to be enhanced under the Career Offender section at 4B1.1. This increased his sentencing exposure by more than 17 years from a guidelines range of level 23, category IV (70-87 months); to level 34, category VI (262-327 months). In the face of all this evidence already in existence prior to the petitioner being sentenced, trial counsel would have at the least, found a trace of this evidence had he exercised his due diligence to advocate a defense for his client. For counsel to not so much as mention any aspect of this enhancement at the petitioner's sentencing hearing, even as the petitioner told counsel he wanted to object to the enhancement, prejudiced the petitioner's merits to fall on the deaf ears of plain error review. Counsel's deficient performance forfeited the petitioner's right to be heard afforded by the Due Process Clauses of the Fifth Amendment of the Constitution. It further hindered the petitioner from seeking review by the higher court to address his claim on the merits fully briefed. As now, the petitioner is forced to plead his truth to the United States Supreme Court, upon the prayer that this Honorable Court will grant a writ of certiorari to correct the injustice that every Career Offender, like the petitioner, that has been enhanced predicated on convictions of conspiracy offenses, has received a term of prisonment different and more excessive than his peers depending upon the Circuit he finds himself/ herself in. This court is in the unique position to bring uniformity among all the lower courts by resolving this growing conflict and bringing the courts back in line of the practice of sound principles of law. The petitioner prays this court will grant a writ of certiorari to review the merits that the lower courts elected to pass on.