

22-6307
No. _____

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

FILED
DEC 10 2022
OFFICE OF THE CLERK
SUPREME COURT, U.S.

John Homer Legros Jr. — PETITIONER
(Your Name)

vs.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

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

PETITION FOR WRIT OF CERTIORARI

John Homer Legros Jr. #20728-035
(Your Name)

P.O. Box 26030

(Address)

Beaumont, TX 77720-6030
(City, State, Zip Code)

N/A (Incarcerated)
(Phone Number)

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QUESTION(S) PRESENTED

- I. Whether "Conspiracy" to Commit a Crime is a Controlled Substance Offense as defined under the United States Sentencing Guidelines Section §4B1.2
- II. Whether a Violation of 21 U.S.C. §846 categorically meets the definition of a Controlled Substance Offense as defined under the United States Sentencing Guidelines Section §4B1.2

LIST OF PARTIES

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

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

RELATED CASES

N/A

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

[] For cases from federal courts:

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

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[] is unpublished.

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

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[] is unpublished.

[] For cases from state courts: N/A/

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

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[] is unpublished.

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

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[] is unpublished.

JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: 11/03/2022, and a copy of the order denying rehearing appears at Appendix A.

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

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

For cases from **state courts**: N/A

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

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

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

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth and Fourteenth Amendments to the
United States Constitution.

21 U.S.C. Section §846

21 U.S.C. Section §841

28 U.S.C. Section §2255

STATEMENT OF THE CASE

On August 22, 2017, a Federal Grand Jury returned an indictment charging the Appellant with one count of Conspiracy to Distribute and to Possess with Intent to Distribute Oxycodone, a Schedule Controlled Substance in Violation of 21 U.S.C. §846 (Count 1) and three counts of Distribution of Oxycodone, in Violation of 21 U.S.C. §841(a)(1) (Counts 2,3 and 5). (Doc 1.)^{1/}

On January 30, 2019, pursuant to a written plea agreement, the Appellant pleaded Guilty to Count One of the Indictment - a stand-alone charge of Conspiracy in Violation of 21 U.S.C. §846 - before the United States Magistrate Judge. (Doc 76-79). The Court adopted the Report and Recommendation regarding the Guilty Plea. (Doc 81 & 84).

A Pre-Sentence Investigation Report ("PSI" or "PSR") was issued on April 1, 2019. Because Appellant was held responsible for 395 Units of Oxycodone, the PSR recommended a conversion to "2,646.5 kg of Converted Drug Weight", which corresponded to a Base Offense Level of 30 under USSG §2D1.1(a)(5). Because a firearm was possessed, a two-level enhancement under USSG §2D1.1(b)(1) was recommended. The Appellants alleged managerial role led to another two-level enhancement, under USSG §3B1.1(c).

(Continued on attached pages)

^{1/}

"Doc #" references documents in Case No. 2:18-CR-00223.

The adjusted offense level was 34. (PSR Pages 29-34).

However, as the Instant Offense was determined to be a Controlled Substance Offense and the Appellant had at least two prior controlled substance offenses, the PSR recommended applying the "Career Offender" enhancement under USSG §4B1.1(b)(3).

Both the United States and the Defendant objected to the PST. The United States asserted the converted drug weight was 661.625 kg's, which correlated to an offense level of 27; because that offense level was lower than the one supplied by the Career Offender provision, the United States suggested "Career Offender status will determine the Guideline range" not the drug quantity. (Addendum to PSR).

The Appellant asserted the Converted Drug Weight was instead between 60 and 80 kilograms, which correlated to an offense level of 20. He further objected to imposition of the Firearm Enhancement under USSG §2D1.1(b)(1), asserting the firearm was found in his residence, and there was no evidence of drug activity occurred there. (Addendum to PSR).

In his Addendum to the PSR, the probation office defended his initial determinations, both regarding the converted drug weight and the firearm enhancement. He noted, however, in response to both the United States and the Defendants objections, that if the Court were to determine the Career Offender provisions dictated the Defendant's offense level instead of the §2D1.1 provision,

his advisory range would be 151-188 months. (Addendum to PSR).

On May 9, 2019, the District Court conducted a sentencing hearing. First addressing Counsel for the United States, the Court asked whether its objection (i.e. regarding converted drug weight) was "mooted". Counsel replied he had let defense know he had "miscalculated the way of converting grams to milligrams," but that ultimately, "the proper [drug quantity] calculation is mooted by the Career Offender designation". The Court noted it agreed. (Sent. Tr. at 2).

When the Court then asked Defense Counsel if he agreed that the objection was "taken care of", Counsel stated he did not believe it was. In response, the Court pointed out that the Government had conceded he was right about the drug quantity suggesting the objection was moot' defense Counsel insisted he and Government Counsel nonetheless differed on whether drug quantity affected the Guideline Range. The Court repeated again that it [didn't] "think it affects the guidelines....". In response, defense Counsel noted a lower drug quantity produced a lower offense level - 20 - thus producing an affect on the Guideliness. In summary, Counsel disagreed on the offense level as to drug amount. However, even so, defense Counsel conceded that if the Court believes Appellant was a Career Offender, the drug quantity issue was moot. (Sent. Tr. at 3-5).

Thereafter, the Court stated its finding that "the calculations as produced by the probation office [are] correct, the determination

as to the Career Criminal calculations [are] correct...". Accordingly, it "overruled" the objections to the PSR. (Sent. Tr. at 4). The Court sentenced Appellant to 144 months, a slight downward deviation from the advisory range of 151-181 months. (Sent. Tr. at 9).

On August 7, 2020, the United States Court of Appeals for the Fifth Circuit, affirmed the District Courts Judgment. The Judgment was entered into the district court record on August 31, 2020. (Doc #120). On Appeal, the Appellant challenged 'the inclusion of an erroneous converted drug weight in his presentence report, as well as the district courts failure to make a finding on his objection to a sentencing enhancement for possessing a firearm". (Rec. Doc. RA). The Fifth Circuit found no clear error in the Courts not correcting the PSR, as neither the gun enhancement nor the drug amount impacted the sentence, and thus, such a correction was not mandates. (Rec. Doc. RA).

On February 22, 2021, Appellant filed a Motion to Vacate, Set Aside or Correct Sentence under 28 U.S.C. §2255. (Rec. Doc. RA). In summary, Appellant argued that Counsel was ineffective for not challenging the imposition of the Career Offender enhancement, on the basis of an Instant Offense of Conspiracy. That substantial legal precedent outside the circuit, provided building blocks for a valid legal argument, worthy of advancement and higher review.

On November 12, 2021, the District Court denied Appellant's Section §2255 Motion. Furthermore, a panel of Fifth Circuit

Judges denied a Certificate of Appealability. Petitioner sought En Banc review, which was denied on November 3, 2022. Petitioner seeks this Courts review.

REASONS FOR GRANTING THE PETITION

The Court should Grant this Petition to resolve a deep circuit split, which has developed in regards to whether a Violation of 21 U.S.C. §846 is a Controlled Substance Offense as defined in the United States Sentencing Guidelines Section §4B1.2(b). In fact, the Court is needed to determine and/or answer two questions, i.e., (1) whether the sentencing commission improperly expanded the Guidelines by incorporating offenses of aiding and abetting, conspiring, and attempting to commit, into the definition of a Controlled Substance in the application notes. See App.N.1 @ 1st Para. In sum, the Court needs to consider and answer the question: whether the Sentencing Commission exceeded its statutory authority by expanding the text of the guidelines to include Conspiracy. Secondly, the Court is needed to determine whether a violation of 21 U.S.C. §846 is categorically a Controlled Substance offense, as defined in the Guidelines. Said another way, if the Sentencing Commission did not do an end-run around Congress to improperly expand the United States Sentencing Guidelines, then the Court should answe the question if Conspiracy is properly added to the guidelines, then does a Violation of 21 U.S.C. §846 meet the generic definition of "conspiracy". As the Guidelines do not define conspiracy and a Violation of 846 requires no overt act. Most importantly, Courts across the Country are splitting and rendering different decisions resulting in sentencing disparities and unequal treatment. For instance, defendants in some circuits are being subjected to the substantial penalties of the Career Offender enhancement while others circuits are not imposing these harsh penalties. Such a disparity undermines the purpose of the USSG. Moreover, this Court is needed to enforce the intent of Congress throughout the Country.

Congress intended the Guideline system to increase uniformity of Federal Sentencing. See United States v. Booker, 543 U.S. 220, 246 (2005). "The post-Booker Federal sentencing scheme aims to achieve uniformity by ensuring the sentencing decisions are anchored by the Guidelines and they remain a meaningful benchmark through the process of appellate review." Peugh v. United, 569 U.S. at 541. See *Id* at 549 ("Guidelines will anchor both the District Courts discretion and the appellate review process"). In sum, without spilling a lot of ink, this Court is aware that the Guidelines are the anchor of Federal sentencing procedures. When the Courts below are at odds as to what constitutes a predicate offense, for one of the ~~harshest~~ sentencing enhancements under these Guidelines, then the ship of Federal sentencing drifts without anchor and undermines the entire purpose of the Federal sentencing guidelines. Mr. Legros will not spill a lot of ink to establish the national importance of the Courts below being uniform on who is and who is not, a Career Offender. Most importantly here, those Courts are not. This Court is needed to maintain uniformity and to protect the integrity of our Criminal Justice System and enforce the will of Congress.

The ship of uniformity is drifting without anchor. Many circuits are bound by historical precedent, establishing that conspiracy crimes and Section 846 are valid precedents for enforcing the Career Offender enhancement. See United States v. Kendrick, 980 F.3d 432, 444 (5th Cir. 2020)(explaining United States v. Lightbourn, 115 F.3d 291(5th Cir. 1997)(controls that relevant question)).

See also United States v. Fiore, 984 F.2d(1st Cir. 1991); United States v. Richardson, 958 F.3d 151 (2d Cir. 2020); United States v. Racepp, 677 F.3d 756(7th Cir. 2012); United States v. Mendoza-Figueonoa 65 F.3d 691, 694(8th Cir. 1995); United States v. Shumate, 329 F.3d 1026(9th Cir. 2003); and United States v. Smith, 54 F.3d 690,693(11th Cir. 1995), all of which establish and control the legal question of whether a violation of Section §846 of Title 21, will support the Career Offender in the relevant circuits.

However, see and compare the following decisions. Petitioner meets his burden here by spotlighting the deep circuit split that has developed as a result of en banc courts overruling historical case law such as Lightbourn. See CF. United States v. Nasir, 982 F.3d 144, 160(3d Cir. 2020)(en banc) overruling United States v. Hightower, 25 F.3d 182 (3d Cir. 1994) in regard to whether the Sentencing Commission adding conspiracy to the USSG text should be given deference relying on Kiser v. Wilkie, 139 S.Ct. 204 (2019)(clarifying the standard to be used to determine whether to defer to an agencies interpretation) to "reevaluate [] its decision in Hightower: see United States v. Whitley, 737 F.App'x 147, 148-49(4th Cir. 2018)(per curiam)(finding §846 does not qualify as Career Offender predicate, effectively overruling United States v. Kennedy, 32 F.3d 876, 888(4th Cir. 1994). See United States v. Havis, 927 F.3d 382(6th Cir. 2019)(en banc)(finding USSG §4B1.2 Cmt.App. n.1, the Commissions definition of a Controlled Substance Offense in USSG §4B1.2 deserved no deference...) overruling United States v. Evans, 699 F.3d 858(6ht

Cir. 2012); see United States v. Martinez-Cruz, 836 F.3d 1305(10th Cir. 2016)(finding §846 was not a categorical match for the generic definition of conspiracy); and United States v. Crooks, 997 F.3d 1273 (10th Cir. 2021)(applying rationale of Martinez-Cruz to invalidate Career Offender on basis of instant offense of a violation of §846). See also United States v. Winstead, 890 F.3d 1082(D.C.Cir. 2018)(finding as a matter of Law, defendant received ineffective assistance at sentencing and his sentence as a Career Offender on basis of conspiracy was improper).

These decisions, conflicting with the ones discussed above, would establish grounds for this Courts review to answer the important question presented. Moreover, due to a majority of the conflicts being consequences of en banc courts overruling historical precedent such as Lightbourn, the Court should Grant Writ of Certiorari to anchor the Federal Sentencing to a United States Sentencing Guidelines that is uniformly being applied.

If the Court needs additional evidence that review is warranted, not only have the circuits split on the issue, at least 2 Circuit Court panels forced to follow historical case law, noted that it disagreed with that panel. See e.g. United States v. Lewis, 963 F.3d 116(1st Cir. 2020)(pointing out the issue was foreclosed, but placing emphasis on the fact controlling circuit law does not say how the panel would rule today on a clean slate). See Id., concurring opinion by Torruella and Thompson (noting if the Court were free to do so....[the court would follow the Sixth and D.C. Circuits lead and hold that Note 1's explanation of

to include conspiracies....does not warrant deference). See United States v. Crum, 934 F.3d 963(9th Cir. 2019)(stating "if we were free to do so, we would follow the Sixth and D.C. Circuits lead. In our view, the commentary improperly expands the definition of a "Controlled Substance Offense" to include offense not listed in the text of the Guidelines."). Moreover, even the en banc Court against Appellant, decided almost 20 years ago, provides support for the review, e.g., see United States v. Mendoza-Figueroa, 65 F.3d 691, 694(8th Cir. 1995)(en banc). That, now controlling decision, had a substantial number of dissenting Judges. See *Id.*, dissenting opinion by John R. Gibson, Senior Circuit Judge, joined by McMillan and Morris Sheppard Arnold, Circuit Judges (concluding that the Sentencing Commission exceeded its statutory authority by including a drug conspiracy offense in the definition of the Career Offender). Accordingly, this Court should Grant review to uniform the Circuits as to this important question.

CONCLUSION

The Court should Grant Review to Strengthen the Ship of Federal Sentencing to its Anchor for a Unified Applied Sentencing Guidelines.

The petition for a writ of certiorari should be granted.

Respectfully submitted,



John Homer Legros Jr.

Date: 12/10/2022