No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

DERRICK STEWART,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

PARRISH KRUIDENIER DUNN GENTRY
BROWN BERGMANN & MESSAMER, L.L.P.

Jessica Donels
Counsel of Record
2910 Grand Avenue
Des Moines, Iowa 50312
Telephone: (515) 284-5737
Facsimile: (515) 284-1704
Email: jdonels@parrishlaw.com

QUESTION PRESENTED FOR REVIEW

Whether trial counsel's failure to utilize existing precedent to challenge the application of a sentencing enhancement pursuant to 21 U.S.C. § 851 constitutes ineffective assistance of counsel.

RELATED PROCEEDINGS

I. *United States v. Derrick Stewart*, S.D. Iowa No. 3:17-CR-24; Judgment entered March 19, 2018.

II. *United States v. Derrick Stewart*, No. 18-1616, 761 Fed. Appx. 659 (8th Cir. Mar. 13, 2019).

III. *Derrick Stewart v. United States*, No. 4:19-cv-00392, 552 F. Supp. 3d 834 (S.D. Iowa Aug. 6, 2021).

IV. *Derrick Stewart v. United States*, No. 21-2791, 2022 WL 3135296 (8th Cir. Aug. 5, 2022); petition for rehearing and rehearing en banc denied October 5, 2022.

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OPINIONS BELOW

On August 5, 2022, the Eighth Circuit affirmed the district court for the Southern District of Iowa's ruling on Stewart's motion for habeas corpus, filed pursuant to 28 U.S.C. § 2255. *United States v. Stewart,* No. 21-2791, 2022 WL 3135296 (8th Cir. Aug. 5, 2022). (App. 2).[1] The petition for panel rehearing/rehearing en banc was denied October 5, 2022. (App. 30).

JURISDICTION

Jurisdiction of the district court was pursuant to 28 U.S.C. § 2255. Jurisdiction of the Eighth Circuit was pursuant to 28 U.S.C. § 2253. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

[1] "App.___" refers to the attached appendix.

STATUTORY PROVISIONS

28 U.S.C. § 2255

(a) 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 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.

(b) 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 a new trial or correct the sentence as may appear appropriate.

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

(d) 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.

(e) 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, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

(f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of –

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to make a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

(g) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain –

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

The following additional statutory provisions are contained in the appendix at App. 58: 21 U.S.C. § 802(17)(D); 21 U.S.C. § 802(44) (2018); 21 U.S.C. § 841(b)(1)(A) (2018); 21 U.S.C. § 851; 720 ILCS § 570/402(c) (2000); 720 ILCS § 570/206(b)(4) (2000).

STATEMENT OF THE CASE

1. The Criminal Case.

Stewart was charged by indictment on April 19, 2017, with:

> Count 1: conspiracy to manufacture, distribute, and possess with intent to distribute 1,000 grams or more of a mixture and substance containing a detectable amount of heroin, in violation of 21 U.S.C. §§ 841(A)(1), (B)(1)(A), 846 and 851;
>
> Count 2: possession with intent to distribute heroin, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C);
>
> Count 3: possession of a firearm in furtherance of drug trafficking, in violation of 18 U.S.C. § 924(c); and
>
> Count 4: felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2).

Regarding Count 1, the Government filed a notice pursuant to 21 U.S.C. § 851 that it intended to seek an increased penalty due to his criminal history involving at least one "felony drug offense." At the time of Stewart's conviction in 2019, a "felony drug offense" was "an offense that is punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances." 21 U.S.C. § 802(44) (2018).

The prior conviction occurred in Illinois, in 2000, pursuant to 720 ILCS 570/402(c) (2000). At the time, 720 ILCS 570/402(c) was a residual or catch-all clause, providing that a person in possession of "an amount of a controlled substance not set forth in [the remainder of the statute] is guilty of a Class 4 felony." 720 ILCS 570/402(c) (2000). A "controlled substance" under Illinois law included any "drug, substance, or immediate precursor" listed in the Schedules of the Illinois Controlled

Substances Act ("CSA"). 720 ILCS § 570/102(f) (2000).

The Presentence Investigation Report (PSR) described the conviction as follows:

49.	03/24/2000 (Age 31)	Ct. 1: Possession Controlled Substance Ct. 2: Possession of Less than 2.5 Grams of Cannabis/Illinois Circuit Court for Rock Island County; Dkt. #2000CF259	6/29/00: Ct. 1, pled guilty, 24 moths' conditional discharge, $150 fine, Ct. 2, dismissed; Discharge date unknown	4A1/1(c)	1

Attorney representation is unknown.

According to the supplemental report, on March 24, 2000, LEO initiated a traffic stop on the defendant for loud music. A basic inventory of the vehicle revealed a straw and tin foil LEO believed to be utilized to snort narcotics in clear sight. Upon opening the tin foil, LEO discovered cocaine. A search of the vehicle also revealed 2.7 grams of marijuana.

The probation office has no information regarding the defendant's conduct while on conditional discharge.

(PSR ¶ 49). Stewart's attorney did not object to the enhancement. (Civ. Doc. No. 7 ¶ 44, App. 45).

Stewart pled guilty to Counts 1 and 3 of the Indictment, under the condition that he could appeal an adverse ruling on a motion to suppress. *See, e.g.*, *United States v. Stewart*, 761 Fed. Appx. 659 (8th Cir. 2019). Although the PSR writer recommended a guidelines' sentence of 210 to 262 months on Count 1,[2] at sentencing,

[2] Based on a base offense level of 32, plus 4 for maintaining a premises for the purposes of distributing a controlled substance and using a minor, and minus 3 for

the Court sustained Stewart's objection to an enhancement, reducing the guidelines range to 168-210 months.[3] (Sent. Tr. 13:6-25, App. 32). The guidelines range for Count 3 was a consecutive sentence of 60 months.

Although the guidelines called for a total sentence as low as 228 months (19 years, consisting of 168 on Count 1, plus 60 on Count 2), Stewart's *statutory* mandatory minimum sentence was 25 years.[4] Simply put, the Court did not want to impose this sentence. Judge Rose stated: "If I had a choice here, I would not give you a 25-year sentence, but I don't. This is what the law requires." (Sent. Tr. 19:16-17, App. 33). Stewart was sentenced to the statutory mandatory minimum sentence of 25 years. (Judgment, App. 22).

2. The Civil Case.

Stewart timely filed a pro se motion under 28 U.S.C. § 2255 on December 5, 2019. He raised two issues:

> GROUND ONE: Petitioner's sentence was enhanced pursuant to 21 U.S.C. § 851 based on an Illinois State drug offense that has been held to be categorically broader than the federal definition of a federal drug offense.
>
> GROUND TWO: Petitioner was denied the effective assistance of counsel . . . Petitioner's counsel was aware the Government had filed a 21 U.S.C. § 851 enhancement notice, Docket Entry 56, and he failed to investigate the prior conviction that was listed as the predicate prior, and then he failed to challenge the 851 predicate at the time of

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acceptance of responsibility, for a total offense level of 33, and based on a criminal history category of V.

[3] Based on a total offense level of 31, and a criminal history category of V.

[4] 20 years on Count 1 pursuant to 21 U.S.C. 841(b)(1)(A); with five years running consecutively for Count 2 pursuant to 18 U.S.C. § 924(c).

sentencing, and then did not raise the issue on appeal.

After conducting an initial review of Stewart's motion, the District Court ordered Stewart's prior counsel to submit an affidavit regarding these allegations.

Prior counsel explained that he did not object to the enhancement for a prior felony drug offense, nor did he do any research on whether it was properly applied:

> 43. In Ground Two of his Petition, Stewart claims he was denied effective assistance of counsel. Specifically, he alleges that counsel "failed to investigate the prior conviction that was listed as the predicate prior, then he failed to challenge the 851 predicate at the time of sentencing, and then did not raise the issue on appeal."
>
> 44. Stewart is correct that as counsel I did not challenge the prior conviction at sentencing or on appeal. However, I believe he is mistaken that this constitutes ineffective assistance of counsel.
>
> 45. Upon receiving the draft Presentence Report, I read it and as is my custom I sent two copies of the draft report to Stewart. One for his files and the other copy was for him to make any notes on and return to me.
>
> 46. Stewart returned the second copy to me. I then reviewed Stewart's notes, and drafted objections to the draft PSR. As part of this process, I would have reviewed in detail the entire report, including the criminal history section. I objected to, among other things portions of criminal history section and the final scoring. I spoke by phone with Stewart about the proposed objections and visited him at the Muscatine Co. Jail. I filed the objections on February 5, 2017. (Docket No. 122). My billing records reflect that I spent 0.3 hours in my initial review of the draft PSR; 0.3 hours reviewing Stewart's notes and proposed objections; 1.2 hours preparing our objections; 1.5 hours reviewing the proposed objections with Stewart at the Muscatine Co. Jail; and 0.5 hours revising the proposed objections.
>
> 47. As part of his criminal record I would have considered all possible factual and legal objections cognizable by current Eighth Circuit law. I was an am familiar with the *Johnson* and *Mathis* line of cases, having successfully attacked in another case an Armed career Criminal predicate offense. The Court there vacated the prison sentence in 2017. *See Todd Clark v. United States*, Case No. 16-CV-2034 (N.D. Ia. 2017) (Hon. Linda R. Reade). I believe my objections in Stewart's case

reflect the then-current state of Eighth Circuit law.

(Mathis Aff., ¶¶ 43-47, App. 44-45).

Before the District Court, the government argued that Ground 1 was procedurally defaulted, and Ground 2 failed on the merits because the categorical approach did not apply to determine whether Stewart's 2000 conviction under Illinois law qualified as a prior drug felony under 21 U.S.C. §§ 841(b)(1)(A) and 802(44) (2018). In the alternative, the government argued that Stewart's 2000 conviction was a categorical match to §§ 841(b)(1)(A) and 802(44). While the District Court recognized that ineffective assistance of counsel on Ground 2 could excuse procedural default on Ground 1, it held that counsel was not ineffective because the categorial approach did not apply to Stewart's prior conviction, and the 2000 conviction was properly classified as a predicate offense.

3. The Eighth Circuit Appeal

On appeal, the Eighth Circuit recognized that the categorical approach *did* apply to determine whether Stewart's conviction was appropriately classified as a predicate offense. (Op. at 2, App. 4). As discussed below, Stewart's 2000 Illinois conviction is *not* in fact a prior drug felony as defined by §§ 841(b)(1)(A) and 802(44). However, the Eighth Circuit denied Stewart's appeal on the "deficient performance" prong of his ineffective assistance of counsel claim, based on the purported existing state of the law at the time of Stewart's sentence:

> In 2008, we held that a conviction under Illinois 570/402(c), the same statute under which Stewart was convicted, was a predicate conviction to support a sentencing enhancement under § 851. *United States v. Hawkins*, 548 F.3d 1143, 1150 (8th Cir. 2008); *see also* 720 Ill. Comp. Stat. 570/402(c) (2000). Although the decision did not mention

> the categorical approach, it did look broadly at the definition of "felony drug offense" in § 802(44) to determine that the Illinois statute "fits within th[at] definition." *Id.* When Stewart was sentenced on March 19, 2018, *Hawkins* was the governing law in our circuit.
>
> More than one year after Stewart's sentencing, we held that the categorical approach should be used to determine whether a statute qualifies as a predicate conviction under certain federal sentencing enhancement schemes, including the Controlled Substances Act ("CSA"). *United States v. Boleyn*, 929 F.3d 932, 936 (8th Cir. 2019). We evaluate counsel's performance from counsel's perspective at the time and ignore the "distorting effects of hindsight." *Love v. United States*, 949 F.3d 406, 410 (quoting *Davis v. United States*, 858 F.3d 529,534 (8th Cir. 2017)); *see Brown v. United States*, 311 F.3d 875, 878 (8th Cir. 2002) ("[C]ounsel's decision not to raise an issue unsupported by then-existing precedent did not constitute ineffective assistance."). Because under the law of our circuit at the time of Stewart's sentencing his prior conviction under § 570/402(c) was a predicate conviction under § 851, Stewart's counsel did not perform deficiently.

(Op. at 2, App. 4). Rehearing by the panel and rehearing *en banc* were sought and denied on October 5, 2022.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

A United States Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

Stewart should not have been subjected to an enhanced sentence. The District Court did not want to incarcerate him for 25 years. Under a proper application of the law, as it existed at the time of Stewart's sentencing proceeding, he should have been subject to a mandatory minimum sentence of 15 years, rather than 25. 21 U.S.C. § 841(b)(1)(A). The Eighth Circuit sanctioned this result by ignoring existing precedent, within and without the Circuit, that would have demonstrated to Stewart's trial counsel the necessity of challenging this enhancement. Trial counsel *was* ineffective for failing to challenge Stewart's predicate offense under the categorical approach.

1. At the time of Stewart's Sentencing, a Circuit split, conflicting authority within the Eighth Circuit, and persuasive authority from the Seventh Circuit demonstrated the need to challenge the predicate offense.

The Eighth Circuit's statement that *United States v. Hawkins*, 548 F.3d 1143 (8th Cir. 2008) was controlling law at the time of Stewart's sentencing hearing (1) fails to acknowledge that *Hawkins* was bad law, and (2) fails to account for contradictory case law within the circuit. These factors, combined with persuasive authority from outside the circuit, would lead reasonable counsel to challenge Stewart's enhanced sentence based on the 2000 Illinois conviction.

The categorical approach is a uniform method of comparing prior offense statutes of conviction to predicate offenses statutes, to determine whether an offender was convicted of a predicate offense. *Hawkins* was bad law because it failed to apply the categorical approach to a scenario that clearly called for its application: a predicate offense under the CSA. This Court has long required the use of the categorical approach where there is a statutory mandatory minimum sentence to be imposed as a result of a prior conviction. In *Taylor v. United States*, 495 U.S. 575, 601 (1990), the Supreme Court noted that Congress "generally took a categorical approach to predicate offenses." The use of the word "convicted" or "conviction" in the statute triggering penalties for having a predicate offense "is the relevant statutory hook" requiring application of the categorical approach. *Moncrieffe v. Holder*, 569 U.S. 184, 191 (2013) (citing *Carachuri-Rosendo v. Holder*, 560 U.S. 563, 580 (2010)).

Using an approach other than the categorical approach to enhance a defendant's sentence for a prior conviction raises constitutional concerns. It is well established that "mandatory minimum sentences increase the penalty for a crime."

Alleyne v. United States, 570 U.S. 99, 103 (2013). Therefore, "[a]ny fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to a jury and found beyond a reasonable doubt." *Id.* The existence of a prior conviction has long been held to be the exception to the rule *because of* the use of the categorical approach. *Id.* at 111 n.1; *see also Almendarez-Torres v. United States*, 523 U.S. 224 (1998); *Shephard v. United States*, 544 U.S. 13, 25 (2005). Applying the categorical approach to sentencing enhancements ensures that the sentencing court considers only those facts which were necessarily submitted to a jury and proved beyond a reasonable doubt, or otherwise admitted as part of a guilty plea. *Mathis v. United States*, 136 S. Ct. 2243, 2252 (2016) (in applying a statute that increases the mandatory minimum sentence for a crime, the court "cannot go beyond identifying the crime of conviction to explore the manner in which the defendant committed that offense.").

Relying on an approach other than the categorical approach also raises significant logistical concerns. This Court has observed the "practical difficulties and potential unfairness" of looking at the factual record of a defendant's conviction, rather than the statute of conviction, "are daunting." *Taylor*, 495 U.S. at 601. Looking at the facts surrounding a defendant's offense, rather than the minimum conduct required by the statute of conviction, raises the prospect of mini-trials over long-settled events at every federal sentencing hearing. *Id.* at 601-02. Nor is it satisfactory to simply allow the words used by the states to describe a particular offense to control whether a prior conviction is a predicate offense in the federal courts, because this

would lead to arbitrary application of enhanced sentences. *Id.* at 590-91 ("It seems to us to be implausible that Congress intended the meaning of 'burglary' for purposes of § 924(e) to depend on the definition adopted by the State of conviction. That would mean that a person convicted of unlawful possession of a firearm would, or would not, receive a sentence enhancement based on exactly the same conduct, depending on whether the State of his prior conviction happened to call that conduct 'burglary.'").

The Eighth Circuit has acknowledged that the CSA is subject to the same categorical approach treatment as the predicate offense enhancements contained elsewhere in the criminal code. *United States v. Boleyn*, 929 F.3d 932, 936 (8th Cir. 2019). But it is incorrect to state that *Boleyn* was the *first* Eighth Circuit case to so recognize. The *Boleyn* court certainly did not acknowledge that it was breaking new ground. The *Boleyn* court did not recognize that it was overturning precedent to the contrary, nor did it adopt a new rule. It simply applied the categorical approach as if this were the accepted standard.

In reality, there are two competing lines of cases within the Eighth Circuit: one refusing to apply the categorical approach, and one applying the approach without question. The first line begins with *Hawkins*: the Eighth Circuit declined to apply the categorical approach to the CSA. *Hawkins*. 548 F.3d at 1150. District Courts within the Eighth Circuit frequently rely on *Hawkins* to deny motions under § 2255. *See, e.g.*, *Hakim v. United States*, No. CIV 08-4097, 2010 WL 2244080, at *4 n.6 (D.S.D. Jun. 2, 2010); *United States v. Santillan*, No. 17-CV-3052-LRR, 2018 WL 8805377, at *3 (N.D. Iowa Mar. 11, 2018). But in *United States v Brown*, decided just two years

after *Hawkins*, the Eighth Circuit employed the categorical approach to determine whether an Iowa conviction for a "simulated controlled substance" qualified as a felony drug offense under § 802(44). 598 F.3d 1013 (8th Cir. 2010). *Brown* has since been relied upon within the circuit to justify the use of the categorical approach to determine whether an offense qualifies as a predicate offense under the CSA. *See, e.g.*, *United States v. Ford*, 888 F.3d 922 (8th Cir. 2018). The Eighth Circuit has never acknowledged the conflicting lines of cases. Nor has the Eighth Circuit spent much time analyzing the import of applying the categorical approach or some other method.

Outside of the Eighth Circuit, the issue is more clearly developed. The First, Fourth, Fifth, Seventh, and Ninth Circuits have all been applying the categorical approach to prior drug felonies under the CSA (all but one of these *before* Stewart was convicted). *See United States v. Elder*, 900 F.3d 491, 500-01 (7th Cir.2018); *United States v. Ocampo-Estrada*, 873 F.3d 661, 667-69 (9th Cir. 2017); *United States v. Brown*, 500 F.3d 48, 59 (1st Cir. 2007); *United States v. Nelson*, 484 F.3d 257, 261 and n.3 (4th Cir. 2007); *United States v. Curry*, 404 F.3d 136, 319 n.5, 320 (5th Cir. 2005). Only the Sixth Circuit has explicitly rejected the categorical approach in CSA cases, stating blandly that "section 802(44) defines 'felony drug offense' broadly to encompass any offense that prohibits or restricts conduct relating to narcotic drugs,'" therefore it should be treated differently from other statutes which create penalties based on prior convictions. *United States v. Soto*, 8 Fed. Appx. 535, 541 (6th Cir. 2001). *Soto* is comparable to *Hawkins*: both lack significant constitutional or statutory analysis of why the categorical approach is inappropriate.

The Eighth Circuit's ruling that trial counsel's failure to object was not ineffective was based on timing: *Hawkins* controlled, and *Boleyn* had not yet been decided. (Op. at 2, App. 4). But the above analysis demonstrates that this conclusion is incorrect. *Hawkins* was not the final word: there were inconsistent panel decisions within the Eighth Circuit (*Hawkins* and *Brown*), and no real analysis between the two decisions to help practitioners understand which was correct. There was persuasive authority from outside of the circuit indicating that *Brown*, 598 F.3d 1013, was correct. The constitutional and statutory analysis support *Brown's* approach. While trial counsel is not ineffective for merely failing to "anticipate a rule of law that has yet to be articulated by the governing courts," *Ragland v. United States*, 756 F3d. 597, 601 (8th Cir. 2014), Stewart's trial counsel did not need to be clairvoyant to piece together an argument based on:

(1) The constitutional, statutory, and logistical necessity of applying the categorical approach to CSA cases. *See, e.g.*, *Moncrieffe*, 569 U.S. at 191; *Alleyne*, 570 U.S. at 103; *Almendarez-Torres*, 523 U.S. 224; *Shephard*, 544 U.S. 13; *Mathis*, 136 S. Ct. 2243;

(2) In-circuit authority applying the categorical approach to CSA cases. *See, e.g.*, *Brown*, 598 F.3d 1013; *Ford*, 888 F.3d 922.

(3) Out-of-circuit authority applying the categorical approach to CSA cases. *See, e.g.*, *Ocampo-Estrada*, 873 F.3d at 667-69 (9th Cir. 2017); *Brown*, 500 F.3d at 59; *Nelson*, 484 F.3d at 261 and n.3; *Curry*, 404 F.3d at 319 n.6, 320.

See, e.g., *Prichard v. Lockhart*, 900 F.2d 352, 354 (8th Cir. 1993) (counsel is ineffective when they ignore the plain language of statutes or directly analogous case precedent); *United States v. Moss*, 252 F.3d 993, 1003 (8th Cir. 2001) (a claim was "reasonably available to counsel," where the claim had been repeatedly rejected, but "defense counsel often challenged" the contrary controlling case law "and several commentators, and courts, had adequately set forth the legal basis" for the claim).

This is where the Eighth Circuit has departed so far from the usual course of judicial proceedings as to demand an exercise of this Court's supervisory powers. Counsel's representation of a criminal defendant is deficient when it falls below an objective standard of reasonableness. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). Failing to object to an inapplicable sentence enhancement is a "viable and significant ineffective assistance of counsel claim." *Dretke v. Haley*, 541 U.S. 386, 394 (2004). Reasonable trial counsel would have fought to protect Stewart from a statutory mandatory minimum 10 years longer than what he had otherwise earned. Stewart's trial counsel had all the tools he needed to challenge *Hawkins*, and no reason not to do so. The timing of the *Boleyn* case cannot excuse this oversight.

2. <u>There is no dispute Stewart was prejudiced by this error. Justice demands the Eighth Circuit exercise its supervisory authority to correct this error.</u>

Under the categorical approach, courts look solely to whether the elements of the crime of conviction match the elements of the federal recidivism statute. *Taylor*, 495 U.S. at 600-01. The application of the categorical approach to Stewart's 2000 Illinois conviction is straightforward. The 2000 version of 720 ILCS § 570/402(c) prohibits substances that are not prohibited under the CSA, because Illinois' schedule

of cocaine is broader than the federal definition of cocaine. Specifically, Illinois' schedule of controlled substances defined cocaine as:

> Coca leaves and any salt, compound, isomer, derivative, or preparation of coca leaves including cocaine or ecgonine, or preparation thereof which is chemically equivalent or identical with any of these substances, but not including decocainized coca leaves or extractions of coca leaves which do not contain cocaine or ecgonine (for the purpose of this paragraph, the term "isomer" includes optical, *positional*, and geometric isomers).

720 ILCS 570/206(b)(4) (2000) (emphasis added). By contrast, with respect to cocaine, federal law defines "isomers" to include only optical and geometric isomers, *not* positional isomers. *See* 21 U.S.C. §§ 802(14), and 802(17)(D). Because Stewart could have been convicted of a felony for possessing positional cocaine isomers under State law, but not under federal law, his Illinois 2000 conviction is not a categorical match to the federal definition of a prior drug felony, and his sentence cannot be enhanced. *United States v. Ruth*, 966 F.3d 642, 647-48 (7th Cir. 2020). He was subject to a 10-year, rather than 20-year, mandatory minimum sentence on Count 1. The record clearly demonstrates that the District Court would have sentenced Stewart to less than 25 years if it was permitted to do so. (Sent. Tr. 19:16-17, App. 33).

CONCLUSION

Stewart's trial counsel made a costly mistake. He ignored a plethora of authority that would have saved his client 10 years off of a mandatory minimum sentence. The Eighth Circuit has glossed over that mistake by misreading its own case law and ignoring controlling authority from this Court. Stewart respectfully requests that his petition for writ of certiorari be granted, so that this Court may exercise its supervisory authority and correct this error.

PARRISH KRUIDENIER DUNN GENTRY
BROWN BERGMANN & MESSAMER, LLP
Jessica Donels
2910 Grand Avenue
Des Moines, Iowa 50312
Telephone: (515) 284-5737
Facsimile: (515) 284-1704
Email: jdonels@parrishlaw.com