

22-7461

NO.

IN THE
SUPREME COURT OF THE UNITED STATES

ORIGINAL

DETRICK DEVONE DAYE,

Petitioner,

vs.

UNITED STATE OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE
FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI
FROM DETRICK DEVONE DAYE

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QUESTION(S) PRESENTED

I

Whether the new statutory definition of the term "serious drug felony" set forth in Section 401(a)(1) of the First Step Act of 2018, and codified in 21 U.S.C. §802(57), would also apply when deciding whether a prior drug conviction would qualify as a predicate offense to support a career offender designation and enhancement of a defendant under U.S.S.G. §4B1.1.

II

Whether trial and appellate counsels rendered ineffective assistance in violation of the Defendant's Constitutional rights when both counsels failed to argue that the defendant's two prior state controlled substance offenses did not qualify as predicate offenses to support a career offender designation and enhancement of the defendant under that section of the Guidelines.

LIST OF PARTIES

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

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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.

OPINION BELOW

The opinion of the United States Court of Appeals appears at Appendix: "A", to the petition and is an unpublished opinion. See *United States v. Detrick Devone Daye*, No. 22-6661 (4th Cir. Feb. 8, 2023).

The opinion of the United States District Court appears at Appendix: "B", to the petition.

JURISDICTION

The date on which the United States Court of Appeals denied the case was on February 8, 2023.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT VI : In all criminal prosecutions, the accused shall enjoy the right to ...have the Assistance of Counsel for his defense.

First Step Act of 2018, Pub. L. 391, 132 Stat. 51 94, §401(a)(1), codified in 21 U.S.C. §802(57):

(57) The term "serious drug felony" means an offense described in section 924(e)(2) of Title 18, United States Code, for which---

- (A) the defendant served a term of imprisonment of more than 12 months, and
- (B) the offender's release from any term of imprisonment was within 15 years of the commencement of the instant offense.

STATEMENT OF THE CASE

District Devone Daye was indicted on March 28, 2018 in counts 1 through 8 of the indictment. (DE1). He was arrested on April 4, 2018. (DE6). A notice of appearance was filed by appointed Federal Public Defender Diana Helena Pereira in April 5, 2018. (DE11). Ms. Pereira filed a motion requesting discovery. (DE12). On July 19, 2018, attorney Joel Merritt Wagoner filed a notice of appearance on behalf of Mr. Daye. (DE22). On July 20, 2018, the court granted Ms. Pereira's motion withdrawing from the case. (DE24,25,26).

On November 5, 2018, after arraignment, and on advise of Mr. Wagoner, Mr. Daye entered an open plea without the benefit of a plea agreement, pleading guilty to conspiracy to possess with intent to distribute an undetermined quantity of heroin and fentanyl, in violation of 21 U.S.C. §846, Count One: and six counts of distribution of an undetermined quantity of heroin in violation of 21 U.S.C. §841, Counts 2 through 7; and one count of possession with intent to distribute an undetermined quantity of heroin, and fentanyl, in violation of 21 U.S.C. §841, Count 8. (DE1&32). Sentencing was set for February 19, 2019. The court ordered a Presentence Investigation Report ("PSR"). (DE33).

For purposes of calculating the Guidelines, probation grouped all counts together, 1 through 8, and determined that the offense level determination is made on the basis of the quantity of the substances involved. (PSR, ¶60). Probation concluded the base offense level for violation of 21 U.S.C. §846 is found in U.S.S.G. §2D1.1. Based on the conversion of the controlled substances involved after converting them to marijuana, Probation concluded the base offense level is 12, according to U.S.S.G. §2D1.1(c)(15). The quantities of narcotics involved are as follows:

| <u>DRUGS</u> | <u>MARIJUANA</u> |
|-----------------------------------|------------------|
| Fentanyl 0.2 grams..... | 500 grams |
| Fentanyl Analogous 1.0 grams..... | 2.5 Kilograms |
| Heroin 1.53 grams..... | 1.53 kilograms |
| Total of drug conversion | 4.53 kilograms |

Probation further determined that Mr. Daye's Criminal History Category ("CHC"), was III, and that a base offense level of 12 with a CHC of II, resulted in a Guideline sentencing range of 15 to 21 months of imprisonment. Probation however, determined that Mr. Daye is a career offender under U.S.S.G. §4B1.1, because he was at least 18 years old at the time of the instant offense of conviction, the instant offense is a felony that involves a controlled substance offense, and the defendant has two prior felony convictions for a controlled substance offense in cases No. 15-CRS-60771, from North Carolina, for delivery of heroin in which the defendant was sentenced to 12 to 24 months in custody, sentence suspended, and instead a 30 month period of probation was imposed; and Case No. 16-CRS-55013, also from North Carolina, in which the defendant was sentenced to 11 to 23 months in custody, with a suspended sentence, and instead a \$400.00 restitution fine, and a 24 month period of probation was imposed.

Probation increased the offense level from 12 to 32, an increase of 20 levels, because the statutory maximum of the instant offense was a term of imprisonment of 20 years or more, but less than 25 years as determined by U.S.S.G. §4B1.1(b)(3). (PSR ¶67). It then decreased the offense level by 3-levels for acceptance of responsibility and a timely pleading guilty under §§E1.1(a)&(b) (PSR, ¶69). Probation concluded that the total offense level was 29 with a CHC of VI, as required by §4B1.1, for career offender defendants. This calculation resulted in a Guideline sentencing range of 151 to 188 months. (PSR, ¶72).

During a sentencing hearing on May 22, 2019, the court noted that, "there is no objections to the PSR from either the government or the defendant". The Court nevertheless, asked defense counsel Mr. Wagoner, whether he had any objections to the presentence report and counsel responded, "Your Honor, may it please the court, no objections to the report from the defense". (DE52:5). The court then adopted the PSR's findings, and it held that the total offense level was 29, with

with a CHC of VI, as a career offender defendant, and with an advisory career offender sentencing range of 151 to 188 months. The court then asked defense counsel whether he had any objections to the career offender advisory Guideline range, to which counsel responded: "No Your Honor, we do not object to that guideline range". (DE52:5).

After hearing from both parties regarding Mr. Daye's offense, and addressing the sentencing factors in 18 U.S.C. §3553(a), the court sentenced Mr. Daye as a career offender to a term of 162 months on each of counts 1 through 8, to run concurrently, and a 3-yr term of supervised release.

A notice of appeal was timely filed. Appellate counsel argued on appeal whether Mr. Daye's sentence was reasonable. The court of appeals denied the appeal and affirmed Mr. Daye's sentence. Mr. Daye filed a motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. §2255, in which he argued that trial counsel was ineffective for failing to object to the PSR's and the district court's designation as a career offender where none of his two prior state drug convictions qualified as predicate offenses to support the career offender designation. He further argued that both trial and appellate counsels were ineffective for failing to research and argue the changes in law brought about by the First Step Act of 2018, which invalidated the use of the two prior state drug convictions to designate him as a career offender. The district court however, denied the motion on April 6, 2022.

A timely notice of appeal was filed and Mr. Daye filed a motion for a Certificate of Appealability. On February 8, 2023, the Court of Appeals for the Fourth Circuit in an unpublished decision, denied the COA petition holding it had reviewed the record and concluded that Mr. Daye had not met the requisite showing. See *United States v. Daye*, No. 22-661, (4th Cir. Feb. 8, 2022). This petition for a writ of certiorari ensue.

REASONS FOR GRANTING THE PETITION

A. The two state prior drug convictions used to designate Mr. Daye as a career offender under §4B1.1 of the Guidelines do not qualify as predicate offenses to support such designation under the new definition of serious drug felony set forth in §401(a)(1) of the First Step Act.

Defendant Devone Daye plead guilty to one count of conspiracy to possess with intent to distribute heroin and fentanyl; six counts of distribution of heroin; and one count of possession with intent to distribute a quantity of heroin and fentanyl, all in violation of 21 U.S.C. §§846, 841(b)(1)(C). The total quantity of narcotics when converted to marijuana yielded a total of 4.53 kilograms of marijuana, resulting in an offense base level of 12, with a CHC of III, and a sentencing range of 15 to 21 months of imprisonment.

Mr. Daye however, was designated as a career offender based on two North Carolina state prior drug convictions for which he never served any time in prison because the sentences in both of those cases was suspended and replaced with a period of probation. The career offender designation resulted in an increase in the Guideline table of 20 levels placing his base offense level at 32, from which 3-levels were reduced for pleading guilty and acceptance of responsibility, resulting in an offense level of 29 with a CHC of Six, and a sentencing range of 151 to 188 months. An increase of 136 months to the lower level of his original guideline and of 167 to the higher range of the original guideline range of 15 to 21 months. Mr. Daye was ultimately sentenced to 162 months on each count running concurrently, resulting in an increase of 147 months of imprisonment from the lower range of his original guideline range, and 141 months from the upper range.

During his motion to vacate, set aside or correct sentence, he challenged the use of these two state prior drug convictions to designate him as a career offender and the fact that his attorney, both trial and appellate, were ineffective in failing to object and challenge his career offender designation on the basis of these two prior state drug convictions.

Now, Mr. Daye seeks this Court's determinaiton as to whether the new definition of the term "serious drug offense", would also apply to the career offender Guidelines when deciding whether a prior drug conviction would qualify as a predicate offense to support the career offender designation of a defendant, because if it does, none of the two prior drug convictions used to enhance Mr. Daye's sentence would qualify as predicate offenses to support the career offender enhancement because he never served any time in prison for those offenses.

In 28 U.S.C. §994(h), Congress directed the Sentencing Commission to ensure that the Guidelines specify a sentence for categories of defendant's who have previously been convicted of two or more prior felonies. Section 994(h) reads as:

(h) 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) had been convicted of a felony that is--

(A) a crime of violence;

(B) an offense described in section 401 of the Controlled Subsntace Act (21 U.S.C. §841)...

(2) has previously been convicted of two or more prior felonies, each of whic is--

(A) a crime of violence; or

(B) an offense described in Section 401 of the Controlled Substance Act (21 U.S.C. §841)...

At the time Congress enacted the Guidelines Section 401 of the Controlled Substance Act codified as 21 U.S.C. §802(44), described a felony drug offense as:

(44) The term "felony drug offense" means an offense that is punishable by imprisonment for more than one year under any law of the United States, or restricts conduct relating to narcotic drugs, marihuana, anabolics, or depressants or stimulant substances.

The language used by the Sentencing Commission to define a career offender largely tracks the criteria set forth in §994(h), and the language used to define the term "controlled substance offense" or "felony drug offense", also largely tracks the definition of that term found in Section 401 of the Controlled Substance

Act and codified in 21 U.S.C. §802(44). Section 4B1.1 of the Sentencing Guidelines, the career offender Guideline, reads as follows:

(a) A defendant is a career offender if: (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

In Section 4B1.2 the Commission provided the definition of the term used in §4B1.1. The term felony drug offense or felony controlled substance offense, is defined in §4B1.2 as:

(b) The term controlled substance offense means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or counterfeit substance), or the possession of a controlled substance (or counterfeit substance), with intent to manufacture, import, export, distribute or dispense.

In §401 of the First Step Act of 2018, Pub. L. No. 391, 132 Stat. 5194 (Dec. 21, 2018), Congress amended and changed the definition of "felony drug offense" to read as follows:

(57) The term "serious drug felony" means an offense described in section 924(e)(2) of Title 18, United States Code, for which--

- (A) the defendant served a term of imprisonment of more than 12 months, and,
- (B) the offender's release from any term of imprisonment was within 15 years of the commencement of the instant offense".

Codified in 21 U.S.C. §802(57). Title 18 U.S.C. §924(e)(2), describes the term serious drug felony as:

(2) As used in this subsection--

(A) the term serious drug offense means--

(i) an offense under the Controlled Substance Act (21 U.S.C. §801 et seq), the Controlled Substance Import and Export Act (21 U.S.C. §951 et seq), or Chapter 705 of Title 46, for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under state law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substance Act

(21 U.S.C. §802(l)), for which a maximum term of imprisonment of ten years or more is prescribed by law.

Prior to the First Step Act, any prior drug conviction that had become final that was punishable for more than one year under federal or state law, regardless of the actual sentence imposed, the time served in prison by the defendant, or the age of the offense, would qualify as a predicate offense for the statutory career offender sentencing enhancement under 21 U.S.C. §841 and §851. Congress however, recognized the draconian nature of the sentences imposed for prior drug felonies under the statutory career offender enhancement and changed the definition in 21 U.S.C. §802(44), and held that only "serious drug felonies" as defined in 18 U.S.C. §924(e)(2) for which the offender had served a term of imprisonment of more than 12 months and for which the offender's release from any term of imprisonment was within 15 years of the commencement of the instant offense, would qualify for the purposes of enhancing sentences for prior drug felony. See First Step Act, at §401(a)(1)(57), and 21 U.S.C. §802(57).

At the time Congress enacted the Guidelines, the wording used to describe the term "controlled substance offense" as used in the career offender Guideline, and defined in §4B1.2(b) of the Guidelines, tracked the language used in 21 U.S.C. §802(44). Thus, because the career offender guideline is the counterpart of the statutory sentencing enhancement in §841, and because both use the same language to decide when a prior felony drug conviction would qualify for purposes of the sentencing enhancement, if Congress changed the statutory language for the statutory enhancement, such change in language should also apply to the Guidelines career offender definition of controlled substance offense when deciding whether a prior drug conviction would qualify as a predicate offense to designate the defendant as a career offender.

By changing the definition of felony drug offense found in §802(44), to the new definition in §401(a)(1) of the First Step Act, codified in 21 U.S.C. §802(57), Congress restricted the use of prior convictions to enhance a defendant's sentence

to offenses described in 18 U.S.C. §924(e)(2). Because the career offender guideline's definition for prior drug felony offenses suffers from the same infirmity as the statutory sentencing enhancement for prior drug felonies found in §841 before Congress changed the definition, such language change should also extend and apply when deciding whether a prior conviction would qualify as a predicate offense to support a sentencing enhancement under the career offender guideline.

The title used by Congress to define §401 of the FSA speaks for itself. "Reduce and Restrict Enhanced Sentencing for Prior Drug Felonies". Congress did not specifically state that the change in definition of drug felonies made in §401 of the FSA, solely applied to the statutory enhancement in 21 U.S.C. §841.

While some courts are of the opinion that §401(a)(1) of the FSA did not change the definition of offenses qualifying for career offender under §4B1.2(b) of the Guidelines, see United States v. Lucena, 2022 U.S. Dist. LEXIS 34991, No. 3:99-CR-30216-DWD, at ¶10 (S.D. Ill. Feb. 28, 2022), and other courts hold that a controlled substance offense under the Guidelines is not the same as a serious drug felony in 21 U.S.C. §802(57), because the latter only applies to the sentencing enhancements for offenses that fall under 21 U.S.C. §841(b)(1)(A)&(B), see United States v. Allen, 2021 U.S. Dist. LEXIS 133186, No. 4:13-CR-0024, at *5 (W.D. Va. July 16, 2021), the fact is that while §401(a)(1) does not reference the guidelines definition of controlled substance offense in §4B1.2(b), neither does it state that a controlled substance offense for purposes of an enhanced sentence under §4B1.1 is a different offense from a controlled substance offense described in §401(a)(1)(57), nor does it state that such definition would solely apply to the sentencing enhancements for prior drug felonies under 21 U.S.C. §841. Congress intent is specifically defined in the title it gave to §401 of the FSA, that is "Reduce and Restrict Enhanced Sentencing for Prior Drug Felonies", generally.

When amending a statutory provision it is not Congress job to specify that such change in law to such statutory provision would also apply to the Sentencing

Guidelines. Congress delegated this task to the Sentencing Commission. It is the Sentencing Commission who is responsible for making the necessary changes to the Guidelines for such to comport to statutory changes, specifically, when, in United States v. Booker, 543 U.S. 220 (2005), this Court rendered the Sentencing Guidelines as advisory and no longer mandatory. A good example is the changes made by Congress in §603(b) of the FSA to 18 U.S.C. §3582(c)(1)(A), the compassionate release statute. There, Congress did not state that such changes also applied to the compassionate release Guideline in §1B1.13 of the Guidelines, nor did it directed the Sentencing Commission to promulgate the necessary changes to the compassionate release Guideline to comport to the statutory changes made by §603(b) of the FSA.

Circuit courts nationwide faced with this dilemma from the First to the Tenth Circuit, and the District of Columbia, held that the Sentencing Commission Policy Statement for compassionate release in §1B1.13, did not apply to motions for compassionate release filed by defendants under the new statutory changes made by §603(b) of the FSA, because the policy statement was inconsistent with the changes made by Congress to the compassionate release statute. Only the Eleventh Circuit disagreed with this reasoning. Because the Sentencing Commission is responsible to amend the Guidelines, recently they published their proposed changes to the compassionate release guideline to bring such guideline to comport with the statutory changes made by Congress to the statute. The career enhancement under §4B1.1, should not be treated any different.

Courts have determined that because the Guidelines are advisory and are written by the Sentencing Commission, they are akin to an agency regulation and not a statute. In Kisor v. Wilkie, 139 S. Ct. 2400, 204 L. Ed 2d 841 (2019), this Court explained the deference due to an agency regulation which also applies when interpreting the Guidelines. This Court instructed that when interpreting a regulation [or Guideline], a court must consider the text, structure, history, and purpose of the regulation and must exhaust all traditional tools of construction. Id, at 139 S. Ct. 2414-15.

guidelines when considering the factors in 18 U.S.C. §3553(a). While this case was in the context of compassionate release, nevertheless, the court recognized that the changes made by §401(a)(1), also applied to the career offender guideline when deciding whether a prior drug offense would qualify as a predicate offense to support a career enhancement under §4B1.1.

Here, Mr. Daye was sentenced on May 22, 2019, at least five months after the enactment of the First Step Act, thus, these changes in law should have applied to his case by virtue of §401(a)(1)(c), which holds that the amendments made by that section shall apply to any offense that was committed before the date of the enactment of this Act, if a sentence for the offense has not been imposed as of such date of enactment.

By enacting §401(a)(1) of the FSA, it is clear that Congress intended to narrow the broad definition used to define a prior controlled substance offense of conviction to drug offenses for which the offender served a sentence of more than 12 months, as opposed to a drug offense punishable for more than one year regardless of the time served by the defendant. Thus, because the statutory language will control over the Guidelines it must be presumed that Congress intended this change in definition narrowing the type of controlled substance offense that would qualify for the purposes of sentencing enhancements by use of prior drug felony convictions, to also apply to §4B1.1 of the Guidelines. In sum, as this Court has previously held, the statutory language supersedes the Guidelines.

Because this is one issue that affects a myriad of defendants and there seems to be a split in the circuits as to the application of §401(a)(1) to the career offender Guideline, this Court should grant certiorari in this case and decide whether the change in definition to controlled substance offenses implemented by Congress in §401(a)(1) of the First Step Act, would also apply when deciding whether a prior controlled substance conviction of a defendant would qualify as a predicate offense to support a sentencing enhancement under §4B1.1 of the Guidelines.

B. Under the categorical approach devised by this Court, Daye's two prior state drug convictions would not qualify as predicate offenses to support an enhanced sentence under §4B1.1 of the Guidelines.

Courts have routinely employed the categorical approach to determine whether a prior drug conviction qualifies as a predicate offense under the sentencing Guidelines. See United States v. Seay, 553 F. 3d 732, 737 (4th Cir. 2009)(citing Taylor v. United States, 495 U.S. 575, 600-02, 110 S. Ct. 2143 (1990)). As set forth by this Court the categorical approach involves two steps. First, it requires a court to distill a "generic" definition of the predicate offense. Taylor, 495 U.S. at 598. And Second, it requires the court to determine whether the conviction at issue constitutes a conviction of that generic offense. Id, at 600. This is done by comparing the elements of the generic offense to the elements of the defendant's offense of conviction. If the offense of conviction criminalizes conduct that is broader than encompassed by the generic offense, then the conviction does not categorically qualifies as a predicate offense under the Guidelines. See United States v. Norman, 935 F. 3d 232, 237 (4th Cir. 2019)(citing United States v. Chacon, 533 F. 3d 250, 254-55 (4th Cir. 2008)).

The two North Carolina state prior drug convictions at issue here are: (1) a January 7, 2018 conviction for selling and delivering one gram or less of heroin in case No. 15-CRS-60771; and (2) a July 7, 2016 conviction for possession with intent to manufacture, sell, or deliver a Schedule I controlled substance (not identified), in case No. 16-CRS-55013.

To decide whether these prior state drug convictions qualify as predicate offenses to support the career offense enhancement, the court is required to compare the elements of the prior offenses with the criteria that the Guidelines use to define a controlled substance offense. See Shula v. United States, 140 S. Ct. 779, 783, 206 L. Ed 2d 81 (2020)(asking whether the conviction meets the relevant criteria). Thus, the question is whether the elements of the two prior state drug convictions meet the criteria of the Guidelines used to define a

controlled substance offense. The court must interpret the Guidelines using all ordinary tools of statutory construction. See United States v. Rouse, 362 F. 3d 256, 262 (4th Cir. 2004). The current version of the Guidelines defines a controlled substance offense as:

[A]n offense under federal or state law punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, distribution, or dispensing of a controlled substance (or counterfeit substance), or the possession of a controlled substance (or counterfeit substance), with intent to manufacture, import, export, distribute, or dispense.

Thus, to qualify as predicate offenses the state offenses at issue here must satisfy the following criteria: (1) the offense must be punishable by imprisonment for a term exceeding one year; and (2) the offense must prohibit the manufacture, import, export, distribution, or dispensing of a controlled substance, or the possession of a controlled substance with intent to manufacture, import, distribute, or dispense.

The first criteria requires the offense to be punishable for one year or more. To make this determination courts must look to the possible penalties for the offense as provided by the state law of conviction, in this case, the North Carolina state law. But here is where the problem begins. The North Carolina statute under which Mr. Daye was sentenced sweeps broader than the generic federal offense because the statute's sentencing structure is tied to the particular defendant's criminal history, creating a type of version of sentencing enhancement in the statutory sentencing scheme which does not exist in the generic federal offense. See United States v. Simmons, 649 F. 3d 237, 243 (4th Cir. 2011)(en banc).

In Simmons, the Fourth Circuit explained that the North Carolina Structured Sentencing Act (the "Act"), creates felony sentences strictly contingent on two factors: (1) the designated class of offense; and (2) the offender's prior record level. (N.C. Stat. §15A-1340-13(b)). The Act requires the sentencing judge to match the offense class which provides three possible sentencing ranges - a mitigated range; a presumptive range; and an aggravated range. Id at 15A-1340.17(c).

The presumptive sentence governs unless the judge makes written findings that identify specific factors, designated by the Act, that permits a departure to the aggravated or mitigated sentencing ranges. See §15A-1340.13(e), and 15A-1340.16(c).

The Act provides that the judge may select from the aggravated sentencing range only if the state has provided a defendant a thirty days notice of its intent to prove the necessary aggravated factors. See §15A-1340.16(a6). Once the judge identifies the appropriate sentencing range the Act requires that he must choose the defendant's minimum sentence from within that range. *Id* at, §15A-1340.17(c). A separate statutory chart provides the defendant's maximum aggravated sentence. See §15A-1340.17(d)&(e). The Act prohibits a judge to impose a sentence higher than the ~~one~~ fixed by the statutory chart. §§15A-1340.13(b)&(c).

In this case, the offenses at issue were classified by North Carolina as class "G" felonies in violation of §90-95(A)(1) of the North Carolina Penal Code. Under North Carolina structured sentencing scheme, a class "G" felony may be punishable by a sentence exceeding 12 months of imprisonment "only" if the state satisfies two conditions: (1) the state must prove the existence of aggravated factors sufficient to warrant the imposition of an aggravated sentence. See §15A-1340.16(a); and (2) the state must demonstrate that the defendant possessed 14 or more criminal history points resulting from his prior record. See §15A-1340.17(c)&(d).

In this case, the state failed to satisfy either of these conditions. This foreclosed the sentencing judge from imposing a higher end of the sentencing range for aggravated factors. Further, the defendant possessed a prior record level of only 3 points, and the Act requires the defendant to possess 14 or more criminal history points for a sentence of more than one year. Thus, in North Carolina case No. 15-CRS-060771, the maximum sentence that could be imposed was 12 months, the defendant however, did not serve any time in prison. While the judge referenced the presumptive range of 12 months and the aggravated range of 24 months, he ultimately, complying with the NC sentencing Act suspended any sentence of imprisonment.

sonment and instead imposed a term of 30 months of probation. The same situation arose in North Carolina case No. 16-CRS-5513, in which Mr. Daye could not receive a sentence of more than 11 months which was the lower end of the range without aggravated factors. The state also failed to satisfy either of the two conditions for the aggravated sentencing range, and Mr. Daye did not possess the required 14 or more points of criminal history for an aggravated sentencing range. Again, while the judge referenced both the presumptive range of 11 months and the aggravated range of 23 months, he ultimately suspended any sentence of imprisonment and instead imposed a 24 month period of probation.

In Simmons, one of the predicate offenses used to impose a federal enhanced sentence was a North Carolina prior drug conviction for possession with intent to sell more than ten pounds of marijuana in violation of §§90-94, and 90-95(b)(2) of the North Carolina General Statute, the same section under which Mr. Daye was charged in North Carolina. Simmons' offense was classified as a class "I" felony punishable by a sentence exceeding 12 months under the North Carolina Structured Sentencing scheme "only" if the state satisfied the two conditions above referenced, the existence of aggravated factors; and the 14 or more criminal history points. The Simmons court held that because the State failed to satisfy these conditions the North Carolina offense was not punishable by more than 12 months and therefore did not qualify as a predicate offense for the sentencing enhancement.

Thus, because the North Carolina Sentencing Act criminalizes conduct broader than encompassed by the generic federal offense, the two North Carolina prior drug convictions used to enhance Mr. Daye as a career offender do not categorically qualify as predicate offenses to support the career enhancement under §4B1.1 of the Guidelines. Further, none of the two prior drug convictions at issue was punishable by more than 12 months under the North Carolina Structured Sentencing Act because the state never satisfied the two requirements for an aggravated sentence of more than 12 months.

C. Trial and appellate counsels rendered ineffective assistance in violation of the defendant's constitutional rights in failing to argue that the defendant's two prior state controlled substance offenses did not support the career offender designation under the Guidelines.

The Sixth Amendment guarantees a defendant in a criminal case the right to effective assistance of counsel to help ensure that our adversarial process produces just results. See Strickland v. Washington 466 U.S. 668, 104 S. Ct. 2052 (1984). Consequently, the Sixth Amendment requires that counsel act in the role of advocate. United States v. Cronic, 466 U.S. 648, 656 (1984). A finding of ineffective assistance ultimately will result when counsel's conduct so undermines the proper function of the adversarial process that the proceedings below cannot be relied on as having produced a just result.

To succeed in a claim of ineffective assistance of counsel a defendant must show: (1) that counsel's performance fell below the objective standard of reasonableness (the performance prong); and (2) the deficient representation prejudiced the defendant (the prejudice prong). Strickland, 466 U.S. at, 687-88. The performance prong is satisfied when counsel provides reasonable effective assistance including demonstrating legal competence, doing relevant research, and raising important issues. Id at, 687-90; see also United States v. Carthorne, 878 F. 3d 456, 458 (4th Cir. 2017). A court typically evaluates claims of ineffective assistance of counsel on collateral review, and judicial scrutiny of counsel's performance must be highly deferential. Roe v. Flores-Ortega, 528 U.S. 470, 477 (2000). However, a court's review does not countenance omissions that were outside the wide range of professional competent assistance. Strickland, 466 U.S. at 690. Competent performance is evaluated by the reference to the reasonableness of counsel's decisions under the professional norms. Padilla v. Kentucky, 599 U.S. 356, 366-67 (2010).

Applying these standards to Mr. Daye's case both counsel's performance was deficient with respect to their duty to investigate, conduct relevant research

and raising important issues that would have prevented the defendant's designation as a career offender under the Guidelines as described above. Both counsels here failed to make informed legal judgments. See Winston v. Pearson, 683 F. 3d 489, 504 (4th Cir. 2012). Counsel's ignorance regarding the changes in law made by the FSA, and how to determine whether a prior controlled substance would qualify as a predicate offense to support the career offender enhancement rendered deficient performance. Both counsels failure to perform basic research on these fundamental points of law is aquintessential example of unreasonable performance. See Hinton v. Alabama, 571 U.S. 263, 134 S. Ct. 1081, 1089 (2014); and William v. Taylor, 529 U.S. 362, 395 (2000)(holding that counsel provided ineffective assistance at sentencing because they failed to investigate records due to their mistaken understanding of state law on accessing records).

Here, trial counsel was constitutionally required to research and object when there may be relevant authority suggesting that a sentencing enahncement may be improper. See Ramirez v. United States, 799 F. 3d 845, 855 (7th Cir. 2015)(an attorney's failure to object to an error in the court's guidelines calculation that results in a longer sentence for the defendant can demonstrate constitutionally ineffective performance); also United States v. Williams, 183 F. 3d 458, 463, n.7 (5th Cir. 1999)(counsel's failure to raise a discrete, legal issue, when precedent [or change of law] is applicable, denies adequate representantion).

Both counsel's failure to do thier durty in this case rendered them legally incompetent. The right to effective assistance of counsel also extends to require such assistance on direct appeal. See Bill v. Jarvis, 236 F. 3d 149, 164 (4th Cir. 2000)(en banc); and United States v. Allmendinger, 894 F. 3d 121, 127 (4th Cir. 2018)(finding counsel was ineffective on direct appeal for failing to raise a near likelihood of success issue).

Here, trial counsel failed to raise written objections to the PSR's designation of the defendant as a career offender. During the sentencing hearing he had every opportunity to make objections to the PSR's career offender designation of the defendant, and to the court's adoption of such designation. The court advised the parties that will consider any motion that might move the sentencing range up or down. It asked counsel whether he had received a copy of the PSR and whether he had any objections. The following dialog took place between court and defense counsel.

The Court: Mr. Wagoner, is it still the case, no objections to the report from the defense.

Mr. Wagoner: Your Honor, may it please the court, no objections to the report from the defense.

The Court: Is that correct Mr. Daye?

The Defendant: Yes Sir, it is.

The Court: no objections from the government, correct?

Mr. Severo: That is correct, Your Honor.

The Court: for purposes of Booker and its progeny, the total offense level is 29, and the criminal history category is VI, the advisory guideline range is 151 to 188 months. Does the government object to that advisory guideline range.

Mr. Severo: The government does not, Your Honor.

The Court: Does the defense object to that advisory guideline range.

Mr. Wagoner: No Your Honor, we do not object to the guideline range.

See (DE52:3-6).

Counsel's failure to do his homework and object to the guideline calculation and career offender designation caused significant prejudice to Mr. Daye. As an initial matter, the base offense level was wrongfully calculated. The total amount of drugs involved in the case when converted to marijuana yielded 4.53 kilograms of marijuana. Pursuant to §2D1.1(15) of the Guidelines, 4.53 kilograms of mari-

juana would result in a base offense level of 10 (at least 2.5 KG but less than 5KG of marijuana), and not an offense level of 12 as calculated by the PSR. A base offense level of 10 and a criminal history category of III, would have resulted in a sentencing range of 10 to 16 months, and would have fallen in Zone "C" of the guideline table, in which case §5C1.1(d)&(e) of the Guidelines would have applied requiring the minimum term of imprisonment.

Further, counsel's failure to object to the career offender designation resulted in an offense level of 29 and a CHC of VI, raising the sentencing range to 151 to 188 months. Mr. Daye was sentenced to 162 months of imprisonment. This resulted in an increase of 152 months above the minimum term required by the correct guideline range, and 146 months above the maximum term under the high end of the correct Guideline range. Even accepting the PSR's erroneous calculation of the base offense level as 12, which would have resulted in a sentencing range of 15 to 21 months, Mr. Daye's career offender sentence resulted in an increase of 147 months from the lower range of that guideline, and an increase of 141 months from the upper range. Counsel's deficient performance resulted in a draconian prejudice to the defendant. This Court has repeatedly held that any increase in a defendant's term of imprisonment as the result of deficient performance may result in prejudice to the defendant. Glover v. United States, 531 U.S. 198, 200-02 (2001)(finding prejudice where a defendant's sentence was likely 6-12 months higher than it would have been under the proper guideline range calculation)

Here, Mr. Daye's sentence was increased more than ten folds from the lower end of the PSR's base offense level of 12, and about eight folds from the higher end of that guideline range. Thus, based on all of the above, both counsels in this case, that is, trial and appellate, rendered deficient performance in prejudice to the defendant.

CONCLUSION

When Congress enacted §401(a)(1) of the First Step Act of 2018, changing the definition of controlled substance offenses, whether called felony drug offenses, or serious drug felonies, Congress made no specific distinction holding that such changes would not apply to the career offender Guideline's definition of drug offenses. Clearly Congress intended to, as stated in the title given to §401(a)(1), that is, "Reduce and Restrict Enhanced Sentencing for Prior Drug Felonies". To state and hold this change in definition applies only to prior drug offenses used for enhancements under 21 U.S.C. §841, will be to undermine Congress intent.

WHEREFORE, based on the above discussions these changes in law should apply to the advisory career offender's definition of a drug felony, since as this Court has previously held, statutory law will supersede the Guidelines. For all of these reasons this Court should grant certiorari and decide whether these changes in law would also apply to the career offender definition of a prior drug felony for purposes of enhancing the sentence of a defendant as a career offender.

Respectfully submitted,



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