No. 18-188

In the Supreme Court of the United States

IVY T. TUCKER, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in determining that petitioner's counsel was not constitutionally ineffective for forgoing an objection to an enhancement of petitioner's offense level under Sentencing Guidelines § 2D1.1(a)(2), where the court found that counsel had made a "reasonable tactical decision" not to do so, Pet. App. 6a.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 889 F.3d 881. The order of the district court (Pet. App. 9a-36a) is not published in the Federal Supplement but is available at 2016 WL 6637957. A prior opinion of the court of appeals is reported at 714 F.3d 1006.

JURISDICTION

The judgment of the court of appeals was entered on May 10, 2018. The petition for a writ of certiorari was filed on August 8, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Wisconsin, petitioner was convicted of conspiracy to distribute more than one kilogram of heroin, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A) (2006). 09-cr-131 Judgment 1. The court

sentenced petitioner to 40 years of imprisonment, to be followed by five years of supervised release. *Id.* at 2-3. The court of appeals affirmed. 714 F.3d 1006. Subsequently, petitioner filed a motion to vacate his sentence under 28 U.S.C. 2255. See Pet. App. 19a. The district court denied petitioner's motion, *id.* at 9a-36a, and the court of appeals affirmed, *id.* at 1a-8a.

1. Petitioner ran a large heroin-distribution enterprise in Racine, Wisconsin. Pet. App. 10a. In 2008 and 2009, federal and state law enforcement officers used informants to make numerous controlled purchases of heroin from petitioner's organization. *Id.* at 11a. The investigation revealed that petitioner was responsible for trafficking large quantities of heroin through numerous co-conspirators. *Id.* at 11a-16a; see, *e.g.*, *id.* at 12a (describing evidence that petitioner purchased kilograms of heroin from suppliers on multiple occasions).

A federal grand jury charged petitioner with conspiracy to distribute more than one kilogram of heroin, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A) (2006). Pet. App. 9a. "Paragraph Three of the indictment included the additional allegation that 'on January 9, 2009, death resulted from the use of heroin distributed by the conspiracy.'" *Id.* at 2a (brackets omitted). That allegation related to an incident in which petitioner sold heroin to a woman named Amanda Ward, who later overdosed on the heroin and died. *Id.* at 3a.

Before trial, "[petitioner] and the government entered into a stipulation to omit all evidence of the causation of the death referenced in Paragraph Three and request that the district court decline to instruct the jury on that portion of the indictment." Pet. App. 2a. The government described the parties' agreement to the district court as follows:

> The government believes that the causation of death issue is a sentencing factor and addresses the mandatory minimum sentence in this case, which would be 20 years. The mandatory minimum of 20 years is still in play, and the government believes it's even more of a sentencing factor than an element of the offense, and the government and defense believe that it might be somewhat prejudicial to [petitioner]. Based upon the fact that we have a young female who died because of the distribution of this controlled substance—that it may be appropriate for the case to be tried on the conspiracy, and to leave the issue of causation of the overdose death or remove the causing death aspect. Include that as part of any sentencing factor * * * [in] the sentencing phase of this case.

Id. at 2a-3a (brackets and ellipses omitted). Petitioner's trial counsel informed the court that this "was a correct recitation of the parties' discussion," *id.* at 3a, and then asked the court not to instruct the jury on the causation-of-death language in Paragraph Three of the indictment, *id.* at 38a-39a.

Consistent with the parties' agreement, "the government did not present any evidence regarding a death" at trial, and the district court "omitted Paragraph Three's charge of a resulting death when it read the indictment to the jury." Pet. App. 3a. The jury found petitioner guilty of conspiracy and returned a special verdict indicating that it had found beyond a reasonable doubt that petitioner's offense involved more than one kilogram of heroin. *Ibid.*

The Probation Office prepared a presentence report in which it calculated petitioner's applicable advisory

range under the 2010 version of the Sentencing Guidelines. Presentence Investigation Report (PSR) ¶ 35. It recommended application of Guidelines § 2D1.1(a)(2), which applied "if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A) and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance," to increase petitioner's base offense level to 38. PSR ¶ 36; see Pet. App. 3a. Applying that enhancement, the Probation Office recommended a Guidelines range of 360 months to life imprisonment. Pet. App. 4a.

At the sentencing hearing, "the government presented evidence and called several witnesses to establish that the heroin [petitioner] distributed was sold to Amanda Ward, who overdosed and died." Pet. App. 3a. The district court found that "the heroin distributed by the members of the conspiracy was the proximate cause of Ward's death." *Id.* at 3a-4a. Accordingly, the court adopted the Probation Office's recommendation to apply Sentencing Guidelines § 2D1.1(a)(2) and sentenced petitioner to 40 years of imprisonment. Pet. App. 4a. Petitioner's trial counsel "did not object to the court's specific finding as to Ward's death," nor to "its adoption of the other findings in the [presentence report]." *Ibid.* The court of appeals affirmed. 714 F.3d 1006.

2. In 2014, petitioner filed a motion to vacate his sentence under 28 U.S.C. 2255. See Pet. App. 19a. As relevant here, petitioner contended that his trial counsel had rendered ineffective assistance by not objecting to the district court's consideration of evidence that petitioner's offense had caused Ward's death as a predicate to applying the offense-level enhancement in Sentencing Guidelines § 2D1.1(a)(2). See Pet. App. 4a-5a. Petitioner noted that, after he was sentenced, the Seventh

Circuit, in *United States* v. *Lawler*, 818 F.3d 281 (2016), had joined the Third, Fifth, and Sixth Circuits in holding that Guidelines § 2D1.1(a)(2) applies only "when a resulting death (or serious bodily injury) was an element of the crime of conviction, proven beyond a reasonable doubt or admitted by the defendant." Pet. App. 4a (citing *Lawler*, 818 F.3d at 285). Although *Lawler* postdated petitioner's sentencing, he argued that the state of the law in other circuits was clear and that constitutionally competent counsel would have challenged the district court's application of the enhancement where the jury had made no finding about Ward's death in his case. *Ibid.* The district court denied petitioner's motion, *id.* at 9a-36a, rejecting petitioner's claim of ineffective assistance on the view that *Lawler* was distinguishable from petitioner's case because, unlike petitioner, Lawler had pleaded guilty, *id.* at 29a.

The court of appeals affirmed. Pet. App. 1a-8a. The court determined that petitioner had failed to show that his trial counsel's decision not to object to the application of Sentencing Guidelines § 2D1.1(a)(2) amounted to constitutionally deficient performance, as necessary to establish a claim of ineffective assistance of counsel under *Strickland* v. *Washington*, 466 U.S. 668 (1984). Pet. App. 6a; see *Strickland*, 466 U.S. at 688. The court explained that petitioner's ineffective-assistance argument "ignore[d] that his counsel made the strategic decision to completely remove from the jury the factual question of whether a death resulted from the drug distribution." Pet. App. 6a. The court declined to "'second guess'" that choice, which was "surely a reasonable tactical decision to strike a deal that would prevent the government from putting evidence before the jury that [petitioner's] drug dealing resulted in the death of a

22-year-old woman." *Ibid.* (quoting *Johnson* v. *Thurmer*, 624 F.3d 786, 792 (7th Cir. 2010)).

The court of appeals went on to acknowledge petitioner's argument "that at the time of his sentencing, three of [the court's] sister circuits had either explicitly held or suggested that § 2D1.1(a)(2) applies only where the resulting death is established beyond a reasonable doubt" by a jury or is admitted. Pet. App. 7a. The court noted that its own decision to the same effect in *Lawler* was not issued until after petitioner's sentencing, and also that counsel's "failure to anticipate a change or advancement in the law does not qualify as ineffective assistance." *Ibid.* "Regardless," the court continued, "the question of whether [petitioner's] counsel should have known, based on existing case law, to make the argument is not dispositive in this case because he made a strategic decision not to do so." *Ibid.* It found that to be a "reasonable calculation" and observed that it would "lead to an absurd result if [petitioner] were able to gain the benefit of taking that factual issue away from the jury, only to turn around and argue that the district court was also barred from resolving it." *Ibid.*

ARGUMENT

Petitioner contends that this Court should grant review to consider the circumstances in which trial counsel is constitutionally deficient in failing to consider out-of-circuit precedent (Pet. 10-13) and the circumstances in which an agreement to reserve a factual question for the judge at sentencing forecloses an objection to the judge's resolution of that question (Pet. 13-15). Neither issue is presented by this case, which was premised on the determination that petitioner's counsel made a "reasonable tactical decision," Pet. App. 6a, rather than on

either of the legal issues that petitioner seeks to raise. The petition for a writ of certiorari should be denied.

1. Petitioner contends that the decision below conflicts with decisions of other courts of appeals on the question of when trial counsel's failure to rely on favorable opinions from other circuits may constitute deficient performance under *Strickland* v. *Washington*, 466 U.S. 668 (1984). Petitioner's ineffective-assistance claim is premised on his contention that his counsel should have argued that the offense-level enhancement in Sentencing Guidelines § 2D1.1(a)(2) may not be applied unless a jury finds (or, in the case of a guilty plea, the defendant admits) that his drug-trafficking offense caused death. After petitioner's conviction became final, the Seventh Circuit in *United States* v. *Lawler*, 818 F.3d 281 (2016), "followed the Third, Fifth, and Sixth Circuits in holding that the enhancement only applies where the resulting death or serious bodily injury 'was an element of the crime of conviction, proven beyond a reasonable doubt or admitted by the defendant.'" Pet. App. 5a-6a (quoting *Lawler*, 818 F.3d at 285).

The jury did not make a cause-of-death finding in petitioner's case, however, based on the parties' own agreement. Counsel for the government—with the express assent of petitioner's counsel—asked the district court to remove from the jury, and to reserve for the court at sentencing, the factual question whether death resulted from petitioner's drug-trafficking offense. Pet. App. 2a-3a. Petitioner's counsel also asked the court not to instruct the jury on the causation-of-death language in Paragraph Three of the indictment. *Id.* at 38a-39a.

On collateral review, petitioner argued that trial counsel should have insisted that the district court was

precluded from considering the issue at all, notwithstanding the parties' agreement to reserve the issue for the court at sentencing rather than submitting it to the jury at trial. See Pet. App. 6a. In rejecting that argument, the court of appeals determined that counsel's performance was not deficient because counsel had made a reasonable "strategic decision to completely remove from the jury the factual question of whether a death resulted from the drug distribution." *Ibid.*; see *ibid.* ("It was surely a reasonable tactical decision to strike a deal that would prevent the government from putting evidence before the jury that [petitioner's] drug dealing resulted in the death of a 22-year-old woman."). Petitioner does not dispute the court's fact-bound determination that his counsel made a "strategic decision" and that the decision was reasonable. Those determinations in themselves are fatal to his ineffective-assistance claim. See *Johnson* v. *Thurmer*, 624 F.3d 786, 792 (7th Cir. 2010) ("It is well established that our scrutiny of counsel's trial strategy is to be deferential and that we do not second guess the reasonable tactical decisions of counsel in assessing whether his performance was deficient.").

Petitioner nevertheless contends that the decision below conflicts with decisions of other courts of appeals, which have "held that failure to cite out-of-circuit appellate authority may constitute constitutionally deficient performance." Pet. 11 (describing *United States* v. *Franks*, 230 F.3d 811 (5th Cir. 2000)); see Pet. 11-12 (discussing *United States* v. *Otero*, 502 F.3d 331 (3d Cir. 2007), and *Jansen* v. *United States*, 369 F.3d 237 (3d Cir. 2004)). But none of those decisions involved the circumstances at issue here, in which counsel "made the reasonable calculation that his client would be better

off" by pursuing the strategy later challenged as deficient. Pet. App. 7a. In the cases relied upon by petitioner, the Third and Fifth Circuits held that counsel's performance was deficient because counsel failed to object to the application of a sentencing enhancement, despite favorable decisions from other circuits, where no "sound strategy [could] be discerned" for counsel's failure to do so. *Jansen*, 369 F.3d at 244; see *Otero*, 502 F.3d at 336; *Franks*, 230 F.3d at 814. Those decisions did not provide an opportunity to consider a circumstance where, as in this case, counsel's failure to object was the result of a "reasonable tactical decision" intended to improve the defendant's chances of an acquittal. Pet. App. 6a.

Nor did the decision below in this case adopt an approach that would dictate a different result from the Third and Fifth Circuits in the scenarios those courts addressed. The decision below observed that the interpretation of Guidelines § 2D1.1(a)(2) requiring a jury to make the cause-of-death finding, which had been adopted by other Circuits, "was not established in [the Seventh] Circuit" in *Lawler* until after petitioner's sentencing and stated that "a failure to anticipate a change or advancement in the law does not qualify as ineffective assistance." Pet. App. 7a. But immediately following that statement, the court made clear that the decision was not based on that principle but instead was based on its assessment of trial counsel's reasonable strategy to keep evidence of Ward's death from the jury. "*Regardless*," the court explained, "the question of whether [petitioner's] counsel should have known, based on existing case law, to make the argument *is not dispositive in this case* because he made a strategic decision not to do so." *Ibid.* (emphases added).

2. Petitioner also contends that the decision below creates a circuit conflict regarding whether the parties' "agreement that the sentencing judge will make a [causation-of-death] finding is an implicit agreement that the finding is a part of the 'offense of conviction,'" as required for application of an enhancement under Guidelines § 2D1.1(a)(2). Pet. 13 (capitalization altered). Petitioner asserts (*ibid.*) that the court of appeals, relying on the parties' pretrial agreement "to defer to the sentencing phase the presentation of any evidence in support of the causation-of-death finding for the 20-year mandatory minimum in 21 U.S.C. § 841(b)(1)(A)," held that petitioner's counsel was therefore "precluded" from arguing at sentencing that an enhancement under § 2D1.1(a)(2) was improper absent a jury finding on causation of death. Petitioner contends that the Sixth Circuit reached a contrary conclusion in *United States* v. *Rebmann*, 321 F.3d 540 (2003) (*Rebmann II*), where it "agreed" with counsel's argument that the enhancement could not be applied where the defendant "had not been convicted of causing a death," even though the defendant's plea agreement had "agreed to defer to the court the factual finding supporting the statutory mandatory-minimum for causation of death." Pet. 13-14 (emphasis omitted).

Petitioner's argument is based on a fact-bound disagreement with the court of appeals regarding the meaning of the stipulation reached by the parties prior to trial. Petitioner characterizes (Pet. 13) the parties' agreement to defer consideration of the causation-of-death issue as relevant only to the question whether petitioner was eligible for "the 20-year mandatory minimum in 21 U.S.C. § 841(b)(1)(A)." But the court below understood the agreement as deferring entirely the

question whether "[petitioner's] drug dealing resulted in [a] death," Pet. App. 6a, including insofar as that question was relevant to the district court's application of an enhancement under Sentencing Guidelines § 2D1.1(a)(2), see Pet. App. 5a-6a. The court of appeals described the "death or serious bodily injury" finding required for application of "Section 2D1.1(a)(2) of the United States Sentencing Guidelines," and then it explained that, because of "the parties' stipulation, the jury in [petitioner's] case did not have the opportunity to make *such a finding*." *Ibid.* (emphasis added); see *id.* at 7a ("It would lead to an absurd result if [petitioner] were able to gain the benefit of taking *that factual issue* away from the jury, only to turn around and argue that the district court was also barred from resolving it.") (emphasis added). Nowhere in its discussion of petitioner's ineffective-assistance claim did the court of appeals suggest that the agreement was by its terms limited to the statutory minimum under Section 841(b)(1)(A) but should nevertheless be construed to apply to Guidelines § 2D1.1(a)(2). Even if the court misunderstood the scope of the parties' agreement, that case-specific dispute would not merit this Court's review.

For similar reasons, no conflict exists between the decision below and *Rebmann II*. In that case, the defendant had pleaded guilty to heroin distribution pursuant to a plea agreement that stated the parties' understanding "that if the district court found that death resulted from the distribution, she would be sentenced to a term of 20 years to life" under the statutory minimum prescribed by 21 U.S.C. 841(b)(1)(C) (Supp. III 1997). *United States* v. *Rebmann*, 226 F.3d 521, 522 (6th Cir. 2000) (*Rebmann I*). The district court then held that the 20-year statutory minimum was applicable based on its

finding, by a preponderance of the evidence, that the defendant's heroin distribution had resulted in death. *Ibid.* The Sixth Circuit reversed. It determined that, "pursuant to her plea agreement, [the defendant] waived her right to a jury trial of the issue of whether her distribution of heroin caused death," but she "did not waive her right to have a court decide" the issue "beyond a reasonable doubt, as opposed to making those determinations by a mere preponderance of the evidence." *Id.* at 524. On remand, the government "withdrew its request for a death enhancement based on § 841(b)(1)(C)" but "continued * * * to pursue a death enhancement pursuant to U.S.S.G. § 2D1.1(a)(2)." *Rebmann II*, 321 F.3d at 541. The government argued that the district court's prior cause-of-death finding, "using the lower preponderance of the evidence standard," was sufficient for application of the Guidelines enhancement. *Id.* at 542. The district court disagreed, however, and it held that the enhancement was inappropriate because "the government had failed to prove beyond a reasonable doubt that [the] death resulted from the distribution." *Ibid.* The Sixth Circuit affirmed, agreeing with the district court that the enhancement was not appropriate under those circumstances, *id.* at 542-545.

The circumstances of *Rebmann II* are not comparable to those of this case. The Sixth Circuit allowed the defendant there to challenge application of Guidelines § 2D1.1(a)(2) because the court understood the plea agreement as waiving only the defendant's "right to a jury trial" on the cause-of-death issue but not her right to have that issue decided "beyond a reasonable doubt, as opposed to * * * by a mere preponderance of the evidence." *Rebmann I*, 226 F.3d at 524; see *Rebmann II*, 321 F.3d at 544. In this case, by contrast, the court of

appeals understood the parties' pretrial stipulation as "agreeing to cede the determination of [the cause-of-death] issue to the district court at sentencing." Pet. App. 6a. Based on that understanding, the court of appeals believed it "would lead to an absurd result if [petitioner] were able to gain the benefit of taking that factual issue away from the jury, only to turn around and argue that the district court was also barred from resolving it." *Id.* at 7a. Nothing in the decision below suggests that the court of appeals would have reached a different conclusion than the Sixth Circuit if presented with the different circumstances at issue in *Rebmann II*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 2018

* The Solicitor General is recused in this case.