No. 15-186

In the Supreme Court of the United States

ANTWAINE LAMAR MCCOY, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
LESLIE R. CALDWELL
Assistant Attorney General
STEPHAN E. OESTREICHER, JR.
Attorney
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether petitioner's counsel was ineffective during petitioner's federal sentencing proceeding because he failed to collaterally attack petitioner's state drug-distribution convictions that were being used to enhance petitioner's federal sentence under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), and Sentencing Guidelines § 4B1.1.

2. Whether the court of appeals correctly denied a certificate of appealability on petitioner's claim that his prior state drug-distribution convictions did not qualify as ACCA predicates because they did not carry a maximum of ten years or more of imprisonment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is not published in the Federal Reporter but is reprinted at 589 Fed. Appx. 169. The opinion of the district court (Pet. App. 6a-20a) is not published in the Federal Supplement but is available at 2012 WL 2872105.

JURISDICTION

The judgment of the court of appeals was entered on January 8, 2015. A petition for rehearing was denied on April 14, 2015 (Pet. App. 22a). On July 8, 2015, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including August 12, 2015. The petition was filed on August 11, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Western District of North Carolina, petitioner was convicted of possessing with intent to distribute cocaine and cocaine base, in violation of 21 U.S.C. 841, 846, and 851, and being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1). 1 C.A. App. 57. The district court sentenced petitioner to 262 months of imprisonment, to be followed by eight years of supervised release. *Id.* at 58-59. The court of appeals affirmed petitioner's convictions and sentence, 227 Fed. Appx. 301 (2007) (per curiam), and this Court denied his petition for a writ of certiorari, 552 U.S. 1214 (2008) (No. 07-8529).

Petitioner filed a motion to set aside his sentence under 28 U.S.C. 2255. The district court denied the motion (Pet. App. 6a-19a) and denied petitioner a certificate of appealability (*id.* at 19a-20a). The court of appeals granted petitioner a certificate of appealability on his claim that his counsel was ineffective at sentencing for failing to collaterally attack his two prior state drug convictions on double-jeopardy grounds, *id.* at 21a, but rejected the claim on the merits, *id.* at 1a-5a.

1. In December 2002, law-enforcement officers in Charlotte, North Carolina, learned from an informant that petitioner was distributing kilogram amounts of cocaine. Presentence Investigation Report (PSR) ¶ 10. At the officers' direction and under their supervision, the informant bought about 59 grams of cocaine base from petitioner. *Ibid.*

In January 2003, police officers stopped a car petitioner was driving, searched the car with his consent, and found a nine-millimeter pistol beneath a floor mat

in the front seating area. PSR ¶ 11. Later, and again with consent, the officers searched petitioner's residences and discovered several firearms (including an assault rifle), a bulletproof vest, a badge marked "Security Officer," a black shirt marked "Police," a money counter, more than $16,000 in currency, nearly two kilograms of powder cocaine, and 67 grams of cocaine base. *Id.* ¶¶ 12-13.

2. A grand jury in the United States District Court for the Western District of North Carolina charged petitioner with (*inter alia*) possessing with intent to distribute cocaine and cocaine base, in violation of 21 U.S.C. 841 and 846, and being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1). See Pet. App. 6a-7a; 1 C.A. App. 1-2. The government filed an information under 21 U.S.C. 851 alleging that petitioner had prior drug convictions in North Carolina in 1992 and 1993. Pet. App. 7a.

Petitioner entered into a plea agreement, in which he agreed to plead guilty to the drug possession with intent to distribute and felon-in-possession counts; in exchange, the government agreed to dismiss all remaining counts. 2 C.A. App. 1 (sealed); see PSR ¶¶ 2-3. As part of the agreement, petitioner "stipulate[d] that based on his criminal history, he qualifie[d] as an Armed Career Criminal, and will be sentenced to a minimum term of 15 years" for his Section 922(g) offense under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e). 2 C.A. App. 2; see Pet. App. 7a. Petitioner also acknowledged that he was subject to a sentence of between ten years and life imprisonment for his Section 841 offense. 2 C.A. App. 1.

In the plea agreement, petitioner expressly "waive[d]" his "rights to contest the conviction[s] and/or the sentence"—whether on "appeal or collateral[] attack"—except on grounds that defense counsel was ineffective, that the prosecution engaged in misconduct, or that the district court made "findings on guideline issues" that "were inconsistent with the explicit stipulations contained" elsewhere in the plea agreement. 2 C.A. App. 5; see Pet. App. 7a.

After a lengthy plea colloquy, petitioner pleaded guilty. 1 C.A. App. 9-22. During the colloquy, the government noted that petitioner had "stipulate[d]" that "he qualifie[d] as an armed career criminal" and would therefore "be sentenced to the minimum term of 15 years" on the Section 922(g)(1) count. *Id.* at 19. Petitioner also acknowledged that he faced a sentence of between ten years and life imprisonment on the Section 841 count. *Id.* at 13. The government noted that petitioner had waived his rights to appeal or collaterally attack his convictions or sentence, subject to the three exceptions set out above. *Id.* at 20. When the magistrate judge asked petitioner if "you understand those to be the terms of your plea agreement," petitioner responded, "Yes, sir." *Id.* at 22. Petitioner's counsel then stated that, "in regards to the stipulation to being an armed career criminal," counsel had talked to petitioner's prior attorney (who represented him for the ACCA predicate offenses), "look[ed] at" whether any challenge could be made to those predicates, and "discuss[ed]" the matter with petitioner. *Id.* at 21-22. Toward the end of the plea hearing, petitioner noted that counsel "did a nice job and I approve of him." *Id.* at 29.

The Probation Office concluded, consistent with the plea agreement, that petitioner is subject to a statutory minimum sentence of 15 years of imprisonment under the ACCA. PSR ¶¶ 34, 46, 80; 2 C.A. App. 10. In pertinent part, the ACCA provides enhanced punishment for a defendant "who violates [S]ection 922(g) of this title and has three previous convictions * * * for a violent felony or a serious drug offense, or both." 18 U.S.C. 924(e)(1). A "serious drug offense" includes "an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance * * * for which a maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. 924(e)(2)(A)(ii). The Probation Office found that petitioner had three qualifying North Carolina convictions: 1992 and 1993 convictions for possession with intent to sell and deliver cocaine, and a 1996 conviction for voluntary manslaughter. PSR ¶¶ 14, 41, 43-44. Based on the same offenses, the Probation Office determined (PSR ¶ 35) that petitioner was a career offender under Sentencing Guidelines § 4B1.1, which enhances the advisory Guidelines imprisonment range of a defendant who (*inter alia*) "has at least two prior felony convictions of either a crime of violence or a controlled substance offense." Sentencing Guidelines § 4B1.1(a).

Petitioner's prior North Carolina drug convictions also had the effect of enhancing his sentence for his federal drug offense. Together with petitioner's guilty plea to 500 grams or more of cocaine, 1 C.A. App. 12, the Section 851 information elevated petitioner's sentencing exposure under 21 U.S.C. 841(b)(1)(B) to a maximum of life imprisonment. PSR ¶ 80; 1 C.A. App. 13; 2 C.A. App. 1. Petitioner's advisory Guidelines

range was 262 to 327 months of imprisonment, based on his offenses and criminal history. PSR ¶¶ 80-81.

At sentencing, petitioner was represented by the same counsel who had represented him at the plea stage. 1 C.A. App. 8; Pet. App. 99a-100a. Counsel stated that he had reviewed the PSR with petitioner "numerous times" and that petitioner objected to the use of his 1992 and 1993 North Carolina drug-distribution convictions to enhance his federal sentence because, although he had pleaded guilty to those offenses, "he did not intend to sell or deliver" the cocaine he had possessed. Pet. App. 104a. Petitioner then testified to that effect. *Id.* at 108a-112a. The district court concluded that, even "accept[ing]" petitioner's account "at face value," "it makes no difference" because petitioner could not, in his federal sentencing proceeding, "attack collaterally a conviction which is a matter of record in state court." *Id.* at 104a.

The court concluded that the Probation Office "accurately calculate[d]" petitioner's advisory Guidelines range as 262 to 327 months. Pet. App. 105a-106a.[1] Seeing "no persuasive reason to vary from the guidelines," and emphasizing the need for "incapacitation and deterrence," the court sentenced petitioner "at the low end of the guideline range," to 262 months of imprisonment. *Id.* at 121a. The court imposed that term on each of the two counts of conviction, and ordered that the sentences on both counts be served

[1] The court at one point referred to the range as "260 to 327 months," Pet. App. 106a, but that was apparently an inadvertent misstatement, because the court later referred to the "low end of the guideline range" as "262 months," *id.* at 121a, consistent with the PSR (¶ 81).

concurrently. *Ibid.* After the court imposed the sentence, the government moved to dismiss the remaining charges and the court dismissed them. *Ibid.*

3. The court of appeals affirmed petitioner's convictions and sentence. 227 Fed. Appx. 301. Petitioner's appellate counsel—an attorney who had not represented him in the district court—filed a brief under *Anders* v. *California*, 386 U.S. 738 (1967), "asserting there are no meritorious issues for appeal," but also "questioning whether [petitioner's] trial counsel was ineffective in failing to object to [petitioner's] armed career criminal and criminal offender classifications because his prior convictions were unconstitutional double jeopardy." 227 Fed. Appx. at 301. According to petitioner's appellate counsel, at the time of petitioner's 1992 and 1993 criminal convictions, he "had already been penalized" because "North Carolina assessed a controlled substance tax against him for the drugs involved," and so the criminal "convictions amounted to double jeopardy." *Id.* at 301-302.

The court of appeals held that the ineffectiveness claim was "not cognizable on direct appeal" because the record did not "conclusively" show that trial counsel was ineffective. 227 Fed. Appx. at 302 (citing *United States* v. *Richardson*, 195 F.3d 192, 198 (4th Cir. 1999), cert. denied, 528 U.S. 1096 (2000)). The court "examined the entire record" and concluded that petitioner had raised "no other meritorious issues." *Ibid.*

This Court denied petitioner's petition for a writ of certiorari. 552 U.S. 1214.

4. Petitioner moved to set aside his sentence under 28 U.S.C. 2255 on four different grounds. Pet. App. 30a. As relevant here, he argued that his counsel had

been ineffective at sentencing in failing to challenge his 1992 and 1993 state drug convictions on double-jeopardy grounds. *Id.* at 38a-41a. In his reply brief in support of his Section 2255 motion, petitioner added a new argument, contending that under the reasoning of *Carachuri-Rosendo* v. *Holder*, 560 U.S. 563 (2010), and *United States* v. *Simmons*, 649 F.3d 237 (4th Cir. 2011) (en banc), his 1992 and 1993 convictions could not serve as ACCA predicates because they did not carry a maximum prison term of ten years or more. Pet. App. 72a; see *id.* at 72a-79a.

The district court denied petitioner's Section 2255 motion. Pet. App. 6a-19a. The court rejected petitioner's ineffective-assistance claim on the ground that any double-jeopardy challenge to the North Carolina drug-distribution convictions would have failed. *Id.* at 15a. The court explained that petitioner did not show that he "had paid a drug tax *prior* to conviction" on the North Carolina drug charges, as would be required to establish that the conviction was an impermissible successive punishment. *Ibid.* The court did not expressly address petitioner's statutory claim under *Carachuri-Rosendo* and *Simmons*.[2] The court also declined to issue a certificate of appealability, concluding that petitioner had not made a substantial showing of the denial of a constitutional right. *Id.* at 19a-20a.

5. The court of appeals denied a certificate of appealability on all of petitioner's Section 2255 claims

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[2] The court rejected petitioner's related claim that his 1992 and 1993 convictions should not count as ACCA predicates because they would not be punishable by ten years or more of imprisonment under current law, as opposed to the law in effect at the time of conviction. Pet. App. 16a-17a.

except one: that counsel was ineffective at sentencing in failing to raise a double-jeopardy challenge to the use of the 1992 and 1993 drug convictions as ACCA predicates. Pet. App. 21a. In an unpublished, per curiam opinion, the court of appeals rejected that claim on the merits and affirmed the district court's denial of relief under Section 2255. *Id.* at 1a-5a.

When addressing the ineffective-assistance claim, the court used the standard established in *Strickland* v. *Washington*, 466 U.S. 668 (1984), stating that petitioner had to show (a) "that counsel's representation fell below an objective standard of reasonableness," and (b) "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Pet. App. 3a (internal quotation marks omitted). Applying that standard to this case, the court concluded that petitioner "failed to demonstrate that his counsel was ineffective in declining to collaterally challenge his state drug convictions on double jeopardy grounds during the federal sentencing hearing, in light of precedent generally barring such collateral challenges, and due to the absence of precedent clearly authorizing the specific collateral challenge [petitioner] advocates." *Id.* at 4a (citing, *inter alia*, *Custis* v. *United States*, 511 U.S. 485, 494-495 (1994), and Sentencing Guidelines §§ 4A1.2, comment. (n.6), and 4B1.2, comment. (n.3)).[3]

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[3] This was an "alternative" basis for denying the Section 2255 motion than used by the district court, Pet. App. 4a, on which the court of appeals relied after the government had conceded in the court of appeals (Gov't C.A. Br. 12 n.2) that the district court was mistaken about the timing of the North Carolina drug-tax assessments.

6. Petitioner filed a petition for rehearing en banc, which was denied, with no judge requesting a poll on the petition. Pet. App. 22a.

ARGUMENT

1. Petitioner first contends (Pet. i, 16-26) that this Court should grant review on his ineffective-assistance claim to clarify that, under *Strickland* v. *Washington*, 466 U.S. 668 (1984), counsel may be deficient for failing to raise a "viable" legal claim even if no "precedent clearly authoriz[ed]" it at that time. This case does not present that question, however, because the court of appeals did not broadly decide whether or when counsel is deficient for failing to raise a colorable claim lacking support in existing law. Instead, the court held that, in light of the "general[] bar[]" against collateral challenges to prior state convictions in federal sentencing proceedings, and the absence of an applicable exception for petitioner's double-jeopardy claim, counsel in this particular case was not deficient for failing to collaterally attack petitioner's prior convictions on double-jeopardy grounds. Pet. App. 4a. That holding is correct and does not conflict with any decision of this Court or another court of appeals. Indeed, the court of appeals' decision is unpublished and does not establish any binding precedent, *id.* at 1a-2a, and so it could not give rise to a circuit conflict that might justify this Court's intervention. Further review is therefore unwarranted.

a. To prevail on a claim of ineffective assistance of counsel, a Section 2255 movant must demonstrate that (a) counsel's representation fell outside "the wide range of reasonable professional assistance," resulting in "errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth

Amendment," and (b) counsel's deficient performance so prejudiced his defense that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland* v. *Washington*, 466 U.S. 668, 687-694 (1984). That standard is necessarily fact-intensive, requiring a court to "consider[] all the circumstances" when evaluating counsel's performance. *Id.* at 688; see *id.* at 688-689 (a defined "set of detailed rules for counsel's conduct" could not "satisfactorily take account of the variety of circumstances faced by defense counsel"); see also *Rompilla* v. *Beard*, 545 U.S. 374, 394 (2005) (O'Connor, J., concurring) (noting that *Strickland* established a "case-by-case approach"). The Court has admonished that attorney performance "is strongly presumed * * * adequate" and must be "viewed as of the time of counsel's conduct," not with the benefit of hindsight. *Strickland*, 466 U.S. at 690.

Petitioner does not contend that the court below failed to follow those principles. Instead, he contends that the court of appeals established an erroneous per se rule that counsel cannot be deficient for failing to raise a particular argument unless "precedent clearly authoriz[ed]" the argument. Pet. 17 (quoting Pet. App. 4a); see Pet. 16-22. But petitioner misreads the decision below and the settled law it applies. The court held that petitioner's counsel was not ineffective "in light of precedent generally barring such collateral challenges, and due to the absence of precedent clearly authorizing the specific collateral challenge [petitioner] advocates." Pet. App. 4a. Petitioner focuses (Pet. 17, 18, 19, 26) on the second half of that sentence and ignores the import of the first half. But the first

half of the sentence provides the necessary context to understand the court's holding.

In the first half of the sentence, the court noted that counsel could not have been ineffective in failing to collaterally attack petitioner's North Carolina drug-distribution convictions because "precedent generally *barr[ed]* such collateral challenges." Pet. App. 4a (emphasis added). In support, the court cited *Custis* v. *United States*, 511 U.S. 485 (1994), where this Court held that "a defendant in a federal sentencing proceeding" has "no * * * right" to "collaterally attack the validity of previous state convictions that are used to enhance his sentence under the ACCA." *Id.* at 487. The court also cited relevant portions of the Sentencing Guidelines making the same point that a defendant generally cannot collaterally challenge a prior conviction in his federal sentencing proceeding. See Pet. App. 4a (citing Sentencing Guidelines §§ 4A1.2, comment. (n.6), and 4B1.2, comment. (n.3)). Then, in the second half of the sentence, the court made the point that, where this Court has generally barred collateral challenges to ACCA predicates, and no court of appeals decision expressly authorized the specific challenge petitioner wished for his counsel to make, counsel could not be ineffective. See *ibid.* The court therefore did not set out a broad legal rule that counsel may be deficient for failing to raise a legal claim only when precedent clearly authorizes the claim.

b. The court of appeals' decision is correct. As the court recognized (Pet. App. 4a), *Custis* squarely "barr[ed]" petitioner's counsel from collaterally attacking on double-jeopardy grounds, in federal sentencing proceedings, petitioner's prior state convic-

tions.[4] Addressing the question whether a defendant facing an ACCA enhancement may collaterally attack his prior state convictions, the *Custis* Court explained that the ACCA does not expressly "authorize[] such collateral attacks" but instead "focuses on the *fact* of conviction," 511 U.S. at 490-491, and it concluded that, given "Congress'[s] passage of other related statutes that expressly permit repeat offenders to challenge prior convictions that are used for enhancement purposes" at sentencing, *id.* at 491, Congress did not intend to permit collateral challenges in ACCA cases, *id.* at 492-493. The Court next concluded (*id.* at 493-494) that the Constitution itself requires entertaining such a collateral challenge only in the "unique" case of a total deprivation of the right to counsel in the state proceeding, in violation of the principle set out in *Gideon* v. *Wainwright*, 372 U.S. 335 (1963). It "decline[d]" to "extend the right to attack collaterally prior convictions used for sentence enhancement beyond the right to have appointed counsel established in *Gideon*," 511 U.S. at 496, relying on the singular nature of a *Gideon* violation, "[e]ase of administration," and "[t]he interest in promoting the finality of judgments," *id.* at 496-497.

Petitioner's proposed double jeopardy challenge in this case does not implicate that "unique" case and therefore does not fall within the narrow exception to *Custis*'s general rule forbidding collateral attacks on

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[4] At the sentencing hearing, the district court stated the same principle, albeit in connection with a different collateral attack and without mentioning *Custis* by name. Pet. App. 104a (court remarked that "attempting to attack collaterally a conviction which is a matter of record in state court * * * would be a futile exercise").

prior state convictions used as ACCA enhancements. Thus, if counsel had tried to raise a double-jeopardy claim to prevent an enhancement under ACCA, he necessarily would have been rebuffed. The same would have been true if counsel had tried to raise such a claim to prevent an enhancement under the career-offender guideline, which expressly forbids collateral attacks. Sentencing Guidelines §§ 4A1.2, comment. (n.6), 4B1.2, comment. (n.3).

Petitioner nonetheless contends (Pet. 23-25) that counsel had a colorable basis for collaterally attacking his state convictions at sentencing, relying on *Daniels* v. *United States*, 532 U.S. 374 (2001), and *United States* v. *Anderson*, 215 F.3d 1321, 2000 WL 620308 (4th Cir. 2000) (per curiam; unpublished), cert. denied, 532 U.S. 981 (2001). He is mistaken.

In *Daniels*, the Court considered whether and to what extent a defendant may collaterally attack an ACCA predicate "after the [federal] sentencing proceeding has concluded, * * * through a motion under 28 U.S.C. § 2255." 532 U.S. at 376. The Court held that, "as a general rule," a defendant "may not" mount such a collateral attack. *Ibid.* Justice O'Connor's opinion for four Members of the Court reserved the question whether, in "rare cases," an exception may be available to a defendant who has "no [other] channel of review * * * available, due to no fault of his own." *Id.* at 383; see *id.* at 385 (Scalia, J., concurring in part) (declining to join this reservation). But that does not aid petitioner, because he had other channels of review available, such as an appeal from his original state convictions, or state post-conviction relief. See *id.* at 381 (providing "direct appeal" and "postconviction proceedings under state law" as examples of

available channels of review).[5] And *Daniels* does not apply here because it addresses a collateral challenge brought in a Section 2255 motion, not at sentencing (where petitioner claims counsel should have mounted a collateral attack). *Custis* governs sentencing proceedings, and *Daniels* confirmed that in sentencing proceedings, "only" *Gideon*-type claims may justify collateral attacks on state convictions used as ACCA predicates. *Id.* at 382 (citing *Custis*, 511 U.S. at 496). The Court specifically noted that "[n]o other constitutional challenge to a prior conviction may be raised in the sentencing forum." *Ibid.* (citing *Custis*, 511 U.S. at 497); accord *Johnson* v. *United States*, 544 U.S. 295, 303 (2005) (noting that in *Custis*, the Court "recognized only one exception to this rule that collateral attacks [at sentencing] were off limits, and that was for challenges to state convictions allegedly obtained in violation of the right to appointed counsel").

The Fourth Circuit's decision in *Anderson* likewise does not aid petitioner. *Anderson* was an unpublished, non-precedential decision, and it concerned a different sentencing statute (not the ACCA). The defendant in *Anderson* was convicted under 21 U.S.C. 846, and his sentence was enhanced under 21 U.S.C. 841(b)(1)(A). 2000 WL 620308, at *1. The court of appeals held that the defendant could collaterally

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[5] Petitioner contends (Pet. 24-25) that no such review was available because state-court precedent foreclosed his claim. Justice O'Connor's opinion did not identify futility as one of the "rare cases" in which no channel of review was available, see *Daniels*, 532 U.S. at 383-384, and in any event, petitioner's contention that any argument would be futile is in tension with his primary argument that counsel was ineffective for failing to raise a claim even when it was foreclosed by existing law.

attack his prior state convictions at sentencing under 21 U.S.C. 851(c). 2000 WL 620308, at *3-*4. But Section 851(c) expressly authorizes such challenges for defendants seeking to avert sentencing enhancements under the Controlled Substances Act, see 21 U.S.C. 851(c), and the ACCA does not. The Court made that very distinction in *Custis*. See 511 U.S. at 491-493 (noting that Section 851(c) is different from the ACCA because Section 851(c) is a statute that "expressly permit[s] repeat offenders to challenge prior convictions that are used for enhancement purposes"). The career-offender guideline likewise does not authorize petitioner's proposed collateral challenge to his state convictions in his federal sentencing proceedings. Petitioner therefore cannot establish that his attorney behaved unreasonably in failing to collaterally attack his prior state convictions at sentencing in this case, let alone that his counsel's error was so extreme that he failed to "function[] as the 'counsel' guaranteed the defendant by the Sixth Amendment," *Strickland*, 466 U.S. at 686-687.[6]

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[6] Contrary to petitioner's contention (Pet. 21-22), the district court did not err by declining to hold an evidentiary hearing in this case. A court adjudicating a Section 2255 motion need not hold an evidentiary hearing no disputed material facts exist. See, *e.g.*, *United States* v. *White*, 366 F.3d 291, 297 (4th Cir. 2004). As explained above, the law was settled that petitioner could not collaterally attack the state offenses used as ACCA predicates in his sentencing hearing, and counsel and the district court were aware of that legal principle. See note 4, *supra*. In his Section 2255 motion, petitioner at times requested an evidentiary hearing, see Pet. App. 47a, but also said that one was *not* required, *id.* at 49a, and he did not identify any disputed material facts that must be resolved to decide his legal claims.

c. The court of appeals' decision does not conflict with any decision of this Court. The court of appeals used the settled *Strickland* standard for its analysis, recognizing that the ineffective-assistance-of-counsel analysis is a fact-specific one. See Pet. App. 2a-3a. Contrary to petitioner's contention (Pet. 19-20), the court did not purport to hold that counsel need not "make reasonable investigations" into the relevant facts and law, *Wiggins* v. *Smith*, 539 U.S. 510, 521 (2003) (quoting *Strickland*, 466 U.S. at 691), or that counsel is allowed to be "ignoran[t] of a point of law that is fundamental to his case," *Hinton* v. *Alabama*, 134 S. Ct. 1081, 1089 (2014) (per curiam). Indeed, the point of the court of appeals' decision is that counsel *correctly* understood that *Custis* and related precedent barred a collateral attack at sentencing. The court of appeals had no occasion to opine on what happens in situations of attorney ignorance.

The court of appeals' decision also does not conflict with a decision from another circuit. As noted above, the court's unpublished decision did not apply, let alone establish, a per se rule that counsel is never deficient for failing to make an argument unsupported by precedent clearly authorizing the argument. Further, even if it had articulated such a rule, the decision would have created any binding circuit precedent.

The decisions petitioner cites (Pet. 19 n.6) from the Fifth and Eleventh Circuits likewise do not set out a per se rule. In *Givens* v. *Cockrell*, 265 F.3d 306 (2001), the Fifth Circuit used the familiar *Strickland* standard and held that, on the facts of that case, counsel was not ineffective where the law was unclear about whether evidence of unadjudicated extraneous offenses could be introduced at sentencing. *Id.* at 309-310.

The court did not adopt a per se rule, but addressed the facts of the case before it. Similarly, in *Jones* v. *United States*, 224 F.3d 1251 (2000), the Eleventh Circuit used the fact-intensive *Strickland* standard to adjudicate a claim of ineffective assistance, and it specifically said that it was "not prepared" to adopt a "categorical[]" rule about whether counsel is ineffective when the law is unsettled. *Id.* at 1258.

The different results in cases petitioner cites from other circuits reflect different facts, not a fundamentally different legal approach. In *Government of the Virgin Islands* v. *Vanterpool*, 767 F.3d 157 (2014), the Third Circuit remanded a case for a further factual development where there appeared to be a "viable" legal challenge left unexplored, possibly because of counsel's "ignorance of the law," rather than to legitimate "strategic" considerations. *Id.* at 168-169. The court did not grant relief, and it did not adopt a per se rule about when counsel must pursue a legal argument when the law is unsettled. In *Starr* v. *Lockhart*, 23 F.3d 1280, cert. denied, 513 U.S. 995 (1994), overruled on other grounds as recognized in *Williams* v. *Norris*, 576 F.3d 850, 865 (8th Cir. 2009), cert. denied, 562 U.S. 1097 (2010), the Eighth Circuit assessed counsel's performance under the specific facts, rather than setting out any general rule about what to do when the law is unsettled. 23 F.3d at 1284. And in that case, the law was not merely unsettled: the court concluded that the argument counsel failed to make "was not 'novel' in any sense of the word." *Id.* at 1286. Petitioner also cites (Pet. 18) *Huerta* v. *Holder*, 484 Fed. Appx. 172 (9th Cir. 2012), but that decision is unpublished and does not create binding circuit precedent, and it is not a criminal case that uses the

Strickland standard. Instead, the case concerns whether counsel should have made a certain argument in an immigration proceeding, *id.* at 173-174, and it (like the other cited decisions) does not adopt any per se rule.

Further, petitioner has not shown that he would be entitled to relief under any other circuit's approach. As noted, petitioner's collateral challenge to his state offenses would have failed under *Custis* even if his attorney had raised it at sentencing. Petitioner cites no case in which this Court or any court of appeals has held that counsel is deficient for failing to raise an argument directly *foreclosed* by governing law. See *United States* v. *McNamara*, 74 F.3d 514, 517 (4th Cir. 1996) ("[T]rial counsel, mindful of the controlling circuit law at the time, had no basis for objecting" to a jury instruction and therefore was not "constitutionally deficient."); *Lowry* v. *Lewis*, 21 F.3d 344, 346 (9th Cir.) (counsel not deficient for failure to file "unmeritorious motion" on the hope it would be erroneously granted, because doing so would have cost the attorney "scarce time" and "credibility with the judge"), cert. denied, 513 U.S. 1001 (1994); cf. *Jones* v. *Barnes*, 463 U.S. 745, 751 (1983) (observing, in appellate context, that "[e]xperienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments").

d. Finally, even if there were disagreement in the circuits, this case would be a poor vehicle in which to address it because of petitioner's plea agreement. As part of that agreement, petitioner "stipulate[d] that based on his criminal history, he qualifie[d] as an Armed Career Criminal" under the ACCA. 2 C.A. App. 2; see Pet. App. 7a. Even if *Custis* and related

law had not precluded counsel from collaterally attacking petitioner's North Carolina convictions during the federal sentencing proceeding, the foregoing stipulation would have. Petitioner's counsel was not ineffective for failing to raise an argument that would have breached a stipulation of petitioner's plea agreement. And petitioner does not contend that counsel was ineffective in connection with the stipulation at the plea stage. See 1 C.A. App. 29 (petitioner stated during the plea hearing that counsel "did a nice job and I approve of him").

Petitioner also could not show prejudice under *Strickland*.[7] In the sentencing context, prejudice turns on whether the defendant would have served a shorter prison term absent counsel's alleged deficiencies. *Glover* v. *United States*, 531 U.S. 198, 200-204 (2001). Petitioner has the burden on that question, see *Strickland*, 466 U.S. at 696, and he cannot carry it. If counsel had successfully attacked petitioner's predicate convictions during the sentencing hearing, he would have violated the stipulation that petitioner was subject to the ACCA (2 C.A. App. 2), and the government would not have been obligated to dismiss the remaining counts. See *United States* v. *Poindexter*, 492 F.3d 263, 271, 273 (4th Cir. 2007) (suggesting that if a defendant breaches an appeal-waiver provision, the government may "assert that it is no longer bound by the plea agreement," and it may seek a "higher sentence" or reinstate charges). Notably, two of the counts the government dismissed under the plea

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[7] The government made this argument in the court of appeals (Gov't C.A. Br. 36-38), but because the court found no deficiency in defense counsel's performance (Pet. App. 4a), it had no occasion to address prejudice.

agreement were charges of possessing a firearm during and in relation to a drug-trafficking crime, in violation of 18 U.S.C. 924(c)(1). See 2 C.A. App. 1; see PSR ¶¶ 2-3. Those counts carried a total mandatory term of 30 years of imprisonment, more time than petitioner received on the counts of conviction. 18 U.S.C. 924(c)(1)(A) and (C); see Answer to 2255 Mot. 10-11 (W.D.N.C. June 3, 2011) (Docket entry No. 8). Petitioner therefore cannot show he would have received a shorter term of imprisonment if his counsel had attempted to collaterally attack his convictions. Because this Court's resolution of the first question presented would not change the ultimate outcome in this case, further review is unwarranted.

2. Petitioner alternatively contends (Pet. 26-30) this Court should grant certiorari, vacate the judgment below, and remand the case to the court of appeals to consider whether his 1992 and 1993 convictions qualify as ACCA predicates in light of *Carachuri-Rosendo* v. *Holder*, 560 U.S. 563 (2010), and *United States* v. *Simmons*, 649 F.3d 237 (4th Cir. 2011) (en banc). Petitioner urges that course based on *Newbold* v. *United States*, 134 S. Ct. 897 (2014), where the Court granted certiorari, vacated the judgment, and remanded the case for consideration of a similar sentencing claim.

But the same disposition would not be appropriate here because, as petitioner acknowledges (Pet. 30 n.9), this case differs from *Newbold* in a significant respect: petitioner faced a sentencing guidelines range of 262 to 327 months of imprisonment based on his drug count; the district court sentenced him within that range, finding a 262-month sentence appropriate; and that range is unaffected by his *Simmons* challenge to

his ACCA sentence. Accordingly, even if one assumes that petitioner did not waive his *Simmons* challenge in his plea agreement, see *United States* v. *Copeland*, 707 F.3d 522, 529 (4th Cir.), cert. denied, 134 S. Ct. 126 (2013), a remand would not change the result in this case.

Petitioner's Guidelines range depended on his designation as a career offender under Sentencing Guidelines § 4B1.1. Petitioner does not challenge that designation; instead, he concedes that it is valid. See Pet. 30 n.9. And that designation is not affected by petitioner's *Simmons* argument, because petitioner's argument is that his 1992 and 1993 drug offenses are not punishable by more than ten years of imprisonment (as is required to be a "serious drug offense" under the ACCA, 18 U.S.C. 924(e)(2)(A)(ii)), and the career offender guideline requires only that the offenses be punishable by more than *one* year of imprisonment. See Sentencing Guidelines §§ 4B1.1(a), 4B1.2(b).[8] Petitioner's designation as a career offender "produced a higher offense level than the ACCA enhancement," Pet. 30 n.9, yielding a correctly-calculated advisory range of 262 to 327 months of imprisonment.

Petitioner does not contend that his *Simmons* claim, if successful on remand, would produce a different advisory range. He nevertheless urges a remand because, in his view, the absence of the ACCA enhancement "could have resulted in the sentencing court departing below the guideline range, which is often done in Career Offender cases." Pet. 30 n.9.

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[8] Petitioner has conceded that under North Carolina law, his 1992 and 1993 offenses were punishable by at least three years of imprisonment. Pet. App. 56a-58a.

But there is no reason to believe the district court would have varied here. Petitioner's drug sentence and his ACCA sentence were imposed to run concurrently. Pet. App. 7a-8a, 121a. The ACCA minimum of 15 years (180 months) was well below the bottom end of the Guidelines range, and the court did not suggest that the ultimate sentence of 262 months was "anchored" to that minimum or would have been lower in its absence. Indeed, the court emphasized that, because of the need for "incapacitation and deterrence," it saw "no persuasive reason to vary from the guidelines." *Id.* at 121a. It is therefore exceedingly likely that the court would impose the same sentence on remand, regardless of the merits of petitioner's *Simmons* claim.[9]

Finally, a remand would be especially inappropriate here, because petitioner already brought *Newbold* to the attention of the court of appeals (in a supple-

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[9] Petitioner's 262-month sentence was well within the statutory maximum on the drug count. As petitioner acknowledges (Pet. 30 n.9), he faced a maximum sentence of life imprisonment under 21 U.S.C. 841(b)(1)(B) because he pleaded guilty to possessing with the intent to distribute 500 grams or more of cocaine, 1 C.A. App. 12, and the government filed a valid information under 21 U.S.C. 851 noting his two prior convictions for felony drug offenses, Pet. App. 7a. To be sure, the information was based on petitioner's 1992 and 1993 North Carolina drug-distribution convictions. But Section 851 does not permit collateral challenges to convictions more than five years after they occurred (as would have been the case here). 21 U.S.C. 851(e); Pet. App. 7a; 1 C.A. App. 3. And, in any event, petitioner's *Simmons* argument would not undercut the Section 841 enhancement because that enhancement depends on at least one prior drug offense being a "felony drug offense," and the definition of felony drug offense requires that the offense to be punishable by more than one year, see 21 U.S.C. 802(44)—not more than ten years (which is the requirement under the ACCA).

ment to his rehearing petition, see Mot. to Hold Petition for Rehearing in Abeyance 1 (4th Cir. Mar. 23, 2015) (Docket entry No. 53)), and the court of appeals nonetheless denied him relief. Further review is therefore unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
LESLIE R. CALDWELL
Assistant Attorney General
STEPHAN E. OESTREICHER, JR.
Attorney

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