11-2119

To Be Argued By:
SARAH P. KARWAN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 11-2119

STEPHEN HARRINGTON,
Petitioner-Appellant,

-vs-

UNITED STATES OF AMERICA,
Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES OF AMERICA

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PURSUANT TO "BLUE BOOK" RULE 10.7, THE GOVERNMENT'S CITATION OF CASES DOES NOT INCLUDE "CERTIORARI DENIED" DISPOSITIONS THAT ARE MORE THAN TWO YEARS OLD.

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Statement of Jurisdiction

This is an appeal from a final judgment entered in the United States District Court for the District of Connecticut (Stefan R. Underhill, J.), which had subject matter jurisdiction pursuant to 18 U.S.C. § 3231 and 28 U.S.C. § 2255. On May 10, 2011, the district court denied the petitioner's motion for relief under 28 U.S.C. § 2255. Appendix ("A")9; Government's Appendix ("GA") 158. Judgment entered on that same date. A9.

On May 19, 2011, the petitioner filed a timely notice of appeal pursuant to Fed. R. App. P. 4(a). A3-A4. On June 7, 2011, the petitioner filed a motion for the issuance of a certificate of appealability, pursuant to 28 U.S.C. § 2253(c)(1)(B), and on June 14, 2011, the district court granted that motion. A7, A14.

On August 9, 2011, the petitioner filed a motion to amend the certificate of appealability to include an additional argument not raised before the district court. A25. The district court has not yet ruled on that motion. A7.

Statement of Issues Presented for Review

I. Did the district court err in concluding that the petitioner's prior counsel was not ineffective for failing to challenge four of the petitioner's convictions as qualifying offenses under the Armed Career Criminal Act?

II. May the petitioner directly challenge his sentence where he did not raise such a challenge in his § 2255 petition?

III. Are the petitioner's direct challenges to his sentence barred by procedural default?

IV. May the petitioner challenge the Armed Career Criminal Act as unconstitutional where such an argument was not raised in his § 2255 petition nor argued in the district court proceedings?

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Preliminary Statement

This is an appeal from the denial of a habeas corpus petition that challenged the petitioner's 15 year sentence under the provisions of the Armed Career Criminal Act, 18 U.S.C. § 924(e). In 2005, the defendant pleaded guilty to being a previously-convicted felon in possession of a fire-arm. Over the petitioner's objection, the district court concluded that the petitioner was subject to the enhanced penalties of § 924(e) because of the petitioner's previous robbery and narcotics convictions, and sentenced the petitioner to a

mandatory minimum term of 180 months. Following the petitioner's unsuccessful direct appeal of his sentence, the petitioner filed a habeas petition challenging the effectiveness of his trial and appellate counsel. He argued that his prior counsel was ineffective for failing to argue that certain of his prior convictions did not qualify as predicate offenses for purposes of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e). The district court dismissed the petition and concluded that, because the petitioner had sustained two prior felony convictions for robbery and one prior felony conviction for unlawful restraint, he had three prior convictions for crimes of violence and had been properly classified as an armed career criminal, and his counsel was not ineffective for having failed to challenge those convictions.

On appeal, the petitioner challenges the district court's ruling and argues that his counsel was ineffective for failing to claim that his unlawful restraint conviction did not qualify as a crime of violence. In the alternative, the petitioner seeks, for the first time, to challenge directly his 15-year sentence because two of the petitioner's four qualifying convictions supposedly no longer count under § 924(e) based on caselaw that developed after the imposition of his sentence. Finally, he argues, for the first time, that the Armed Career Criminal statute is unconstitutionally vague.

For the reasons set forth below, this Court should affirm the judgment of the district court in its entirety.

Statement of the Case

On April 22, 2004, a federal grand jury sitting in New Haven, Connecticut, returned an indictment charging the petitioner with two counts of possession of a firearm by a convicted felon, in violation of 18 U.S.C. §§ 922(g) and 924(e). GA171. On March 17, 2005, the petitioner pleaded guilty to count one of the indictment. GA176. On December 21, 2005, the district court (Stefan R. Underhill, J.) concluded that the petitioner qualified as an armed career criminal and sentenced him to 180 months of imprisonment under the ACCA. GA177.

The petitioner then filed a timely appeal to this Court, arguing that a jury, not the district court, should have determined whether his prior convictions qualified as either violent felonies or serious drug offenses, as defined by the ACCA. *See United States v. Harrington*, No. 05-6958-cr, 2007 WL 2728461, at *2 (2d Cir. Sept. 20, 2007). By summary order, this Court rejected the petitioner's arguments and affirmed his sentence. *Id.* The defendant then timely filed a petition for writ of certiorari to the United States Supreme Court, which was denied on February 19, 2008. *See Harrington v. United States*, 128 S. Ct. 1261 (2008).

On December 3, 2008, the petitioner filed with the district court a petition for relief pur-

suant to 28 U.S.C. § 2255. A13. On May 10, 2011, the district court denied the petitioner's motion for relief. GA158-GA169. On June 7, 2011, the petitioner filed a motion for the issuance of a certificate of appealability, pursuant to 28 U.S.C. § 2253(c)(1)(B), and on June 14, 2011, the district court granted that motion. A7, A14. On August 9, 2011, the petitioner filed a motion to amend the certificate of appealability to include an additional argument not raised before the district court. A25. The district court has not ruled on that motion. A7.

This appeal followed.

Statement of Facts

A. Factual basis

Had this case gone to trial, the Government would have presented the following facts, which were set forth in the Pre-Sentence Report ("PSR"), and which are not in dispute:

In January 2004, a confidential informant ("CI") provided information to law enforcement officers that an individual known as "H.G.," later identified as the petitioner, was able to get firearms and had been observed in possession of a firearm. PSR ¶ 9. On January 30, 2004, acting at the direction of law enforcement, the CI placed a call to the petitioner and informed him that a drug dealer would be arriving at a residence in the area of Whalley and Winthrop Avenues in New Haven with a large sum of money. PSR ¶ 10. The CI proposed to the petitioner that the CI and the petitioner rob the drug dealer,

and the petitioner agreed. PSR ¶ 10. The petitioner stated that he would take a taxi from his home at 123 Shelton Street to the area of Whalley and Winthrop Avenues, and would bring a firearm with him. PSR ¶ 10.

At about 9:10 p.m., law enforcement officers observed the petitioner leave his residence, get into a taxi, and travel in the direction toward Whalley Avenue. PSR ¶ 11. At the intersection of Whalley and Winthrop Avenues, police officers stopped the taxi. PSR ¶ 11. As the petitioner got out of the taxi, a .38 caliber revolver fell from his waist to the ground. PSR ¶ 11. Officers then recovered a second .38 caliber revolver from the petitioner's waistband. PSR ¶ 11. As a multi-convicted felon, the petitioner was not lawfully allowed to possess a firearm. PSR ¶ 12. Both of the firearms had been transported in interstate commerce before coming into the possession of the petitioner. PSR ¶ 11.

B. Guilty plea

On March 17, 2005, the petitioner pleaded guilty to count one of the indictment pursuant to a written plea agreement with the Government. GA158. The plea agreement contained a stipulation of offense conduct in which the parties agreed that the petitioner was a convicted felon, ÿthat he had knowingly possessed the two, .38 caliber revolvers found on him on January 30, 2004, and that both firearms have been transported in or affected interstate commerce. GA186. The plea agreement also set forth the

Government's belief that the petitioner was subject to the penalties of the ACCA, and that his resulting Sentencing Guidelines range was 168 to 210 months of imprisonment, subject to the 180 month mandatory minimum required by the ACCA. GA181. The petitioner "acknowledge[d] that he may be subject to [the ACCA], including the mandatory minimum sentence of 15 years[,]" but reserved "the right to present evidence or argument that he is not subject to the [ACCA]." GA182.

C. Sentencing proceeding

The PSR calculated the petitioner's total offense level as 30 based upon the petitioner's status as an armed career criminal pursuant to 18 U.S.C. § 924(e) and U.S.S.G. § 4B1.4(b)(3)(B). PSR ¶¶ 23-25. The PSR set forth the details of the petitioner's previous convictions, including his two convictions for first degree robbery, PSR ¶¶ 28, 32, his conviction for sale of narcotics, PSR ¶ 29, his conviction for carrying a dangerous weapon, PSR ¶ 30, and his conviction for unlawful restraint, PSR ¶ 34. These convictions resulted in 16 criminal history points and a criminal history category VI. PSR ¶ 35. The corresponding guideline range was 168 to 210 months of imprisonment, subject to the ACCA ÿmandatory minimum term of 180 months. PSR ¶ 55.

The petitioner challenged the PSR's conclusion that he was subject the penalties set forth in the ACCA. Specifically, the petitioner argued

that because his previous convictions were entered pursuant to the *Alford* doctrine, *see North Carolina v. Alford*, 400 U.S. 25 (1970), the Supreme Court's decision in *Shepard v. United States*, 544 U.S. 13 (2005) limited the court's use of such prior convictions and, thus, the petitioner did not qualify for the mandatory sentence under § 924(e). GA5-GA7. That is, the petitioner argued, because he did not adopt or admit any facts, but instead maintained his innocence to the offenses in question, his previous convictions could not be considered in the ACCA analysis. GA10.

The Government agreed with the PSR's conclusion that the petitioner had four qualifying ACCA predicates and thus faced a mandatory minimum term of 180 months of imprisonment. GA4.

The district court disagreed with the petitioner's argument, noting that under *Burrell*, "a guilty plea under the *Alford* doctrine . . . is sufficient for these purposes, and the crimes to which he pled guilty are necessarily qualifying offenses by their definition. So I don't even need to look at any police reports or plea colloquies or whatever, because the act of the conviction satisfies the Armed Career Criminal Act." GA11. The district court went on to conclude that the petitioner's previous two robbery convictions and his unlawful restraint conviction qualified as "crimes of violence" under the ACCA, and that the petitioner's sale of narcotics conviction was also a qualifying offense. GA12-GA13. Having

found that the petitioner was an armed career criminal, the court sentenced him to 180 months of imprisonment and a five years of supervised release. GA32.

D. Direct appeal

On December 28, 2005, the petitioner filed a timely notice of appeal to this Court. *See United States v. Harrington*, No. 05-6958-cr, 2007 WL 2728461, *2 (2d Cir. Sept. 20, 2007). On appeal, the petitioner argued that, because the characterization of the petitioner's previous convictions as a violent felonies or serious drug offenses created a mandatory minimum term of imprisonment under the ACCA, the Sixth Amendment afforded the defendant the right to have a jury find those facts. *See Harrington*, No. 05-6958-cr, 2007 WL 2728461, at *2-3. The petitioner did not challenge his sentence on any other basis. He did not argue that the unlawful restraint conviction did not count as a crime of violence or that the sale of narcotics conviction did not count as a serious drug offense. Nor did he claim, as he does in the instant appeal, that the ACCA was unconstitutional.

On September 27, 2007, this Court issued a summary order that affirmed the petitioner's conviction, rejecting the petitioner's argument that his Sixth Amendment rights were violated. Instead, this Court explained, "[T]o the extent that the District Court examined the statutory definitions of Harrington's prior offenses in evaluating whether they were of the kind that fall

within § 924(e), this examination comports with the Sixth Amendment." *Harrington*, No. 05-6958-cr, 2007 WL 2728461, at *2-3.

On February 19, 2008, the Supreme Court denied the petitioner's petition for a write of certiorari. *See Harrington v. United States,* 128 S. Ct. 1261 (2008).

E. §2255 proceedings

On December 3, 2008, the petitioner filed a pro se habeas corpus petition, arguing that his previous counsel was ineffective in connection with his sentencing. Specifically, he claimed that his trial and appellate counsel were ineffective for the following reasons: (1) counsel failed to raise an argument that his sale of narcotics conviction was not a qualifying felony for purposes of the ACCA because Connecticut's controlled substance schedules contain two drugs that are not on the federal list of controlled substances; and (2) counsel failed to object that two of his prior convictions (for unlawful restraint and robbery) were consolidated for purposes of trial and sentencing and thus were not "separate" convictions under the ACCA. GA37-GA46.

On March 25, 2009, the Government filed an objection to the petition. GA47-GA57. The Government argued that the petitioner's prior counsel was not ineffective. Specifically, the Government asserted that the petitioner's argument concerning his sale of narcotics conviction rested upon legal developments that occurred after the petitioner was sentenced, and thus counsel was

not deficient for failing to predict a change in the law and raise such an argument. GA54-55. In addition, the Government argued that clear legal precedent established that the petitioner's prior convictions for unlawful restraint and robbery were separate convictions under the ACCA, regardless of the fact that those two matters were consolidated for trial and sentencing. GA50-54. Thus, the Government argued, even without the sale of narcotics conviction, the petitioner was still an armed career criminal based upon his two robbery convictions and his one unlawful restraint conviction. GA54.

On April 21, 2009, the petitioner filed a pro-se reply brief, conceding that his two prior convictions for unlawful restraint and robbery were separate convictions under the ACCA even though the two counts had been consolidated for trial purposes. GA67. The petitioner maintained, however, that his narcotics conviction was not a qualifying ACCA felony. GA59-GA61. In addition, the petitioner argued that his unlawful restraint conviction did not qualify as a "violent felony" under the ACCA. GA62-GA64.

On May 6, 2009, the Government filed a surreply brief to address the challenge to the petitioner's unlawful restraint conviction. GA69-GA73. The Government argued that unlawful restraint in Connecticut is a violent felony for purposes of the ACCA, and petitioner's prior counsel was not deficient for failing to raise an argument asserting the contrary. GA70-71.

On July 20, 2010, the district court appointed counsel for the petitioner. A10. On October 14, 2010, through counsel, the petitioner filed an additional brief, which reiterated that prior counsel was ineffective for failing to challenge the petitioner's prior convictions as qualifying ACCA predicates. GA74-GA127. The brief discussed the same issues as argued earlier by the petitioner but attempted to "fully develop[]" the legal support for those arguments. GA74. On November 29, 2010, the Government responded. GA128-GA157.

On May 10, 2011, the district court denied the § 2255 motion in a written ruling. GA158-GA169. The district court explained that, to succeed on his challenge, the petitioner had to show that his prior counsel's conduct "fell below an objective standard of reasonableness," and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." GA-162, *quoting Strickland v. Washington*, 466 U.S. 668, 688 (1984). The district court summarized the petitioner's arguments as follows:

> [H]e asserts that his counsel should have argued: (1) that unlawful restraint is not a "violent felony," (2) that the robberies should not be considered violent felonies, and (3) that Harrington's sale of narcotics conviction does not qualify as "serious drug offense" because the Connecticut definition of a controlled substance is

> broader than the federal definition. The government maintains that all four of Harrington's prior convictions qualify as violent felonies or serious drug offense. The ACCA requires imposition of an enhanced sentence if the defendant has three or more qualifying convictions. 18 U.S.C. § 922(e)(1). Therefore, in order for Harrington's habeas petition to succeed, he must win two of his arguments.

GA162.

The district court ultimately concluded that the petitioner's first two arguments failed, and did not reach the third argument. Thus, the court held, the petitioner's prior counsel was not ineffective because the petitioner had been properly classified as an Armed Career Criminal. GA169.

First, the district court concluded that the petitioner's unlawful restraint conviction was a "violent felony" for purposes of the ACCA. The court adopted the "categorical approach" mandated by *Taylor v. United States*, 495 U.S. 575 (1990) and *Shepard*, 544 U.S. 13, to determine whether Connecticut's statutory definition of "unlawful restraint" met the definition of a violent felony pursuant to the ACCA. GA164. The court noted that the ACCA did not require that an offense involve "actual violence," but instead the "serious potential risk of physical injury to

another." 18 U.S.C. § 924(e)(2)(B). GA164. The court the explained that the Connecticut statute contained an element that the victim face a "substantial risk of physical injury" during the court of its commission, which created a "substantial similarity between the language of Connecticut's definition of unlawful restraint and the ACCA's definition of violent felony[.]" GA164. The court therefore concluded "that it was not an 'unprofessional error' for Harrington's counsel to decide not to argue that the conviction for unlawful restraint in the first degree was not a crime of violence under the ACCA." GA164. The court noted that this Court has not ruled on the precise issue, but cited favorable support from other circuits. GA165-166. The court explained: "The consensus of courts of appeals regarding the violent nature of unlawful restraint seriously undercuts Harrington's claim." GA-166.

Next, the district court addressed the petitioner's challenge to his two first degree robbery convictions. The court explained that first degree robbery in Connecticut "has as an element the use, attempted use, or threatened use of physical force[,]" such that "by its very definition . . . constitutes a violent felony under the ACCA." GA167-GA168. The district court rejected the petitioner's reliance upon *United States v. Rosa*, 507 F.3d 1142 (2d Cir. 2007), which held that a juvenile conviction for first degree robbery did not constitute a violent felony where there was no evidence that the defendant had pos-

sessed a firearm. *See* 18 U.S.C. § 924(e)(2)(B). The court explained that the requirement that the defendant possess a firearm "does not exist for crimes that are not acts of juvenile delinquency." GA168.

Finally, the district court addressed the petitioner's challenge to his sale of narcotics conviction. While the court noted that at least one decision supported the petitioner's argument "that a Connecticut drug conviction does not qualify under the ACCA for sentence enhancement because the controlled substance schedules in Connecticut include drugs that are not controlled substances under federal law[,] GA169 (citing *United States v. Lopez*, 536 F.Supp.2d 218 (D.Conn. 2008)), the court nonetheless reasoned it need not reach the petitioner's argument. The court explained "[b]ecause Harrington has the three qualifying offenses required by the ACCA even without the sale of narcotics conviction . . . the result of the proceedings would have been no different if counsel had successfully challenged counting the drug conviction for purposes of the ACCA." GA169. Although the court did not reach the petitioner's argument that his narcotics conviction did not qualify as a predicate offense based on the difference in Connecticut's controlled substance schedules from their federal counterparts, the court did note that "[i]t is by no means clear that Harrington's counsel should be faulted for failing to raise this issue because all of the relevant case law developed after Harrington's sentencing." GA169, n.3 (citing *Parisi*

v. United States, 529 F.3d 134, 141 (2d Cir. 2008).

On May 19, 2011, the petitioner filed a timely notice of appeal. A9. On June 7, 2011, the petitioner filed a motion for the issuance of a certificate of appealability, A14, which argued that "the issues contained in the § 2255 and decided by the Court involve substantial constitutional rights which have been denied by the ruling[.]" A15. The petitioner also attached a memorandum of law to the motion, which characterized the petition as claiming "that his counsel in his previous conviction was ineffective in failing to raise issues regarding whether or not the predicate offenses which led to his enhanced sentence were either qualifying crimes of violence or drug offenses." A17. In addition, the petitioner set forth five "points" that the petitioner argued should be decided by this Court: first, that counsel was ineffective for failing to challenge the petitioner's four predicate offenses under the ACCA, A18-A19; second, that unlawful restraint in Connecticut is not categorically a crime of violence, A20; third, that the petitioner's drug conviction did not qualify as a predicate offense because the petitioner pleaded guilty under the *Alford* doctrine, A20-A21; fourth, that *Begay* afforded the petitioner a direct right to challenge his sentence, A21-A22; and fifth, that the issues involved in the petitioner's case were so novel as to excuse the petitioner's failure to raise those issues at the original sentencing or on direct appeal. A22.

On June 14, 2011, the district court granted the petitioner's motion for a certificate of appealability by an endorsement order. A7.

On August 9, 2011, the petitioner moved to amend the certificate of appealability to include a sixth issue, that "recent jurisprudence involving the Armed Career Criminal Act . . . renders [the Act] unconstitutionally vague." A26. The Government filed an opposition to that motion, noting that the ongoing appeal divested the district court of jurisdiction over the case and that the issue as to the ACCA's constitutionality was not one raised in the habeas proceedings. A31-A32. The district court has not ruled on the petitioner's motion.

Summary of Argument

I. The district court correctly concluded that the petitioner's previous counsel was not constitutionally ineffective for failing to challenge the petitioner's four prior convictions as qualifying offenses under the ACCA. The defendant had three felony convictions, including two for robbery and one for unlawful restraint, which all categorically qualified as violent felonies under the act. Moreover, even if the petitioner's previous convictions did not categorically qualify as predicate offenses, counsel was not ineffective in failing to raise such a challenge because the petitioner cannot show that counsel's conduct was unreasonable under the prevailing standards at the time of his sentencing.

II. The district court improperly granted the petitioner's certificate of appealability as it relates to a direct challenge to his sentence, where such a challenge was not contained in the § 2255 petition, nor addressed by the district court below.

III. Even if this Court were to reach the petitioner's direct challenge to his sentence, such a challenge fails because it is procedurally barred, and the petitioner has not shown cause or prejudice to justify such a challenge.

IV. This Court should not reach the petitioner's constitutional challenge to the ACCA because that argument was not raised in the § 2255 petition below and the original certificate of appealability did not include that issue. In any event, the challenge fails as a matter of law.

Argument

I. The district court properly rejected the petitioner's claims that his counsel was ineffective for failing to challenge his qualifying convictions under the ACCA.

A. Governing law and standard of review

1. Habeas corpus relief

To obtain collateral relief under 28 U.S.C. § 2255, an aggrieved defendant must show that his "sentence was imposed in violation of the Constitution or laws of the United States." 28 U.S.C. § 2255. Habeas corpus relief is an extraordinary remedy and should only be granted where it is necessary to redress errors that, were they left intact, would "inherently result[] in a complete miscarriage of justice." *Hill v. United States*, 368 U.S. 424, 428 (1962). The strictness of this standard embodies the recognition that collateral attack upon criminal convictions is "in tension with society's strong interest in [their] finality." *Ciak v. United States*, 59 F.3d 296, 301 (2d Cir. 1995); *see also Strickland v. Washington*, 466 U.S. 668, 693 (1984) (recognizing the "profound importance of finality in criminal proceedings").

"A motion under § 2255 is not a substitute for an appeal." *Zhang v. United States*, 506 F.3d 162, 166 (2d Cir. 2007) (quotation marks and ci-

tations omitted). If a petitioner "failed properly to raise his claim on direct view, the writ [of habeas corpus] is available only if the petitioner establishes 'cause' for the waiver and shows 'actual prejudice resulting from the alleged . . . violation.' *Reed v. Farley*, 512 U.S. 339, 354 (1994).

Although, in general, a writ of habeas corpus will not be allowed to do service for an appeal, "failure to raise an ineffective-assistance-of-counsel claim on direct appeal does not bar the claim from being brought in a later, appropriate proceeding under § 2255." *Massaro v. United States*, 538 U.S. 500, 509 (2003). However, a person challenging his conviction on the basis of ineffective assistance of counsel bears a heavy burden. "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. The ultimate goal of the inquiry is not to second-guess decisions made by defense counsel; it is to ensure that the judicial proceeding is still worthy of confidence despite any potential imperfections, as "'the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial.'" *Roe v. Flores-Ortega*, 528 U.S. 470, 482 (2000) (quoting *United States v. Cronic*, 466 U.S. 648, 658 (1984)).

In *Strickland*, the Supreme Court held that a defendant who challenges his lawyer's effectiveness must establish (1) that his counsel's performance "fell below an objective standard of

reasonableness," and (2) that counsel's unprofessional errors actually prejudiced the defense. 466 U.S. at 688, 692; *see also Harrington v. Richter*, 131 S. Ct. 770, 787-88 (2011) (describing *Strickland's* two prongs).

> To satisfy the first, or "performance," prong, the defendant must show that counsel's performance was "outside the wide range of professionally competent assistance," [*Strickland*, 466 U.S. at 690,] and to satisfy the second, or "prejudice," prong, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id*. at 694."

Brown v. Artuz, 124 F.3d 73, 79-80 (2d Cir. 1997). A defendant must meet both requirements of the *Strickland* test to demonstrate ineffective assistance of counsel. If the defendant fails to satisfy one prong, the court need not consider the other. *Strickland*, 466 U.S. at 697. "The *Strickland* standard is rigorous, and the great majority of habeas petitions that allege constitutionally ineffective counsel founder on that standard." *Linstadt v. Keane*, 239 F.3d 191, 199 (2d Cir. 2001). "The court's central concern is not with 'grad[ing] counsel's performance,' but with discerning 'whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system

counts on to produce just results.'" *United States v. Aguirre*, 912 F.2d 555, 560 (2d Cir. 1990) (quoting *Strickland*, 466 U.S. at 696-97 (internal citations omitted)). "A court considering a claim of ineffective assistance must apply a 'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance." *Harrington v. Richter*, 131 S. Ct. 770, 787 (2011) (quoting *Strickland*). "The challenger's burden is to show 'that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment.'" *Id.* (quoting *Strickland*).

The Supreme Court recently cautioned courts about the application of the *Strickland* test:

> An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the Strickland standard must be applied with scrupulous care, lest intrusive post-trial inquiry threaten the integrity of the very adversary process the right to counsel is meant to serve. . . . Even under de novo review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is all

> too tempting to second-guess counsel's assistance after conviction or adverse sentence. . . . The question is whether an attorney's representation amounted to incompetence under prevailing professional norms, not whether it deviated from best practices or most common custom.

Richter, 131 S. Ct. at 788 (internal citations and quotation marks omitted).

The Court again reaffirmed its view that *Strickland* was meant to be very narrowly applied in *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011), wherein it held that the lower court had "misapplied" *Strickland*, failed to apply the "strong presumption of competence that *Strickland* mandates," and "overlooked the constitutionally protected independence of counsel and the wide latitude counsel must have in making tactical decisions." *Id.* at 1406-1407 (internal quotation marks and ellipse omitted). The Court cautioned that, "[b]eyond the general requirement of reasonableness, specific guidelines are not appropriate." *Id.* (internal quotation marks omitted). The Court explained, "No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions." *Id.* (internal quotation marks omitted).

The second element of the Strickland test requires defendant to show that "there is a rea-

sonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different . . . ." 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Cullen,* 131 S. Ct. at 1403 (internal quotation marks omitted). "That requires a substantial, not just conceivable, likelihood of a different result." *Id.* (internal quotation marks omitted). In order to satisfy the prejudice element of the *Strickland* test, defendant "must make more than a bare allegation" of prejudice. *United States v. Horne*, 987 F.2d 833, 836 (D.C. Cir. 1993).

"A court of appeals reviews a district court's denial of a 28 U.S.C. § 2255 petition de novo." *Fountain v. United States*, 357 F.3d 250, 254 (2d Cir. 2004); *Coleman v. United States*, 329 F.3d 77, 81 (2d Cir. 2003). "[B]oth the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact." *Strickland*, 466 U.S. at 698; *see also United States v. Monzon*, 359 F.3d 110, 119 (2d Cir. 2004); *United States v. Schwarz*, 283 F.3d 76, 90-91 (2d Cir. 2002). Findings of historical fact are upheld unless clearly erroneous, while conclusions of law are reviewed de novo. *See Monzon*, 359 F.3d at 119; *United States v. Gordon*, 156 F.3d 376, 379 (2d Cir. 1998) (per curiam).

2. The Armed Career Criminal Act

A "crime of violence" for purposes of the ACCA is any crime punishable by imprisonment for a term exceeding one year that:

> (i)has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii)is burglary, arson, or extortion, involves the use of explosives, or therwise involves conduct that presents a serious potential risk of physical injury to another.

18 U.S.C. § 924(e)(2)(B).

Generally, a sentencing court is required to consider only the fact of conviction and the statutory definition of the prior offense, and not the particular facts underlying the conviction, in determining whether a defendant has committed a violent felony (the so-called "categorical approach"). *Taylor v. United States*, 495 U.S. 575, 600-601 (1990). Under the categorical approach, courts need only determine that "the conduct encompassed by the elements of the offense, in the ordinary case, presents a serious potential risk of injury to another." *United States v. Johnson*, 616 F.3d 85, 88 (2nd Cir. 2010)(citing *James v. United States*, 550 U.S. 192, 208 (2007)). Thus, only the typical instance of the crime needs to be considered, and not a hypothetical, outlier situation. The court should also consider whether the state courts have narrowed the law's application. *Johnson*, 616 F.3d at 88.

The Supreme Court has explained that clause (ii) of the "crime of violence" definition cited above, also known as the "residual clause," should be read to include crimes "that are roughly similar" to burglary, arson, or extortion, "in kind as well as in degree of risk posed[.]" *Begay v. United States*, 553 U.S. 137, 143 (2008). That is, the enumerated offenses found in clause (ii) "provide guidance" in making the determination if the crime at hand presents a serious potential risk of injury. *Sykes v. United States*, 131 S. Ct. 2267, 2273 (2011). In *Sykes*, the Supreme Court concluded that Indiana's law prohibiting vehicle flight from a law enforcement officer was akin to arson in that it involved a perpetrator's "indifference" to potential violent consequences for others, such as pedestrians and fellow drivers, and was also similar to burglary in that it was "dangerous because it can end in confrontation leading to violence." *Id.* at 2273.

In *Begay*, the Court held that a state DUI conviction did not qualify as a crime of violence because such laws "are most nearly comparable to, crimes that impose strict liability, criminalizing conduct in respect to which the offender need not have had any criminal intent at all." 553 U.S. at 146. In *Chambers v. United States*, 129 S.Ct. 687, 692 (2009), the Court held that a conviction for failure to report to a penal institution likewise did not qualify as a crime of violence because the crime "amounts to a form of inaction" and that "an individual who fails to report would seem unlikely, not likely, to call attention to his

whereabouts by simultaneously engaging in violent and unlawful conduct." In those two decisions, the Court cited to lack of "purposeful, violent and aggressive" conduct associated with the criminalized conduct.

Most recently, in *Sykes*, the Court explained that the "purposeful, violent, and aggressive" language was not a phrase found in the text of the ACCA, but instead one added by the Court in *Begay*. The *Sykes* Court clarified that while "purposeful, violent and aggressive" conduct will often go hand-in-hand with conduct that creates a "serious risk of physical injury to another," the focus of any inquiry should remain on the level of risk created by the illegal conduct. That risk is, the *Sykes* court explained, the "increased likelihood that the offender is the kind of person who might deliberately point the gun and pull the trigger." *Id.* at 2275 (citing *Begay*, 533 U.S at 146). In this connection, the *Sykes* court distinguished crimes "akin to strict liability, negligence, and recklessness crimes," such as those discussed in *Begay* and *Chambers*, from crimes involving a "stringent mens rea requirement" where "violators must act knowingly or intentionally." *Id.*[1]

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[1] The petitioner suggests that the "additional test" discussed in *Begay* that the crime must be "purposeful, violent and aggressive" may be resurrected, citing to Justice Kagan's dissent in *Sykes*. The *Sykes* decision makes clear, however, that to read previous cases as creating such requirement "overreads the

B. Discussion

1. Unlawful restraint in Connecticut is categorically a crime of violence under the ACCA

First, the petitioner argues that his former counsel was ineffective for failing to raise the argument that the petitioner's prior conviction for unlawful restraint was not a "crime of violence" for purposes of the ACCA. Specifically, the petitioner contends that because there are "nonviolent ways to commit unlawful restraint," counsel erred in not objecting to the PSR's finding that unlawful restraint in Connecticut was a violent crime for purposes of the ACCA.

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opinions of the Court." 131 S.Ct. 2275. As the Court explained, the *Begay* decision "gave a more specific reason for its holding [than the fact that the crime in question did not involve violent and aggressive conduct]: 'The conduct for which the drunk driver is convicted (driving under the influence) need not be purposeful or deliberate[.]" *Id*. (citing *Begay*, 533 U.S. at 145). Given that "[t]he phrase 'purposeful, violent, and aggressive' has no precise textual link to the residual clause," the *Sykes* court further reasoned, the analysis must focus on the ACCA language that the conduct "otherwise involv[e] conduct that presents a serious potential risk of physical injury." *Id.* (citing 18 U.S.C. § 924(e)(2)(B)(ii)). While those two frameworks may often overlap, the Court noted that "between the two inquiries, risk levels provide a categorical and manageable standard that suffices to resolve the case before us." *Id.*

In Connecticut, unlawful restraint in the first degree is defined as follows:

> (a) A person is guilty of unlawful restraint in the first degree when he restrains another person under circumstances which expose such other person to a substantial risk of physical injury.

Conn. Gen. Stat. § 53a-95. Connecticut further defines "restrain" as follows:

> (1) 'Restrain' means to restrict a person's movements intentionally and unlawfully in such a manner as to interfere substantially with his liberty by moving him from one place to another, or by confining him either in the place where the restriction commences or in a place to which he has been moved, without consent. As used herein "without consent" means, but is not limited to, (A) deception and (B) any means whatever, including acquiescence of the victim, if he is a child less than sixteen years old or an incompetent person and the parent, guardian or other person or institution having lawful control or custody of him has not acquiesced in the movement or confinement.

Conn. Gen. Stat. § 53a-91 (emphasis added).

An examination of Connecticut's unlawful restraint statute, which criminalizes restraining someone– i.e., "intentionally" restricting their movements, Conn. Gen. Stat. § 53a-91(a), "under circumstances which expose such other person to a substantial risk of physical injury[,]"--reveals that the statute is categorically a crime of violence under the residual clause of the ACCA. The statute criminalizes the intentional, physical restraint of another, without that person's consent, under circumstances that expose the victim to "substantial" physical harm. As such, the statute addresses the same type of intentional conduct that creates a risk of physical harm as the enumerated offenses of clause (ii) of the ACCA.[2] For example, like burglary, the unlawful restraint of a person is "dangerous because it can end in confrontation leading to violence[,]" when the restrained individual attempts to free him or herself. *Sykes*, 131 S. Ct. at 2273.

Significantly, as the district court observed, the Connecticut unlawful restraint statute mimics the language in the ACCA in that the statute criminalizes conduct that creates a "substantial risk of physical injury" and the ACCA reaches

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[2] "The petitioner concedes that that unlawful restraint has to be purposeful [.]" Pet'r's Br. at 19.

conduct that creates a "serious potential risk of injury."[3] GA164.

Indeed, a review of Connecticut state court decisions reveals that unlawful restraint in the first degree typically involves intentional, violent and aggressive behavior. *See, e.g., State v. Jason B.*, 958 A.2d 1266 (Conn. App. 2008) (defendant restrained the victim against her will when victim tried to flee car by grabbing her arm and pulling her back in car, and by driving to a remote location); *State v. Cotton*, 825 A.2d 189, 206 (Conn. App. 2003) (defendant changed driving directions, parked in a parking lot and physically accosted victim, effectively confining her to the car); *State v. Jordan*, 781 A.2d 310 (Conn. App. 2001) (defendant struck the victim and pinned her shoulders to a bed).

While this Court has not addressed whether Connecticut's unlawful restraint statute qualifies as a crime of violence, several other Courts of Appeals have analyzed similar statutes and have concluded that they constitute crimes of violence. *See United States v. Smith*, 284 Fed. Appx. 943, 945 (3d Cir. 2008) (unpublished decision) (Pennsylvania unlawful restraint/ involuntary servitude statute); *United States v. Riva*, 440 F.3d 722 (5th Cir. 2006) (Texas unlawful restraint of a child statute); *United States v. Stapleton*, 440 F.3d 700 (5th Cir. 2006) (Louisiana's

[3] In contrast, unlawful restraint in the second degree in Connecticut does not contain a risk of injury element. *See* Conn. Gen. Stat. § 53a-96.

crime of false imprisonment); *United States v. Wallace*, 326 F.3d 881 (7th Cir. 2003) (Illinois unlawful restraint statute); *United States v. Billups*, 536 F.3d 574 (7th Cir. 2008) (Wisconsin false imprisonment statue); *United States v. Zamora*, 222 F.3d 756 (10th Cir. 2000) (New Mexico false imprisonment statute); *United States v. Nunes*, 147 Fed. Appx. 854 (11th Cir. 2005) (unpublished decision) (Illinois statute for unlawful restraint).

Most recently, in *United States v. Capler*, 636 F.3d 312 (7th Cir. 2011), the Seventh Circuit concluded that Illinois's unlawful restraint statute was a crime of violence (even under a post-*Begay* analysis) because "[r]estraining another against his will, apart from carrying a serious risk of injury, is an aggressive act categorically similar to the crimes enumerated . . . ." *Id.* at 324.[4]

In sum, it is clear that Connecticut's unlawful restraint statute is categorically crime of violence under the ACCA. The petitioner's arguments to the contrary are unavailing.

First, the petitioner argues that unlawful restraint is not similar to the enumerated offenses in the ACCA because the Connecticut statute "sets forth nonviolent ways to commit unlawful restraint, namely by deception." Pet'r's Br. at

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[4] In Illinois, a personal commits unlawful restraint "when he or she knowingly without legal authority detains another." 720 Ill. Comp. Stat., 5/10-3(a)(2010).

17. To the extent that the petitioner suggests that actual violence is necessary under the ACCA, he is wrong. Instead, "risk of violence," is sufficient. *Sykes*, 131 S.C.t at 2273. As the district court below noted, "There can be a potential for violence even where it did not materialize." ÿGA164. Like burglary, the physical restraint of another "is dangerous because it can end in confrontation leading to violence." *Sykes*, 131 S. Ct. at 2273. Indeed, given that a burglary can occur without the presence of the victim-homeowner, the unlawful restraint statute presents an even greater risk that violence may ensue, because the victim of the crime would be present and aware that he or she was being restrained.

The petitioner also argues that if a crime may be committed by "deception," it is categorically not a crime of violence. Again, the petitioner is incorrect. Intentionally restricting the movement of another, without his or her consent carries with it the risk of physical confrontation and, in the case of Connecticut, the serious potential of physical injury. For example, in *United States v. Kaplansky*, 42 F.3d 320, 324 (6th Cir. 1994), the Sixth Circuit explained that, even though kidnapping in Ohio could be accomplished through deception, that did "not erase" the potential for violence inherent in abducting someone against their will. *See Vargas-Sarmiento v. United States Dep't of Justice*, 448 F.3d 159, 171 (2d Cir. 2006) (citing *Kaplansky* for authority that even if it is "possible to hypothesize" circumstances where kidnapping may

be committed "without actual force," that crime was nonetheless a crime of violence because of the substantial risk of force, and thus injury, that was inherent to the crime); *see also Billups*, 536 F.3d at 581 (explaining that even though unlawful restraint statute could be committed by deception, the crime presented a substantial risk of injury because a victim would realize that the defendant had no legal authority over her and then likely resist the defendant's assertion of physical control.).

The petitioner's reliance upon *United States v. Oliveira*, --F.Supp.2d--, 2011 WL 2909816 (D. Mass. July 21, 2011) (Pet'r's Br. at 18), is misplaced because the crime at question there— larceny of a person— does not involve the type of risk of physical injury that goes hand-in-hand with an unlawful restraint. Instead, the crime in *Oliveira* is essentially "pickpocketing or purse-snatching," and is "uniquely non-confrontational." *Id.* at *11. The district court explained that the larceny was not akin to burglary in terms of risk of injury because burglary involves a risk of face-to-face confrontation, occurs within a dwelling, and because "[a] victim of a burglary may be- or may feel- trapped in his home with no means of escape." *Id.* In contrast, larceny from a person did not involve a risk of injury because "the pickpocketer is unlikely to resort to violence in a populated area . . . [and] by definition the pickpocketer is at least attempting to operate in stealth." *Id.* Moreover, the district court's opinion holds little weight in

comparison to the court of appeal decisions cited above, which squarely address the crime of unlawful restraint and which unanimously agree that it is a crime of violence.

The petitioner's reliance on *United States v. Smith*, 652 F.3d 1244 (10th Cir. 2011), for the proposition that the crime need involve a law enforcement official as the victim in order to involve a risk of injury, is also unpersuasive. There, the Tenth Circuit concluded that an assault or battery on a Juvenile Affairs employee involved a risk of bodily injury or confrontation that might lead to bodily injury because the defendant's behavior is directed at someone who is required or would reasonably be expected to respond with force. Nothing in that opinion, however, *requires* that the victim be a law enforcement officer. On the contrary, restraining someone against his or her will is the type of behavior in which one would expect the victim to respond with force. *See Zamora*, 222 F.3d at 765 (Tenth Circuit decision concluding that the crime of false imprisonment is a crime of violence because restraining someone against their will creates a "substantial risk of violence.").

Finally, contrary to the petitioner's assertion, the conclusion that unlawful restraint is a violent felony does not rely upon the "powder keg" theory that is typically associated with crimes committed within penal institutions. In those cases, courts have concluded that crimes committed within prison create serious risks of physical injury because "prisons are like powder

kegs, where even the slightest disturbance can have explosive consequences." *United States v. Johnson*, 616 F.3d 85, 94 (2d Cir. 2010).[5] In ÿsuch situations, the location of the crime within a prison setting creates the risk of physical confrontation and injury. In contrast, the Connecticut statute already has with it an essential element that the offender's conduct pose "a substantial risk of physical injury."

As set forth above, the petitioner's unlawful restraint conviction properly qualified as a crime of violence for ACCA purposes. On appeal, the petitioner does not challenge that his two prior robbery convictions were also categorically crimes of violence.[6] Thus, the petitioner has

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[5] Contrary to the defendant's assertion, the *Chambers* decision did not "repudiate" the powder keg theory, but instead rejected its application to a statute criminalizing the failure to report to prison. *See Chambers*, 555 U.S. at 128 ("While an offender who fails to report must of course be doing something at the relevant time, there is no reason to believe that the something poses a serious potential risk of physical injury. To the contrary, an individual who fails to report would seem unlikely, not likely, to call attention to his whereabouts by simultaneously engaging in additional violent and unlawful conduct.").

[6] This Court has had little difficulty concluding that robbery, regardless of its degree, categorically qualifies as a crime of violence. *See, e.g., United States v. Johnson*, 616 F.3d 85, 87, n. 2 (2d Cir. Aug. 2, 2010) ("There is no dispute that [the defendant's] remain-

three qualifying ACCA violent crime convictions. His ineffective assistance argument therefore fails because counsel's failure to challenge the petitioner's unlawful restraint conviction did not affect the sentence that petitioner received. *See Brown*, 124 F.3d at 79-80 ("The defendant must show that 'there is reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'") (citing *Strickland*, 466 U.S. at 694).

2. Prior counsel was not ineffective.

a. Failure to challenge the unlawful restraint conviction

As set forth above, the petitioner's unlawful restraint conviction was and remains a crime of violence, and prior counsel was not ineffective for failing raise an argument to the contrary. However, even assuming *arguendo* that this Court were to conclude that unlawful restraint was a violent felony, the petitioner's ineffective assistance claim would nonetheless fail.

The petitioner has not demonstrated that his counsel's performance was unreasonable under "prevailing professional norms." *Strickland*, 466

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ing predicate offenses, two instances of robbery, are violent felonies under the ACCA."); *United States v. Walker*, 595 F.3d 441, 446 (2d Cir. 2010) (holding that the generic definition of robbery used in all 50 states is a crime of violence under U.S.S.G. § 2K2.1(a)(2));U.S.S.G. § 4B1.2, n. 1 ("crime of violence" for purposes of the Career Offender enhancement includes robbery).

U.S. at 688. At the time of the petitioner's sentencing in 2005, several courts of appeal had concluded that unlawful restraint was a crime of violence under the ACCA. *See, e.g.*, *United States v. Nunes*, 147 Fed. Appx. 854 (11th Cir. 2005) (unpublished decision); *United States v. Wallace*, 326 F.3d 881 (7th Cir. 2003); *United States v. Zamora*, 222 F.3d 756 (10th Cir. 2000)). Thus while this Court had not weighed in on the issue, the prevailing law at the time (as it remains) was that unlawful restraint convictions did qualify as predicate ACCA offenses. Indeed, the petitioner has not cited to a single case that holds to the contrary.

As discussed above, the Supreme Court recently expressed its dissatisfaction with lower court decisions that have misapplied the *Strickland* standard on ineffective assistance. *See Richter*, 131 S. Ct. at 788; *Cullen*, 131 S. Ct. at 1406. According to the Court, "[t]he question is whether an attorney's representation amounted to incompetence under prevailing professional norms, not whether it deviated from best practices or most common custom." *Richter*, 131 S. Ct. at 788. Here, it appears to be uncontested that the "prevailing professional norms" at the time of the sentencing in this case did not contemplate that unlawful restraint was anything other than a categorical crime of violence. Thus, using "[t]he proper measure of attorney performance," namely, "reasonableness under prevailing professional norms," as examined from "counsel's perspective at the time," *Strickland*,

466 U.S. at 688-89, the performance of the petitioner's counsel cannot be considered constitutionally ineffective.

b. Failure to challenge the sale of narcotics conviction

The district court did not reach the issue of whether the narcotics conviction counted under § 924(e) because it held that the petitioner's two robbery convictions and one unlawful restraint conviction qualified as ACCA predicate offenses. The petitioner asks this Court to find counsel ineffective with respect to the unlawful restraint conviction "and remand[] to the District Court to determine if his drug offense qualifies as a predicate under ACCA." Pet'r's Br. at 30. If this Court were to find, however, that counsel was constitutionally ineffective for failing to challenge the unlawful restraint conviction, the Court should still not reverse the district court's dismissal of the petition because any challenge to prior counsel's failure to object to the petitioner's narcotics conviction as a qualifying predicate under the ACCA also fails under the first prong of the *Strickland* test. Petitioner's argument below asserted that counsel was ineffective for failing to raise a claim pursuant to *United States v. Savage*, 542 F.3d 959 (2d Cir. 2008), that his prior drug conviction did not qualify as a serious drug offense under the ACCA because Connecticut's controlled substance schedules include two drugs that are not controlled substances under federal law.

Section 21a-277(a) makes it a felony offense to engage in conduct with respect to two categories of substance on Connecticut's Controlled Substances Schedules: "hallucinogenic substance[s] other than marijuana" and "narcotic substance[s]." Id. The primary question with respect to the categorical analysis would be whether these two categories at the time of defendant's conviction included substances not covered by the categories of federally controlled substances. The answer, in short, would be that at the time in question, Conn. Gen. Stat. § 21a-277(a) was over-inclusive in relation to 21 U.S.C. § 802(44). This was so because in May 1986, in an effort to conform its controlled substance schedules to federal law, the State of Connecticut listed on its Controlled Substance Schedule I two obscure chemicals, thenylfentanyl and benzylfentanyl, which it categorized as "narcotic substances," but these substances have not been controlled as narcotics under federal law since November 29, 1986. Consequently, despite a pronounced overall trend in Connecticut's regulation of controlled substances toward conformance with federal scheduling, and notwithstanding that these obscure substances have in all likelihood never served as the basis of a single prosecution or conviction, categorical reliance on a conviction under Conn. Gen. Stat. § 21a-277(a) would be precluded because of the abstract theoretical possibility that a defendant

might have been convicted of conduct relating to thenylfentanyl and benzylfentanyl.[7]

Contrary to the petitioner's claim below that prior counsel should have been aware of the *Savage* argument with respect to petitioner's narcotics conviction, "it had always been the case in Connecticut that convictions for violating Conn. Gen. Stat. § 21a-277(a), whether derived from *Alford* pleas or not, counted as . . . predicates. No one even challenged that universally accepted belief." *Tellado v. United States*, No. 3:09CV1572(MRK), Movant's Memorandum dated Oct. 12, 2010, Submitted on behalf of the movant by Assistant Federal Defender Terence Ward, dated Oct. 12, 2010; *see also id.*, Movant's Memorandum dated Nov. 8, 2010, at 11-12 ("In the seventeen years that the sentencing guidelines had been applied in this District, no lawyer had discovered that the state and federal provisions were not coterminous. . . . This lack of recognition was not the result of poor lawyering on

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[7] Indeed, a Westlaw search of all federal cases shows that the term "benzylfentanyl" first appeared in *United States v. Madera*, 521 F.Supp.2d 149 (D. Conn. 2007) (finding that narcotics trafficking offenses under Connecticut's statutes require a modified categorical inquiry to determine whether they qualify as predicate serious drug offenses on the grounds that Connecticut's controlled substance schedules include two drugs, benzylfentanyl and thenylfentanyl, that are not included on the federal controlled substance list), which was decided on March 5, 2007.

the part of the bar. Instead, the failure of anyone to recognize and raise the differences between the state and federal provisions was due to the byzantine drafting of the state statutory scheme."); Sarah French Russell, *Rethinking Recidivist Enhancements: The Role of Prior Drug Convictions in Federal Sentencing*, 43 U.C. Davis L. Rev. 1135, 1199 (2010) ("Until recently, federal defendants in firearm, drug, and immigration cases in the District of Connecticut routinely had sentencing enhancements applied if they had prior convictions for violating Connecticut's drug distribution statute."). In other words, until the Second Circuit's decision in *Savage* and subsequent litigation, defense counsel in this district had proceeded with the long-held belief that prior Connecticut convictions for sale of narcotics qualified categorically as controlled substance offenses under U.S.S.G. § 4B1.1 and felony drug offenses under 21 U.S.C. § 841(b)(1).

Here, it appears to be absolutely uncontested that the "prevailing professional norms" at the time of the petitioner's sentencing in this case did not contemplate use of the modified categorical approach for deciding whether a Connecticut sale of narcotics conviction qualified as a felony drug offense under 21 U.S.C. § 841(b)(1). Thus, using "[t]he proper measure of attorney performance," namely, "reasonableness under prevailing professional norms," as examined from "counsel's perspective at the time," *Strickland*, 466 U.S. at 688-89, the performance of the petitioner's counsel cannot be considered constitu-

tionally ineffective. *See also, e.g., Padilla*, 130 S. Ct. at 1482 (attorney performance inquiry is "linked to the practice and expectations of the legal community"); *Parisi*, 529 F.3d at 141 ("To counteract this inclination to evaluate counsel's performance against insight gained only through the passage of time, Strickland requires that [w]hen assessing whether or not counsel's performance fell below an objective standard of reasonableness . . . under prevailing professional norms, we must consider the circumstances counsel faced at the time of the relevant conduct and . . . evaluate the conduct from counsel's point of view.") (internal quotation marks and citations omitted).[8]

Thus, the petitioner's claim to relief on the grounds of the supposed ineffectiveness of counsel fails.

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[8] Compare *Carter v. United States*, No. 3:07CV1477(EBB), 2010 WL 3123370 (D. Conn. Aug. 6, 2010), (concluding that counsel was ineffective for failing to raise the issue of Connecticut's controlled substance schedules to challenge a prior drug conviction) with *McCoy v. United States*, No. 3:09cv1960(MRK), 2011 WL 3439529 (D.Conn. Aug. 4, 2011) (holding that counsel's failure to raise issue of Connecticut's controlled substance schedules was not unreasonable under the *Strickland* test given the prevailing norms at the time), *appeal filed* (No. 11-3457).

II. The Petitioner Is Not Entitled to Directly Challenge His Sentence, Independent of His Unsuccessful Claim of Ineffective Assistance, Because Such Claim Was Not Raised in the § 2255 Petition And Is Not Property Before this Court

Next, the petitioner seeks to directly challenge his sentence. He claims that *Begay* and *Chambers* announced a new substantive rule for the purpose of habeas relief and that his claims are so novel that they were not reasonably available to counsel at the time of the petitioner's sentencing. As to his underlying challenge, he argues that he was not properly classified as an armed career criminal at sentencing both because his unlawful restraint and sale of narcotics convictions do not count as qualifiers under § 924(e) and the ACCA is unconstitutionally vague. This Court need not reach these arguments, as they were not raised in the § 2255 motion and were not properly part of the certificate of appealability. Moreover, they fail under the cause of prejudice standard applied to challenges not raised on direct appeal and fail on their merits.

A. Governing law and standard of review

1. Certificate of appealability

If the district court denies a § 2255 petition, the federal habeas appeals statute, as amended by the Antiterrorism and Effective Death Penalty Act of 1996, provides that the court may issue

"[a] certificate of appealability . . . only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (2006). "[A] certificate of appealability is not to be granted unless the petitioner makes 'a substantial showing of the denial of a constitutional right,' 28 U.S.C. § 2253(c)(2), and '[t]he certificate of appealability . . . *shall indicate which specific issue or issues satisfy the showing required by paragraph (2),*' id. § 2253(c)(3)." *Grotto v. Herbert*, 316 F.3d 198, 209 (2d Cir. 2003)(emphasis supplied).

Recently, this Court has made clear that "[a]ppellate courts cannot waste scarce judicial resources by wading through trial records in an effort to guess which issues a district judge may have deemed worthy of appellate review." *Blackman v. Ercole*, --F.3d --, 2011 WL 5084322 (2d Cir. Oct. 27, 2011).

2. Cause and prejudice standard

As discussed above, a writ of habeas corpus will not be allowed to do service for an appeal. *Reed v. Farley*, 512 U.S. at 354. "Where the petitioner–whether a state or federal prisoner–failed properly to raise his claim on direct review, the writ is available only if the petitioner establishes 'cause' for the waiver and shows 'actual prejudice from the alleged . . . violation'". *Id.* (quoting *Wainwright v. Sykes*, 433 U.S. 72, 84 (1977)).

"'[C]ause' under the cause and prejudice test must be something external to the petitioner, something that cannot be fairly attributed to

him." *Coleman v. Thompson*, 501 U.S. 722, 753 (1991) (emphasis in orginal). "[T]he existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the . . . procedural rule." *Id.* (internal quotation marks and citations omitted).

The cause standard may be met when the defaulted claim is "so novel that its basis [was] not reasonably available to counsel." *Reed v. Ross*, 468 U.S. 1, 16 (1984). Novelty, however, is to be assessed in terms of whether the petitioner "lacked the tools to construct their . . . claim." *Engle v. Isaac*, 456 U.S. 107, 133 (1982). A claim may be "sufficiently novel" to justify procedural default only if the "law . . . necessary to conceive and argue the claim were not yet in existence" at the time of default. *See Poyner v. Murray*, 964 F.2d 1404, 1424 (4th Cir. 1992). "Even if others have not been raising a claim, the claim may still be unnovel if a review of the historical roots and development of the general issue involved indicates that petitioners did not 'lack[] the tools to construct their constitutional claim.' *Engle*, 456 U.S. at 133." *Pitts v. Cook*, 923 F.2d 1568, 1572 n.6 (11th Cir. 1991).

B. Discussion

Here, the §2255 petition raised issues related only to the ineffectiveness of the petitioner's prior counsel and did not assert a direct challenge to the petitioner's sentence. Indeed, the

district court's opinion characterizes the petition as "alleging ineffective assistance of counsel in contravention of the Sixth Amendment." GA158. The district court then discussed the petitioner's arguments in the context of the ineffective assistance claim and did not reach any arguments that directly attacked the sentence itself.

The petitioner's motion for certificate of appealability, however, presented issues well-beyond an ineffective assistance of counsel claim,[9] asserting two additional issues that should be decided by this Court: (1) that *Begay* gave the petitioner a direct right to challenge his sentence (Point Four); and (2) that the issues "involved in this case regarding predicate offenses" were so novel that the petitioner had a direct right to challenge his sentence (Point Five). These two issues constitute direct challenges to the petitioner's sentence and set forth arguments not identified in the petition, nor reached by the district court in its opinion.

The district court's endorsement order granting the motion for a certificate of appealability did not specifically identify on which issues the

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[9] A fair reading of the petitioner's first three issues--(1) that petitioner's previous counsel was ineffective for failing to challenge the petitioner's four ACCA predicate convictions; (2) that unlawful restraint was not a crime of violence under the ACCA; and (3) that the petitioner's drug offense was not a qualifying predicate under the ACCA—is that those issues collectively form the ineffective assistance argument.

petitioner had "made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Instead, the order granted the petitioner's motion without any further discussion or elaboration. The court's order does not meet the requirements set by this Court in *Blackman v. Ercole*, --F.3d --, 2011 WL 5084322 (2d Cir. Oct. 27, 2011). While the granting of the certificate of appealability could be read to authorize an appeal of the very issues that were raised in the petition and reached by the district court, the court's endorsement order should not be read to reach the arguments concerning the direct challenge to the petitioner's sentence—issues not raised in the petition and not discussed by the district court.

Even if this Court were to conclude, however, that the certificate of appealability properly included a direct challenge to the petitioner's sentence, under the standards discussed above, the petitioner's defaulted claims regarding his previous unlawful restraint conviction were not so novel at the time of his sentencing to justify "cause" for the default. That is, the tools were available with respect to the petitioner's *Begay* claims that he now raises. The issue of what did and what did not constitute a crime of violence was thoroughly litigated in this Circuit and elsewhere at the time of the petitioner's sentencing. For example, the issue of whether escape was a crime of violence caused a split in the Circuit Courts that was ultimately resolved in *Chambers*, 129 S.Ct at 690. Also, as noted

above, several circuit courts had specifically issued decisions concerning whether unlawful restraint and similar statutes constituted crimes of violence under the ACCA; thus, the petitioner cannot show a lack of law "necessary to conceive and argue" his claims at the time of his default. *See Poyner*, 964 F.2d at 1424.

Moreover, the defaulted claims regarding the application of the holdings of *Savage* and *Madera* to the petitioner's narcotics conviction were not novel, so a direct challenge to the narcotics conviction would likewise fail. Those holdings were based on unchanged state and federal statutory and guidelines provisions, and the extension of the existing *Taylor/Shepard* framework. Although competent counsel could not have been expected to raise the claims that eventually led to those holdings, the tools to do so were available. These claims were "hiding in plain sight" for years. *Tellado v. United* States, --F.Supp.2d---, 2011 WL 2746123, at *7 (D.Conn. July 13, 2011), *appeal filed* (No. 11-3227). The claims, thus, were simultaneously "not so novel as to excuse procedural default, [and] not so established that failure to [assert them] constituted ineffective assistance of counsel." *Pitts*, 923 F.2d at 1571-72.

Accordingly, the petitioner's effort to overcome procedural default on the basis of novelty fails. Even if the petitioner were able to overcome procedural default and directly challenge his sentence, however, the challenge would fail because, as discussed above, the petitioner's un-

lawful restraint qualifies as a crime of violence and establishes that the petitioner is an armed career criminal.

Finally, the petitioner asks this Court to find the residual clause of the ACCA, 18 U.S.C. § 924(e)(2)(B)(ii), unconstitutionally vague. This Court should decline to reach this argument, as it was not raised below in the district court proceedings, nor included in the issues presented for the issuance of the certificate of appealability. *See Armienti v. United States*, 234 F.3d 820, 824 (2d Cir. 2000) ("We will not address a claim not included in the certificate of appealability."); *Chalmers v. Mitchell*, 73 F.3d 1262, 1268, n.1 (2d Cir. 1996) (concluding that the failure to raise and argument as an independent ground in a habeas petition preclude a party from raising that issue as a claim on appeal.).

In any event, even if the Court reaches the merits of the argument, it should reject it as patently frivolous. The courts that have considered the issue have unanimously concluded that the ACCA survives constitutional scrutiny. *See United States v. Sorenson*, 914 F.2d 173, 175 (9th Cir. 1990) ("The factors for sentence enhancement under 18 U.S.C. § 924(e)(1) are quite specific."); *United States v. Presley*, 52 F.3d 64, 68 (4th Cir. 1995); *United States v. Childs*, 403 F.3d 970, 972 (8th Cir. 2005); *United States v. Michel*, 446 F.3d 1122, 1135-36 (10th Cir. 2006).

Conclusion

For the foregoing reasons, the judgment of the district court should be affirmed.

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Respectfully submitted,

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Federal Rule of Appellate Procedure 32(a)(7)(C) Certification

This is to certify that the foregoing brief complies with the 14,000 word limitation of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 11,194 words, exclusive of the Table of Contents, Table of Authorities, Addendum, and this Certification.

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