

# 11-3227

*To Be Argued By:*  
ROBERT M. SPECTOR

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**United States Court of Appeals**

**FOR THE SECOND CIRCUIT**

**Docket No. 11-3227**

—————  
SHAWN TELLADO,  
*Petitioner-Appellant,*

-vs-

UNITED STATES OF AMERICA,  
*Respondent-Appellee.*

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

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**BRIEF FOR THE UNITED STATES OF AMERICA**

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## Table of Contents

Table of Authorities .....	v
Statement of Jurisdiction .....	xiv
Statement of Issue Presented for Review.....	xv
Preliminary Statement.....	1
Statement of the Case .....	3
Statement of Facts and Proceedings	
Relevant to this Appeal .....	5
A. The offense conduct.....	5
B. The guilty plea .....	6
C. Sentencing proceeding .....	10
D. The <i>Savage</i> decision.....	13
E. Section 2255 petition .....	14
F. Ruling on habeas petition .....	19
Summary of Argument .....	28
Argument.....	30

- I. The petitioner cannot establish an “actual innocence” defense or demonstrate he met the requirements for equitable tolling to overcome his untimely-filed § 2255 petition .... 30
  - A. Governing law and standard of review ..... 30
    - 1. Statutory framework for habeas claims..... 30
    - 2. Statute of limitations for § 2255 petitions ..... 31
    - 3. Equitable tolling .....33
    - 4. Actual innocence ..... 35
    - 5. Standard of review ..... 35
  - B. Discussion..... 35
    - 1. The petitioner has not presented a credible claim of actual innocence sufficient to toll the one-year statute of limitations ..... 36
    - 2. The petitioner is not entitled to equitable tolling..... 43
- II. The petitioner knowingly and voluntarily waived his right to collaterally attack his sentence in a § 2255 petition..... 48

- A. Governing law and standard of review ..... 49
  - 1. Enforcing collateral attack waivers .. 49
  - 2. Rule 11 canvass..... 50
  - 3. Claim of ineffective assistance of counsel ..... 50
  - 4. Standard of review..... 54
    - a. Unpreserved rule 11 errors ..... 54
    - b. Ineffective assistance of counsel .. 57
- B. Discussion ..... 57
  - 1. The district court complied with Rule 11 ..... 57
  - 2. The waiver was knowing and voluntary ..... 59
  - 3. The petitioner’s decision to plead guilty was not affected by the court’s alleged Rule 11 error ..... 61
  - 4. Any Rule 11 error did not seriously affect the fairness of judicial proceedings..... 62
  - 5. The waiver should be enforced..... 63

6. Claims of ineffective assistance do not undermine the waiver.....	64
Conclusion .....	67
Certification per Fed. R. App. P. 32(a)(7)(C)	
Addendum	

## Table of Authorities

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.

### Cases

<i>Baldayaque v. United States</i> , 338 F.3d 145 (2d Cir. 2003) .....	44
<i>Belot v. Burge</i> , 490 F.3d 201 (2d Cir. 2007) .....	33
<i>Black v. District Attorney of Philadelphia</i> , 246 Fed. Appx. 795 (3d Cir. 2007).....	40
<i>Ciak v. United States</i> , 59 F.3d 296 (2d Cir. 1995) .....	31
<i>Coleman v. United States</i> , 329 F.3d 77 (2d Cir. 2003) .....	35
<i>Cousin v. Lensing</i> , 310 F.3d 843 (5th Cir. 2002).....	40, 41
<i>Cullen v. Pinholster</i> , 131 S. Ct. 1388 (2011).....	52
<i>David v. Hall</i> , 318 F.3d 343 (1st Cir. 2003) .....	40, 41

<i>Diaz v. Kelly</i> , 515 F.3d 149 (2d Cir. 2008) .....	33
<i>Doe v. Menafee</i> , 391 F.3d 147 (2d Cir. 2004) .....	23, 35
<i>E.J.R.E. v. United States</i> , 453 F.3d 1094 (8th Cir. 2006).....	21, 44
<i>Escamilia v. Jungwirth</i> , 426 F.3d 868 (7th Cir. 2005).....	40, 41
<i>Flanders v. Graves</i> , 299 F.3d 974 (8th Cir. 2002).....	40, 41
<i>Fountain v. United States</i> , 357 F.3d 250 (2d Cir. 2004) .....	35
<i>Garcia-Santos v. United States</i> , 273 F.3d 506 (2d Cir. 2001) .....	49
<i>Garcia v. Portuondo</i> , 334 F. Supp.2d 446 (S.D.N.Y. 2004) .....	40
<i>Gibson v. Klinger</i> , 232 F.3d 799 (10th Cir. 2000).....	40
<i>Gonzalez v. Hasty</i> , 651 F.3d 318 (2d Cir. 2011) .....	44
<i>Harper v. Ercole</i> , 648 F.3d 132 (2d Cir. 2011) .....	46, 47

<i>Harrington v. Richter</i> , 131 S. Ct. 770 (2011).....	52
<i>Hill v. United States</i> , 368 U.S. 424 (1962).....	31
<i>Hizbullahankhamon v. Walker</i> , 255 F.3d 65 (2d Cir. 2001) .....	34, 45
<i>Holland v. Florida</i> , 130 S. Ct. 2549 (2010).....	43
<i>Jenkins v. Greene</i> , 630 F.3d 298 (2d Cir. 2010) .....	33, 34
<i>Lee v. Lampert</i> , 610 F.3d 1125 (9th Cir. 2010).....	40, 41
<i>Linstadt v. Keane</i> , 239 F.3d 191 (2d Cir. 2001) .....	51
<i>Lucidore v. New York State Division of Pa- role</i> , 209 F.3d 107 (2d Cir. 2000) .....	35
<i>Massaro v. United States</i> , 538 U.S. 500 (2003).....	50
<i>McCoy v. United States</i> , No. 3:09cv1960 (MRK) Slip. Op. (D. Conn. Aug. 4, 2011) .....	67

<i>Padilla v. Kentucky</i> , 130 S. Ct. 1473 (2010).....	53
<i>Parisi v. United States</i> , 529 F.3d 134 (2d Cir. 2008) .....	53, 54
<i>Pointdexter v. Nash</i> , 333 F.3d 372 (2d Cir. 2003) .....	22, 36, 37
<i>Puckett v. United States</i> , 129 S. Ct. 1423 (2009).....	54
<i>Rashid v. Mukasey</i> , 533 F.3d 127 (2d Cir. 2008) .....	33, 34
<i>Reed v. Farley</i> , 512 U.S. 339 (1994).....	50
<i>Roe v. Flores-Ortega</i> , 528 U.S. 470 (2000).....	51
<i>Sellan v. Kuhlman</i> , 261 F.3d 303 (2d Cir. 2001) .....	53
<i>Shepard v. United States</i> , 544 U.S. 13 (2005).....	14, 19, 23, 45
<i>Sistrunk v. Vaughn</i> , 96 F.3d 666 (3d Cir. 1996) .....	53
<i>Smith v. McGinnis</i> , 208 F.3d 13 (2d Cir. 2000) .....	33

<i>Sotirion v. United States</i> , 617 F.3d 27 (1st Cir. 2010) .....	55, 59
<i>Souter v. Jones</i> , 395 F.3d 577 (6th Cir. 2005).....	40
<i>Spence v. Superintendent, Great Meadow Correctional Facility</i> , 219 F.3d 162 (2d Cir. 2000) .....	37
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984).....	<i>passim</i>
<i>TRW Inc. v. Andrews</i> , 534 U.S. 19 (2001).....	42
<i>Taylor v. United States</i> , 495 U.S. 575 (1990).....	14, 18, 45
<i>Teague v. Lane</i> , 489 U.S. 288 (1989).....	17
<i>United States v. Aguirre</i> , 912 F.2d 555 (2d Cir. 1990) .....	51
<i>United States v. Arellano-Gallegos</i> , 387 F.3d 794 (9th Cir. 2004).....	56
<i>United States v. Corso</i> , 549 F.3d 921 (3d Cir. 2008) .....	56
<i>United States v. Deandrade</i> , 600 F.3d 115 (2d Cir. 2010) .....	54

<i>United States v. Djelevic</i> , 161 F.3d 104 (2d Cir. 1998) .....	26, 64
<i>United States v. Dominguez Benitez</i> , 542 U.S. 74 (2004) .....	54, 55, 56, 61
<i>United States v. Edgar</i> , 348 F.3d 867 (10th Cir. 2003).....	56
<i>United States v. Escalera</i> , 401 Fed. Appx. 571 (2d Cir. 2010).....	39
<i>United States v. Fields</i> , 565 F.3d 290 (5th Cir. 2009).....	53
<i>United States v. Flores-Vasquez</i> , 641 F.3d 667 (5th Cir. 2011).....	39
<i>United States v. Froom</i> , 616 F.3d 773 (8th Cir. 2010).....	56
<i>United States v. Gomez-Perez</i> , 215 F.3d 315 (2d Cir. 2000) .....	49
<i>United States v. Gordon</i> , 156 F.3d 376 (2d Cir. 1998) .....	35, 57
<i>United States v. Graziano</i> , 83 F.3d 587 (2d Cir. 1996) .....	31
<i>United States v. Hayman</i> , 342 U.S. 205 (1952).....	30

<i>United States v. Lopez</i> , 536 F. Supp.2d 218 (D. Conn. 2008) .....	29
<i>United States v. Marcus</i> , 130 S. Ct. 2159 (2010).....	54, 62
<i>United States v. Maybeck</i> , 23 F.3d 888 (4th Cir. 1994).....	22, 23, 37
<i>United States v. Morgan</i> , 406 F.3d 135 (2d Cir. 2005) .....	63
<i>United States v. Monzon</i> , 359 F.3d 110 (2d Cir. 2004) .....	35, 57
<i>United States v. Murdock</i> , 398 F.3d 491 (6th Cir. 2005).....	56
<i>United States v. Olano</i> , 507 U.S. 725 (1993).....	54
<i>United States v. Oliver</i> , 630 F.3d 397 (5th Cir. 2011).....	55
<i>United States v. Plitman</i> , 194 F.3d 59 (2d Cir. 1999) .....	55
<i>United States v. Roque</i> , 421 F.3d 118 (2d Cir. 2005) .....	64
<i>United States v. Salcido-Contreras</i> , 990 F.2d 51 (2d Cir. 1993) .....	49

<i>United States v. Savage</i> , 542 F.3d 959 (2d Cir. 2008) .....	<i>passim</i>
<i>United States v. Schwarz</i> , 283 F.3d 76 (2d Cir. 2002) .....	57
<i>United States v. Sura</i> , 511 F.3d 654 (7th Cir. 2007).....	56
<i>United States v. Torrellas</i> , 455 F.3d 96 (2d Cir. 2006) .....	56
<i>United States v. Vaval</i> , 404 F.3d 144 (2d Cir. 2005) .....	57
<i>United States v. Walsh</i> , 194 F.3d 37 (2d Cir. 1999) .....	55
<i>United States v. Warren</i> , 335 F.3d 76 (2d Cir. 2003) .....	32, 42
<i>United States v. Yemitan</i> , 70 F.3d 746 (2d Cir. 1995) .....	49
<i>Valverde v. Stinson</i> , 224 F.3d 129 (2d Cir. 2000) .....	33, 44
<i>Whitley v. Senkowski</i> , 317 F.3d 223 (2d Cir. 2003) .....	35
<i>Zhang v. United States</i> , 506 F.3d 162 (2d Cir. 2007) .....	57

## Statutes

18 U.S.C. § 924(e).....	39
18 U.S.C. § 3553.....	1
21 U.S.C. § 841.....	3
28 U.S.C. § 2244.....	42
28 U.S.C. § 2255.....	<i>passim</i>
Conn. Gen. Stat. § 21a-277(a) .....	15, 27, 29
Conn. Gen. Stat. § 21a-277(b) .....	13, 14

## Rules

Fed. R. App. P. 4(a) .....	xiv
Fed. R. App. P. 4(c) .....	3
Fed. R. Civ. P. 59 .....	47
Fed. R. Crim. P. 11.....	<i>passim</i>
Fed. R. Crim. P. 52(b) .....	54

## Guidelines

U.S.S.G. § 2D1.1.....	<i>passim</i>
U.S.S.G. § 4B1.1.....	18
U.S.S.G. § 4B1.2.....	13

## Statement of Jurisdiction

This is an appeal from a final judgment entered in the United States District Court for the District of Connecticut (Mark R. Kravitz, J.), which had subject matter jurisdiction pursuant to 28 U.S.C. § 2255. On July 13, 2011, the district court denied the defendant's motion for relief under 28 U.S.C. § 2255. Joint Appendix ("JA") 186. On that same date, pursuant to 28 U.S.C. § 2253(c)(1)(B), the court issued a certificate of appealability as to three issues: "(1) whether Mr. Tellado might be entitled to equitable tolling under AEDPA; (2) whether the [c]ourt applied the correct standard and reached the correct conclusion in its assessment of the Rule 11(b)(1)(N) error alleged by Mr. Tellado; and (3) whether advice from Mr. Tellado's attorney to accept the terms of the plea agreement in this case could rise to the level of ineffective assistance of counsel under the Sixth Amendment to the United States Constitution and render Mr. Tellado's waiver of his rights of collateral attack unknowing or involuntary." JA232.

Judgment entered on August 1, 2011. JA8, JA240. On August 4, 2011, the petitioner filed a timely notice of appeal pursuant to Fed. R. App. P. 4(a), and this Court has appellate jurisdiction over the petitioner's challenge to the district court's denial of his § 2255 motion pursuant to 28 U.S.C. § 2253(a). JA241.

**Statement of Issues  
Presented for Review**

- I. Was the petitioner's § 2255 motion, filed more than two years after his judgment of conviction became final, barred by the applicable one-year statute of limitations?
  - A. Did the petitioner present a credible claim of actual innocence as to his designation as a career offender and, if so, does such a claim toll the statute of limitations?
  - B. Did the petitioner establish extraordinary circumstances and reasonable diligence sufficient to equitably toll the statute of limitations?
- II. Did the petitioner knowingly and voluntarily waive his collateral attack rights in his plea agreement, and is that waiver enforceable in light of the petitioner's claims that the plea canvass as to the waiver was incomplete and that he received ineffective assistance of counsel in connection with the plea agreement?

# United States Court of Appeals

## FOR THE SECOND CIRCUIT

Docket No. 11-3227

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SHAWN TELLADO,  
*Petitioner-Appellant,*

-vs-

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

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### **BRIEF FOR THE UNITED STATES OF AMERICA**

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#### **Preliminary Statement**

On September 10, 2007, the district court sentenced the petitioner to 188 months in prison for his role in a cocaine conspiracy which was responsible for the purchase and redistribution of hundred of grams of cocaine in Waterbury, Connecticut. The petitioner himself purchased fifty grams of cocaine at a time and redistributed it in smaller quantities for profit. He pleaded guilty to the offense and, in doing so, agreed that he was a career offender. After considering the various factors set forth under 18 U.S.C. § 3553(a),

including the seriousness of the offense conduct and the petitioner's extensive criminal record, which included two prior convictions for sale of narcotics and three prior convictions for second and third degree assault, the district court determined that the parties' stipulation was accurate, that the petitioner was a career offender, and that a sentence at the bottom of the career offender range was sufficient, but no greater than necessary to accomplish the purposes of a criminal sanction.

Over two years later, the petitioner filed a § 2255 motion arguing, for the first time, that he was not a career offender pursuant to this Court's decision in *United States v. Savage*, 542 F.3d 959 (2d Cir. 2008), and asking that he be resentenced in accordance with the lower range provided for under Chapter Two of the guidelines. The district court denied the § 2255 motion on two alternative grounds. First, the court found that the motion itself was untimely and rejected the petitioner's insistence that the statute of limitations period should be excused entirely or equitably tolled. Second, the court found that the petitioner had knowingly and voluntarily waived his collateral attack rights in his plea agreement.

The petitioner appeals, arguing that the district court erred in denying his § 2255 motion on these grounds. For the reasons that follow, this Court should affirm the district court's ruling.

## Statement of the Case

On October 1, 2009, a federal grand jury returned an indictment charging the petitioner in Count One with conspiracy to possess with the intent to distribute 500 grams or more of cocaine, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B) and 846. Government's Appendix ("GA") 3 (docket entry). On May 4, 2007, the petitioner pleaded guilty to Count One of the Indictment and, in doing so, waived his right to appeal and collaterally attack any incarceration term that did not exceed 188 months. JA46-JA53. On September 10, 2007, the district court (Mark R. Kravitz, J.) sentenced the petitioner principally to 188 months' incarceration. JA98, JA125. The petitioner did not appeal his conviction or sentence.

On October 1, 2009, the petitioner filed a *pro se* motion to vacate, set aside or correct his sentence, pursuant to 28 U.S.C. § 2255.<sup>1</sup> JA3. On

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<sup>1</sup> Before the district court, the parties assumed that the applicable filing date under the mailbox rule was September 25, 2009, which is the date on which the petitioner signed his memorandum in support of his § 2255 motion. JA22. To obtain the benefit of the prison mailbox rule under Fed. R. App. P. 4(c), however, an inmate must execute "a declaration in compliance with 28 U.S.C. § 1746" or provide "a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid." Fed. R. App. P. 4(c)(1). The petition contained no such declaration or statement. In the end, however, whether the petition was deemed as

December 4, 2009, the Government submitted its response to the motion. JA3. On January 5, 2010, the petitioner filed a *pro se* response to the Government's opposition. JA3.

On April 14, 2010, the court appointed CJA counsel to represent the petitioner. JA3. After receiving multiple additional rounds of briefing from both counsel, the court heard oral argument on November 29, 2010. JA4-JA5. On January 5, 2011, the parties entered into a written stipulation regarding the availability of the *Savage* decision to the petitioner. JA6.

On May 13, 2011, the petitioner submitted a motion to amend his original § 2255 motion to add a separate claim of ineffective assistance of counsel. JA6.

On July 13, 2011, the court issued a written memorandum of decision denying the motion to amend as moot and denying the § 2255 motion in its entirety. JA7, JA186-JA232. In this same ruling, the court issued a certificate of appealability as to whether the petitioner was entitled to “equitable tolling under AEDPA,” whether “the court had applied the correct standard and reached the correct conclusion” in determining that the petitioner had knowingly waived his collateral attack rights at the time of his guilty plea; and whether “advice from [the petitioner’s] attorney to accept the terms of the plea agree-

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filed on September 25 or October 1 is immaterial to the issues raised in this appeal.

ment” constituted constitutionally ineffective assistance of counsel which rendered the petitioner’s “waiver of his rights of collateral attack unknowing and involuntary.” JA232. Judgment entered on August 1, 2011. JA8. The petitioner filed a timely notice of appeal as to the denial of the § 2255 motion on August 4, 2011. JA8.

**Statement of Facts and Proceedings  
Relevant to this Appeal**

**A. The offense conduct**

Had this case gone to trial, the Government would have presented the following facts, which were set forth almost verbatim in the Pre-Sentence Report (“PSR”):

In October 2005, the Federal Bureau of Investigation (“FBI”) began a drug trafficking investigation in Meriden, Connecticut. Using a cooperating witness, the FBI engaged in several controlled purchases of multi-ounce quantities of cocaine base from a variety of different sources, including Milton Roman. *See* PSR ¶ 15. Through these controlled purchases, the FBI identified Roman as a primary source of supply for cocaine base in Meriden. *See* PSR ¶ 17. A subsequent wiretap investigation revealed that Roman had about 35 customers and distributed kilogram quantities of powder and crack cocaine on a monthly basis. *See* PSR ¶ 18.

At the same time, the FBI identified co-defendant Eluid Rivera as a primary source of supply for Roman. *See* PSR ¶ 19. Rivera ob-

tained kilogram quantities of cocaine from various individuals in Waterbury, Connecticut and distributed cocaine and cocaine base on a regular basis to approximately 20 individuals in the Waterbury area. *See* PSR ¶ 20.

The petitioner was one of Rivera's customers and acquired redistribution weights of cocaine from Rivera. *See* PSR ¶ 23. For example, on May 25, 2006, the petitioner purchased 50 grams of cocaine from Rivera; on July 2, 2006, the petitioner purchased 100 grams of cocaine from Rivera; and on July 3, 2006, the petitioner told Rivera that he wanted to purchase 500 grams of cocaine from him, and the two agreed on a price of \$10,000. *See* PSR ¶¶ 23, 25.

### **B. The guilty plea**

On October 1, 2009, a federal grand jury returned an indictment charging the petitioner in Count One with conspiracy to possess with the intent to distribute 500 grams or more of cocaine. GA3. On May 4, 2007, the petitioner changed his plea to guilty as to Count One and, in doing so, entered into a written plea agreement. JA46. In that agreement, the petitioner agreed that he was responsible for a quantity of at least 500 grams, but less than 2 kilograms, of powder cocaine. JA48. The petitioner further agreed that he was a career offender and, as a result, his base offense level was 34 and his guideline incarceration range was 188 to 235 months. JA48-JA49. Both parties agreed not to seek any guideline adjustments to the agreed-

upon range, and the petitioner reserved his right to request a downward departure and/or a non-guideline sentence. JA49. Although the Government reserved its right to oppose such a request, it agreed not to file a second offender notice and not to oppose a sentence at the bottom of the career offender guideline range. JA49. Finally, the petitioner waived his right to appeal or collaterally attack “in any proceeding, including a motion under 28 U.S.C. § 2255 and/or §2241,” his conviction and incarceration term, provided that the court did not sentence him to more than 188 months in prison. JA49.

The district court conducted a thorough plea canvass pursuant to Fed. R. Crim. P. 11. JA57-JA93. The petitioner, under oath, indicated that he was fully informed of the nature of the offense, the maximum and minimum penalties, his trial rights, the terms of the plea agreement, and the Government’s factual basis. JA57-JA93. He also stated that he was satisfied with his attorney’s representation of him. JA63.

In reviewing the written plea agreement, which the petitioner had read, understood and discussed thoroughly with his attorney, JA71, the Government described the extensive guideline stipulation entered into by the parties. JA73-JA74. In particular, the Government explained that, in the parties’ view, the petitioner was a career offender based on his 1997 conviction for second degree assault and his 2003 conviction for sale of narcotics. JA74. The Government also stated that, “in consideration of the

guilty plea,” it had agreed not to file a second offender notice, which would have caused the mandatory minimum statutory penalty to increase to 120 months’ incarceration, and the guideline range to increase to 262-327 months’ incarceration. JA75. The Government indicated that it had also agreed not to oppose a sentence at the bottom of the guideline range. JA75.

At that point, the Government summarized the petitioner’s waiver of his appeal and collateral attack rights as follows: “There’s also, on page 4, a waiver of a right to appeal or rights of collateral attack. The defendant has agreed to waive his rights of appeal or to collaterally attack the conviction or sentence of imprisonment imposed by the Court, as long as the sentence does not exceed 188 months.” JA76.

The court then canvassed the petitioner on the waiver, as follows:

And I should stop . . . here, for a moment . . . and focus you in on this waiver, because as I said, if you plead guilty and I accept your plea, ordinarily, you cannot appeal your conviction, okay, but you could appeal your sentence for any reason and—but in this waiver, you’re agreeing that so long as your sentence does not exceed 188 months, you’re not—you’re going to give up your right to appeal, even if you thought that the way in which I got to your sentence might be wrong. So you’re giving up a valuable right here.

JA76-JA77. The court asked the petitioner, “Have you discussed that with Mr. Amore,” and the petitioner replied, “Yes.” JA77. The court then asked, “And after having discussed it with Mr. Amore, are you willing to give up your right to appeal so long as it doesn’t exceed 188 months?” JA77. The petitioner replied, “Yes.” JA77. And the court asked the same of defense counsel, “And, Mr. Amore, are you satisfied that that waiver of appeal right is knowing and voluntary on your client’s part.” JA77. Defense counsel stated, “Yes, I am, Your Honor.” JA77.

The court later reminded the petitioner of the waiver when it was explaining to him the sentencing procedure in federal court and, in particular, the fact that it was not bound by any agreement between the parties regarding the guideline range or the sentence. JA86. The court admonished, “[Y]ou could appeal the sentence if it was more than 188 months, and say that it’s too far—too long, or whatever you wanted to say about it, but you could not withdraw your guilty plea here today.” JA86. The court explained, “I’m not bound by any estimate that Mr. Amore may . . . have given you, as to your sentencing guidelines or your actual sentence, and again, it’s possible that I might sentence you to a sentence that’s more severe than any you’ve even talked about with Mr. Amore, and if that were to happen, if it was more than 188 months, you could appeal the sentence and challenge it on appeal, but you could not come here and try to withdraw your guilty plea . . . .” JA86.

### C. Sentencing proceeding

The PSR agreed with the parties' guideline calculations in the plea agreement. It found that the base offense level, under U.S.S.G. § 2D1.1(c)(7), was 26 because the petitioner was responsible for at least 500 grams, but less than 2 kilograms, of cocaine. *See* PSR ¶ 31. It then increased the base offense level to 34 based on the fact that the petitioner had "two qualifying felony convictions for controlled substance offenses . . . ." PSR ¶ 37. The petitioner's 1997 felony assault conviction did not count as career offender qualifier because the petitioner was under 18 when he committed the offense, and he was released from confinement on the conviction itself more than five years before the offense conduct. *See* PSR ¶ 41; U.S.S.G. § 4A1.2(d). With a three-level reduction for acceptance of responsibility, the petitioner's total offense level was 31. *See* PSR ¶¶ 38-39.

As to criminal history, the PSR found that the petitioner fell into Criminal History Category VI both by virtue of his career offender status and his accumulation of 17 criminal history points. *See* PSR ¶ 53. Between 1997 and 2006, the petitioner was convicted of approximately twelve separate offenses. *See* PSR ¶¶ 41-52. Specifically, he was convicted of second degree assault in 1997, driving under the influence, resisting arrest, failure to appear and possession of narcotics in 2000, third degree assault and violation of a protective order in 2002, sale of narcotics

(twice) in 2003, possession of drug paraphernalia in 2005, and third degree assault (twice) in 2006. See PSR ¶¶ 41-52. He committed the instant offense while serving a term of state probation and had violated state probation on multiple occasions in the past. See PSR ¶¶ 43, 45-47, 53.

Sentencing occurred on September 10, 2007. At the start of the hearing, the court confirmed that the petitioner and his counsel had reviewed the PSR and had no objections to it. JA101-JA102. The court then adopted the factual statements contained in the PSR and concluded that the guideline incarceration range was 188 to 235 months. JA101, JA105.

The petitioner asked for a non-guideline sentence. He argued that the court should balance the petitioner's criminal history and offense conduct against his difficult childhood, his familial responsibilities and his relative role in the charged conspiracy. JA111-JA113. Several family members came to the hearing to support the petitioner, and both his mother and his girlfriend spoke on his behalf. JA111, JA116.

The Government relied on its sentencing memorandum, in which it had emphasized the petitioner's significant criminal history. Specifically, it pointed out that the petitioner fell comfortably within Criminal History Category VI even without the career offender designation and had accumulated 17 criminal history points in just nine years. JA118. As to his family responsibilities, the Government pointed out, "It's un-

fortunate but in this particular case, I think the defendant has had a lot of prior chances to consider the impact of his conduct on the children. . . . Obviously they're seven and eight years old. He's racked up a number of criminal history points while they have been growing up . . . ." JA119.

After reviewing the various purposes of sentencing and the factors to be considered under § 3553(a), the court emphasized the seriousness of the petitioner's offense conduct in possessing and redistributing amounts of cocaine that were far in excess of amounts distributed by many co-defendants, and the petitioner's extensive criminal record. JA122. The court concluded that, based on the petitioner's "lengthy list of convictions in a very short period of time," some of which involved "violence and assaults [against] women," and his repeated commission of crimes while on probation, "the risk of recidivism here unfortunately is very high." JA123. The court stated, "[Y]ou've had some opportunities, kind of some wake-up calls, to kind of get you off this escalator and yet . . . you've not taken the opportunity to turn yourself around. . . . I think you will re-offend, if you were to get out of prison soon, and I do feel a need to protect the public, to sort of bring home deterrence to you, and to provide just punishment." JA123. Thus, the court decided not to impose a non-guideline sentence because "to do that would really . . . run counter to not only the purposes of a criminal sentence but also would not respond to the need to avoid

unwarranted disparities in sentences.” JA124. Consequently, the court imposed a sentence at the bottom of the guideline range and opted to run this sentence concurrent to the unrelated state sentence that the petitioner was already serving because “188 months is a very, very long time in prison.” JA124.

In advising the petitioner of his appeal rights, the court reminded him that he had waived his “right to appeal or collaterally attack the sentence so long as it did not exceed 188 months . . . .” JA129. The petitioner never filed a direct appeal.

#### **D. The *Savage* decision**

On September 18, 2008, this Court, in *United States v. Savage*, 542 F.3d 959 (2d Cir. 2008), held that a conviction under Conn. Gen. Stat. § 21a-277(b) was not categorically a conviction for a “controlled substance offense” as that term is defined in U.S.S.G. § 4B1.2(b), the career offender guideline. *See id.* at 960. “The term ‘controlled substance offense’ means an offense under . . . state law . . . that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance . . . or the possession of a controlled substance . . . with intent to manufacture, import, export, distribute or dispense.” U.S.S.G. § 4B1.2(b). A controlled substance offense “include[s] the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.” *Id.* comment. (n.1). A “sale” under Connecticut law, however, includes “a mere offer

to sell drugs,” and “a mere offer to sell, absent possession, does not fit within the Guidelines’ definition of a controlled substance offense.” *Savage*, 542 F.3d at 965 (internal quotation marks and citation omitted).

Accordingly, the Court held that a prior conviction that resulted from a guilty plea to “sale” of a controlled substance under § 21a-277(b) does not qualify as a conviction for a controlled substance offense under the guidelines unless the sentencing court determines that the defendant necessarily pled guilty to exchanging drugs for money. *Id.* at 967. For the purposes of determining whether a defendant’s plea necessarily rested on the elements of a “controlled substance offense,” as that predicate offense is defined in the guidelines, a sentencing court is limited to “the terms of the charging document, the terms of the plea agreement or transcript of colloquy between judge and defendant [in the prior case] in which the factual basis for the plea was confirmed by the defendant, or some other comparable judicial record of [that] information.” *Shepard v. United States*, 544 U.S. 13, 26 (2005) (relying on *Taylor v. United States*, 495 U.S. 575, 602 (1990)); see *Savage*, 542 F.3d at 966.

#### **E. Section 2255 petition**

On November 7, 2008, the petitioner filed a *pro se* motion to extend time for ninety days to file his § 2255 motion. GA9 (docket entry). On November 10, 2008, the court denied that motion, concluding that it lacked jurisdiction to

consider it because no petition had yet been filed. GA215. The court noted that significant hurdles could prevent it from considering the merits of any subsequently filed petition, including the petitioner's waiver of his collateral attack rights in his plea agreement and the running of the one-year statute of limitations. GA215-GA216.

On October 1, 2009, the petitioner filed a motion pursuant to 28 U.S.C. § 2255 which claimed only that he was actually innocent of being a career offender, pursuant to this Court's decision in *Savage*. JA16. More specifically, he pointed out that, because his two prior qualifying career offender convictions were for violations of Conn. Gen. Stat. § 21a-277(a), they did not qualify categorically as controlled substance offenses. JA16. He alleged that these prior convictions could not count as career offender qualifiers because he had pleaded guilty to both offenses under the *Alford* doctrine. JA16. He claimed that his collateral attack waiver in his plea agreement was not binding because the court had failed specifically to question him about that portion of the waiver during the plea canvass. JA21. He also argued that his claim of "actual innocence" should "overcome" the applicable one-year statute of limitations. JA21. He asked that the court re-sentence him without application of the career offender guidelines. JA22. The petitioner attached to his petition a transcript of his

guilty pleas for his 2003 Connecticut sale of narcotics convictions. JA25-JA29.<sup>2</sup>

The Government submitted its response on December 4, 2009 and argued that the petition should be denied because it was time-barred, there were no extraordinary circumstances to justify application of the doctrine of equitable tolling, and, to the extent that the *Savage* decision could be considered “newly discovered evidence,” the petition was still untimely because it was filed more than one year after the decision. JA32-JA33, JA37. The Government also argued that the petition was barred by the petitioner’s plea agreement, in which he had waived his rights to appeal or collaterally attack any sentence that did not exceed 188 months. JA34-JA36. Finally, the Government argued that the petition should be denied on the separate basis that *Savage* could not be applied retroactively to the petitioner. JA37-JA39.

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<sup>2</sup> The state transcript attached to the petition and included in the Joint Appendix is incomplete in a crucial section. The defendant’s answer to the court’s question as to whether he agreed with the prosecutor’s factual basis was not listed in the transcript. In preparing its brief on appeal, the Government noticed this omission, requested a corrected copy of that transcript and included that copy in its Government’s Appendix, while at the same time filing a motion to supplement the record on appeal.

In a written *pro se* response filed on January 5, 2010, the petitioner argued that (1) his actual innocence claim “trumps substantive and procedural bars in collateral proceedings”; (2) the canvass as to his collateral attack waiver was inadequate, rendering the waiver invalid; and (3) *Savage* should apply retroactively. JA41-JA44.

On April 14, 2010, the district court appointed counsel to represent the petitioner. JA3. On June 14, 2010, counsel submitted a memorandum addressing only the retroactivity issue and arguing that *Savage* did not involve a new rule of criminal procedure or a constitutional issue; instead it involved “a substantive determination of what a statute meant” so that the rule of non-retroactivity set forth in *Teague v. Lane*, 489 U.S. 288 (1989), did not apply. GA25-GA27.

On August 17, 2010, the court ordered additional briefing from both parties on the various issues raised. JA4. On October 11, 2010, the Government submitted a supplemental memo which, *inter alia*, changed its position as to *Teague* retroactivity and conceded that *Savage* would apply retroactively to the petitioner. GA37. The Government then argued that the petitioner’s direct challenge to his sentence was not cognizable through a § 2255 motion because, as a challenge to a guidelines application, it did not involve a miscarriage of justice. GA47. The Government also argued that the petitioner, in challenging his sentence, failed to satisfy the

“cause” and “prejudice” standard applicable to claims raised for the first time on collateral attack. GA56.

On November 29, 2011, after receiving several additional memoranda from both sides regarding the issues of actual innocence, equitable tolling and collateral attack waiver, the court entertained oral argument on the petition. The court questioned the petitioner about why the petitioner had been unable to file his petition any sooner. JA145-JA146. In response, the petitioner’s counsel again maintained that *Savage* was a novel decision that was not foreseeable, so that the petitioner should not be penalized for failing to capitalize on it in a timely manner. JA146-JA147. At that point, the court noted that petitioner’s counsel had failed to raise an ineffective assistance of counsel claim and might want to consider seeking leave to amend the petition to do so. JA147. The court also questioned how the petitioner could be considered actually innocent of the career offender enhancement when the facts underlying his two sale convictions showed that they did qualify as controlled substance offenses under U.S.S.G. § 4B1.1. JA154-JA159. The court drew a distinction between someone who is actually innocent of being a career offender, based on information from police reports and the like, and someone who is legally innocent, when considering the more narrow category of information defined by *Shepard* and *Taylor*. JA160-JA164.

On January 5, 2011, the parties entered into a written stipulation. According to that stipulation, the petitioner was incarcerated at Wyatt Detention Center from July 10, 2008 through December 19, 2008, at MDC Brooklyn from December 19, 2008 through April 22, 2009, and at USP Canaan from April 22, 2009 through to the present. JA179. The *Savage* decision was not available to inmates at Wyatt while the petitioner was incarcerated there, but it was available at MDC Brooklyn and USP Canaan for the entire time periods when the petitioner was incarcerated at those facilities. JA179-JA180.

On May 11, 2011, the petitioner submitted a motion to amend his petition to expressly state an ineffective assistance of counsel claim. JA181. Specifically, he alleged that his trial counsel was ineffective for failing to challenge the career offender designation at the time of the plea and the sentencing. JA184. On June 15, 2011, the Government submitted a response to this motion which argued that (1) the motion should be denied because the new claim did not relate back to the original claim; (2) the petition continued to be time barred; (3) the petition continued to be barred by the collateral attack waiver in the plea agreement; and (4) counsel was not ineffective for failing to foresee *Savage*. GA205.

#### **F. Ruling on the habeas petition**

On July 13, 2011, the district court issued a 47-page written memorandum of decision denying the § 2255 motion. At the outset, the court

stated, “This is a difficult case because it places the societal interest in finality of judgments against the possibility of a shorter sentence for the Petitioner, Shawn Tellado.” JA186. The court concluded that “the societal interest in finality overcomes Mr. Tellado’s personal interest in a shorter sentence.” JA186. In denying the motion, the court relied on the Government’s statute of limitations and plea waiver arguments and, therefore, did not reach the underlying merits of the § 2255 motion or other procedural arguments, such as the claim that the petitioner’s challenge to his sentence was barred because it is a non-constitutional claim that was not raised on direct appeal. JA189.

As to the statute of limitations, the court concluded that the petition was time-barred because it was not filed within one year of when the petitioner’s judgment of conviction became final, as required by the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”).<sup>3</sup> JA190-

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<sup>3</sup> First, the court rejected the petitioner’s argument that “the change in the law occasioned by *Savage*” created “a new ‘fact’ for the purposes of § 2255(f)(4).” JA191. The court held, “The Second Circuit’s decision in *Savage* did not create a ‘fact’ supporting Mr. Tellado’s claim, but rather established the legal ground for his claim.” JA192. The court reasoned that the petitioner’s reading of § 2255(f)(4) would render meaningless § 2255(f)(3), which “explicitly allows the one-year limitations period to be triggered by a Supreme Court ruling that newly recognizes the

JA191. The court concluded that the petitioner was not entitled to equitable tolling of the one-year statute of limitations. JA196. It rejected the petitioner’s claim that this Court’s *Savage* decision “constituted or created ‘an extraordinary circumstance’ that would justify equitable tolling” and reasoned that no obstacle or “external force” prevented the petitioner from timely filing his § 2255 motion, so that “the unavailability of the holding in *Savage* . . . did not, in itself, prevent him from timely filing a § 2255 petition.” JA196-JA197 (relying on *E.J.R.E. v. United States*, 453 F.3d 1094, 1098 (8th Cir. 2006)). Indeed, the court concluded that “[t]he timing of the Second Circuit’s decision in *Savage* did not even prevent Mr. Tellado from making the argument adopted by the Second Circuit in *Savage* in a timely § 2255 petition[,]” or even prior to his original sentencing. JA198. The court noted that, according to the petitioner himself, “the *Savage* decision was ‘hiding in plain sight.’” JA198. The court also found that the petitioner’s “limited knowledge of the law” was not “an extraordinary circumstance meriting tolling.” JA199. Finally, the court found that, even if it “assumes for the sake of argument that the unavailability of the *Savage* decision constituted an ‘extraordinary circumstance,’ and even if the [c]ourt accepts as true Mr. Tellado’s contention that he pursued his rights with diligence as soon as he learned of

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right asserted by a petitioner . . . .” JA192. The petitioner does not raise this argument on appeal.

*Savage*, Mr. Tellado has not alleged any facts that would demonstrate that he acted with reasonable diligence *throughout the period he seeks to toll.*” JA201 (emphasis in original).<sup>4</sup>

Lastly, as to the statute of limitations ground, the court concluded that the petitioner had “not presented a credible claim of actual innocence.” JA203. Relying on this Court’s decision in *Point-dexter v. Nash*, 333 F.3d 372, 381 (2d Cir. 2003), the court pointed out that the petitioner “does not allege that he is actually innocent of exchanging drugs for money” in his prior sale convictions and, therefore, “does not assert that he is actually innocent of the ‘act on which his harsher sentence was based.’” JA205-JA206 (emphasis in original).

The court also addressed and rejected two alternative arguments on actual innocence “for thoroughness.” JA206. First, the court distinguished *United States v. Maybeck*, 23 F.3d 888 (4th Cir. 1994), on which the petitioner relied, by pointing out that, “in Mr. Maybeck’s case, the sentencing court had not misclassified a conviction for a particular state offense as a crime of violence – rather, the defendant’s conviction in

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<sup>4</sup> The court also noted that an evidentiary hearing was not necessary on the issue of reasonable diligence because the petitioner had failed to establish extraordinary circumstances and “because he has not alleged facts that, taken as true, would establish reasonable diligence throughout the period he seeks to toll . . . .” JA201.

fact had been for a different state offense[,]” *i.e.*, third degree burglary instead of armed burglary. JA207. Moreover, the court pointed out that “[t]he Fourth Circuit has subsequently emphasized the narrowness of its holding in *Maybeck* and stated that ‘legal argument’ that a predicate conviction was misclassified ‘is not cognizable as a claim of actual innocence.’” JA207.

Second, the court rejected the petitioner’s suggestion that, in considering the claim of actual innocence, it was restricted to “the limited evidence a sentencing court may consider” under *Shepard*, relying on *Doe v. Menafee*, 391 F.3d 147, 162 (2d Cir. 2004), for the proposition that “reviewing courts must consider a claim of actual innocence in light of the evidence in the record as a whole, including evidence that might have been inadmissible at trial.” JA208 (internal brackets omitted).

In addition to the statute of limitations ground, the court dismissed the habeas petition on the wholly independent basis of the petitioner’s collateral attack waiver in his plea agreement, which the court concluded was “valid and enforceable.” JA208. The central disputed issue as to this argument was whether the court’s failure to include the words “collateral attack” in its otherwise sufficient canvass of the petitioner on his appellate waiver invalidated the waiver set forth in the written plea agreement. JA208. After reviewing the extensive case law from the various Circuits on the issue of what standard governs unpreserved Rule 11 challenges in a

§ 2255 proceeding, the court decided that “it is safe to conclude that in the Second Circuit, a defendant asserting an unpreserved Rule 11(b)(1)(N) error at the very least must (1) show that the trial court made a plain Rule 11 error, and (2) either demonstrate that the waiver was unknowing or involuntary; or demonstrate that but for the error, he would not have pled guilty, and that the error is one that affects the fairness, integrity or public reputation of judicial proceedings.” JA216.

Applying this standard, the court first concluded that its mistake in failing to use the words “collateral attack” during its plea canvass did not constitute error under Rule 11, “let alone error that is ‘clear or obvious.’” JA219. Based on its review of the canvass itself, the terms of written plea agreement, and the comments by the prosecutor, the petitioner and defense counsel during the colloquy, the court concluded that, despite its omission, it had, as required by Rule 11(b)(1)(N), addressed the petitioner personally and insured that he understood the full extent of the appeal and collateral attack waiver in his plea agreement. JA219. It likewise concluded that, even if its omission of the words “collateral attack” constituted a “technical error,” “nothing in the record suggests that Mr. Tellado’s waiver of his right to collaterally attack his sentence was involuntary or that Mr. Tellado did not understand the potential consequences of the waiver.” JA220. In making this finding, the court pointed out that the petitioner had never in any

of his § 2255 filings claimed to have not understood the waiver provision in the plea agreement. JA222.

Second, the court concluded that its omission did not affect the petitioner's substantial rights. In coming to this conclusion, the court noted that the petitioner had indicated at the time of the guilty plea that he had understood and accepted the collateral attack waiver. JA223. In fact, the court pointed out that it had correctly described the collateral attack waiver at the conclusion of the sentencing, and the petitioner, at that time, had not objected or sought to withdraw his plea. JA224.

Third, the court rejected the petitioner's argument that his misunderstanding of the career offender enhancement at the time of his plea undermined and invalidated his waiver. JA224. Relying on this Court's precedent, the court held, "A defendant's inability to anticipate changes to the sentencing law does not render a waiver of appeal or collateral attack rights unknowing." JA224.

Finally, the court addressed the petitioner's motion to add a claim of ineffective assistance of counsel and decided that it need not resolve the relation-back issue because the amendment to the petition "would be futile." JA226. The court repeated its findings that the petition was untimely and that the petitioner had waived his collateral attack rights at the time of his guilty plea. JA226-JA227. As to the waiver, the court

specifically found that the ineffective assistance claim did not invalidate it or undermine it because the petitioner did not claim that he had received ineffective assistance in connection with the waiver itself. JA227. Instead, he argued that his trial counsel was ineffective for agreeing to the career offender designation and failing to raise a *Savage*-type claim either at the time of the plea or at sentencing. JA227. Relying on *United States v. Djelevic*, 161 F.3d 104 (2d Cir. 1998), the court noted this Court’s statement, “If we were to allow a claim of ineffective assistance of counsel at sentencing as a means of circumventing the plain language in a waiver agreement, the waiver of appeal provision would be rendered meaningless.” JA228.

And lastly, the court concluded that, even if the petition was not barred by the statute of limitations or the plea waiver, the ineffective assistance claim failed on its merits. Specifically, the court concluded that trial counsel was not constitutionally ineffective under *Strickland v. Washington*, 466 U.S. 668 (1984). The court found that, although trial counsel could have challenged the career designation and counseled the petitioner against signing the plea agreement, “there was no manifest deficiency in counsel’s performance in light of the information then available to counsel.” JA229 (internal quotation marks and brackets omitted). The court explained, “While the legal building blocks of the Second Circuit’s decision in *Savage* existed at that time Mr. Tellado entered his guilty plea, the

simple fact is that *Savage* was not yet controlling case law.” JA229. The court went on, “Mr. Tellado himself has emphasized that, until *Savage* was decided it had always been the case in Connecticut that convictions violating Conn. Gen. Stat. § 21a-277(a), whether derived from *Alford* pleas or not, counted as career offender predicates.” JA229. The court pointed out that, in the petitioner’s own memorandum, he maintained that “a reasonable attorney would not be expected to have raised a *Savage*-type claim prior to the publication of the Second Circuit’s opinion in *Savage*.” JA229-JA230. The court stated, “Evaluating counsel’s conduct from counsel’s perspective at the time, . . . , the Court finds no basis to doubt that counsel’s advice to Mr. Tellado regarding the plea agreement was reasonable under prevailing professional norms.” JA230 (internal quotation marks and brackets omitted).

At the conclusion of its decision, the Court granted a certificate of appealability as to three issues: “(1) whether Mr. Tellado might be entitled to equitable tolling under AEDPA; (2) whether the [c]ourt applied the correct standard and reached the correct conclusion in its assessment of the Rule 11(b)(1)(N) error alleged by Mr. Tellado; and (3) whether advice from Mr. Tellado’s attorney to accept the terms of the plea agreement in this case could rise to the level of ineffective assistance of counsel under the Sixth Amendment to the United States Constitution and render Mr. Tellado’s waiver of his rights of

collateral attack unknowing or involuntary.”  
JA232.

### **Summary of Argument**

I. The petition, having been filed more than two years after the petitioner’s conviction became final, was untimely, and the petitioner cannot satisfy the very stringent requirements necessary to justify tolling the one-year period under the theories of actual innocence or equitable tolling.

As the district court concluded, the petitioner has not presented a credible claim of actual innocence. A review of the stipulated facts in the PSR, along with the plea transcript of the underlying state narcotics convictions, reveals that the petitioner was a career offender. Moreover, a claim of actual innocence in a non-capital case should not be sufficient to toll AEDPA’s otherwise applicable time limit; at the very minimum, a mere challenge to a career offender guideline application cannot constitute a “credible claim of actual innocence.”

The petitioner also is not entitled to equitable tolling of the one-year statute of limitations because the *Savage* decision was not an extraordinary circumstance which served as an obstacle to the petitioner’s ability to file timely his petition. In addition, even assuming that the decision was an extraordinary circumstance, the petitioner has failed to show both the necessary causal connection between the issuance of the

decision and the petitioner's late filing, and that the petitioner acted with reasonable diligence during the time period he seeks to toll.

II. A plain reading of the Rule 11 canvass establishes that the petitioner knowingly and voluntarily waived his collateral attack rights in his plea agreement and had no reasonable expectation at that time that he would ever be able to challenge his sentence in any post-conviction proceeding. Although the district court omitted the words "collateral attack" from its otherwise accurate discussion of the appeal waiver provision from the plea agreement, immediately prior to this canvass, the prosecutor had accurately summarized the waiver provision, and the court had asked several questions of the petitioner and his counsel to ensure that the petitioner fully understood the entire plea agreement and this particular waiver section of the agreement.

The waiver is not undermined by the petitioner's claim that he received ineffective assistance of counsel in connection with the guilty plea. Given the prevailing professional norms at the time and the general acceptance in Connecticut that violations of Conn. Gen. Stat. § 21a-277(a) categorically qualified as controlled substance offenses, trial counsel was not constitutionally ineffective for advising the petitioner to accept the plea agreement here. In that agreement, the Government agreed not to file a second offender notice and not to advocate for a sentence above the bottom of the guideline

range, and the petitioner agreed that he was a career offender, waived his appeal and collateral attack rights to a sentence at or below the bottom of the career offender range, and reserved his right to seek a departure and/or a non-guideline sentence below the guideline range.

### **Argument**

#### **I. The petitioner cannot establish an “actual innocence” defense or demonstrate he met the requirements for equitable tolling to overcome his untimely-filed § 2255 petition.**

The petitioner’s § 2255 motion, filed over two years after his judgment of conviction became final, was time barred.

##### **A. Governing law and standard of review**

###### **1. Statutory framework for habeas claims**

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. Section 2255 essentially codifies the common-law writ of habeas corpus in relation to federal criminal offenses. *United States v. Hayman*, 342 U.S. 205 (1952) (describing history of § 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*, 466 U.S. at 693 (recognizing the “profound importance of finality in criminal proceedings”).

## **2. Statute of limitations for § 2255 petitions**

“[T]he scope of review on a § 2255 motion should be ‘narrowly limited’ in order to preserve the finality of criminal sentences and effect the efficient allocation of judicial resources.” *United States v. Graziano*, 83 F.3d 587, 590 (2d Cir. 1996) (citations omitted). Thus, under 28 U.S.C. § 2255(f), which was adopted as part of AEDPA, every habeas petition is subject to a one-year statute of limitations which runs from the latest date of certain triggering events. The limitations provision is as follows:

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

- (1) the date on which the judgment of conviction becomes final;
- (2) the date on which the impediment to making a motion created by governmental action in viola-

tion of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

- (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
- (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2255(f).

“Habeas corpus relief is, with narrow exceptions, subject to limitation periods, 28 U.S.C. § 2255[(f)], and to restrictions on successive petitions, 28 U.S.C. § 2255[(h)],” consistent with an overall scheme in which “[v]irtually every stage of the federal criminal justice process is progressively tailored to further the goal of finality without foreclosing relief for miscarriages of justice,” such that “[r]emedies for error are . . . available to criminal defendants but subject to various substantive and procedural limitations as the legal and temporal distance from the trial or guilty plea increases.” *United States v. Warren*, 335 F.3d 76, 78-79 (2d Cir. 2003).

### 3. Equitable tolling

The doctrine of equitable tolling can apply to AEDPA's one-year statute of limitations period "in rare and exceptional circumstances." *Belot v. Burge*, 490 F.3d 201, 205 (2d Cir. 2007). To qualify for equitable tolling, a petitioner must establish that he pursued his rights diligently and that some extraordinary circumstance prevented him from timely filing his § 2255 petition. See *Diaz v. Kelly*, 515 F.3d 149, 153 (2d Cir. 2008). "A petitioner seeking equitable tolling must demonstrate a causal relationship between the extraordinary circumstances on which the claim for equitable tolling rests and the lateness of his filing, a demonstration that cannot be made if the petitioner, acting with reasonable diligence, could have filed on time notwithstanding the extraordinary circumstances." *Jenkins v. Greene*, 630 F.3d 298, 303 (2d Cir. 2010) (internal quotation marks and citation omitted), *cert. denied*, 132 S. Ct. 190 (2011).

The petitioner bears the burden of establishing that he is entitled to equitable tolling. See *Rashid v. Mukasey*, 533 F.3d 127, 130 (2d Cir. 2008); *Smith v. McGinnis*, 208 F.3d 13, 17 (2d Cir. 2000). If the petitioner satisfies the two-prong inquiry, the Court may "extend the statute of limitations beyond the time of expiration as necessary to avoid inequitable circumstances." *Valverde v. Stinson*, 224 F.3d 129, 133 (2d Cir. 2000) (internal quotation marks omitted).

Equitable tolling “does not reset the clock on a statutory limitation period; it is a doctrine that provides a plaintiff with some additional time beyond a limitations period.” *Rashid*, 533 F.3d at 131. The petitioner must establish that he diligently pursued his claim for the time period he seeks to toll. *See Hizbullahankhamon v. Walker*, 255 F.3d 65, 75 (2d Cir. 2001) (holding that equitable tolling not available where petitioner failed to exercise reasonable diligence, which would have allowed timely filing during limitations period remaining after asserted “extraordinary circumstance”); *see also Rashid*, 533 F.3d at 133 (holding that petitioner’s equitable tolling claim failed because he did not assert that he took any “affirmative action” to find out about his claim during a 14-month period of inaction).

In rejecting an equitable tolling claim, this Court has recently emphasized that, though a strict adherence to AEDPA’s timing rules may lead to harsh results, such a result was an unavoidable “consequence of Congress’s decision to impose a limitations period on petitions for habeas corpus.” *See Jenkins*, 630 F.3d at 305. The Court explained, “Such limitations statutes by their nature preclude sympathetic or meritorious claims as well as frivolous ones. And the doctrine of equitable tolling does not permit us to excuse compliance with the statute whenever a potentially meritorious claim is at stake, or whenever a petitioner faces an especially severe sentence.” *Id.*

#### 4. Actual innocence

This Court has expressly left open the question of whether there is an exception to the AEDPA's statute of limitations based on actual innocence. See *Whitley v. Senkowski*, 317 F.3d 223, 225 (2d Cir. 2003); *Lucidore v. New York State Div. of Parole*, 209 F.3d 107, 114 (2d Cir. 2000). The Court has instructed district courts to determine first whether "the petitioner has presented a credible claim of actual innocence before ruling on the legal issues of whether such a showing provides a basis for equitable tolling." *Doe v. Meneffee*, 391 F.3d 147, 161 (2d Cir. 2004).

#### 5. Standard of review

"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). To the extent that the district court's decision relies on findings of historical fact, those findings are upheld unless clearly erroneous; to the extent that the court's decision relies on conclusions of law, those conclusions are reviewed *de novo*. See *United States v. Monzon*, 359 F.3d 110, 119 (2d Cir. 2004); *United States v. Gordon*, 156 F.3d 376, 379 (2d Cir. 1998) (per curiam).

#### B. Discussion

The petitioner's § 2255 motion was filed more than two years after his judgment of conviction

became final. It is, therefore, time barred. To avoid this result, the petitioner argues that his “actual innocence” overcomes the statute of limitations, and that the statute of limitations should have been equitably tolled. As set forth below, neither argument helps the petitioner.

**1. The petitioner has not presented a credible claim of actual innocence sufficient to toll the one-year statute of limitations.**

The petitioner argues that he is actually innocent of being a career offender and that this claim of actual innocence should toll the statute of limitations. The district court rejected this argument finding that the petitioner had not presented a “credible claim of actual innocence” and thus did not address the underlying question of whether a credible claim of actual innocence can toll AEDPA’s statute of limitations in non-capital cases. JA203.

The district court was correct in its analysis. First, in analyzing whether the concept of “actual innocence” applies to habeas claims of sentencing error in non-capital cases, this Court has rejected the “proposition that misclassification as [a] career offender is equivalent to a claim of actual innocence.” *Pointdexter v. Nash*, 333 F.3d 372, 380 (2d Cir. 2003). In *Pointdexter*, the defendant had claimed that his three underlying qualifying career offender convictions should have been treated as a single conviction, so that he should not have been classified as a career of-

fender. *See id.* at 381. This Court rejected the claim that a legal error in a career offender designation was equivalent to an actual innocence claim. In doing so, the Court distinguished its prior decision in *Spence v. Superintendant, Great Meadow Correctional Facility*, 219 F.3d 162 (2d Cir. 2000), and the Fourth Circuit’s prior decision in *United States v. Maybeck*, 23 F.3d 888 (4th Cir. 1994), both of which “grant[ed] collateral relief to applicants who showed that they in fact had not committed the crimes on which the calculation or imposition of their sentences was based.” *Pointdexter*, 333 F.3d at 381.

Here, the petitioner never claimed that he was not actually convicted of the two 2003 possession with intent to sell narcotics convictions which formed the basis for the career offender finding; instead, he claimed that the district court made a legal error by not using the modified categorical approach in considering whether each conviction qualified. That challenge is similar to the legal error claimed in *Pointdexter* and does not constitute a claim of actual innocence.

Moreover, the petitioner is not actually innocent of being a career offender. At sentencing, he raised no objection to the factual statements in the PSR, which contained detailed descriptions of the offense conduct underlying his two prior sale convictions. Specifically, trial counsel advised that he had no “objections to the factual statements that are in the presentence report,”

and the petitioner himself stated that he had reviewed “with care” the report, had reviewed it with his counsel, was satisfied with his legal representation, and had “no objections, suggestions or additions to the factual statements in this presentence report.” JA101-JA102.

According to the PSR, the first of the 2003 narcotics convictions involved the police’s discovery of 12 baggies of marijuana, ten baggies of crack cocaine, packaging material and \$144 in cash from the petitioner’s apartment, and the petitioner’s on-scene admission that all of the narcotics and narcotics paraphernalia belonged to him. *See* PSR ¶ 48.

The second of the 2003 narcotics convictions involved the police observing the petitioner selling narcotics to another individual and then arresting him after seeing him discard 3.6 grams of crack cocaine and finding him in possession of \$265 in cash. *See* PSR ¶ 49.

As the district court pointed out, the petitioner’s claim of actual innocence does not implicate any disputed issue of fact. He does not challenge, nor could he challenge, the facts underlying his narcotics convictions. Those facts absolutely establish that he was convicted of two qualifying controlled substance offenses and is a career offender.

Indeed, a corrected copy of the plea transcript for the 2003 convictions further undercuts the petitioner’s insistence that, under *Savage*, he is actually innocent of being a career offender. Ac-

ording to that transcript, the petitioner explicitly admitted to the facts described by the prosecutor. GA15. Although the parties, at the outset, stated that the guilty pleas were being made pursuant to the *Alford* doctrine, the petitioner clearly did not stick to that plan. GA13, GA15; see *United States v. Escalera*, 401 Fed. Appx. 571, 573 (2d Cir. 2010) (unpublished decision) (finding that, even in an *Alford* plea situation, a district court can rely on a defendant’s explicit admission to a prosecutor’s proffered facts); *United States v. Flores-Vasquez*, 641 F.3d 667, 672 (5th Cir.) (relying on *Escalera* and holding that “the mere fact that a defendant enters a plea denominated as an *Alford* plea does not preclude a sentencing court from relying upon a proffer of facts which was independently confirmed by the defendant.”), *cert. denied*, 132 S. Ct. 361 (2011).<sup>5</sup>

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<sup>5</sup> Although the corrected plea transcript for the 2003 narcotics cases reveals that there was no *Savage* issue with the convictions, the fact that the prosecutor gave a detailed description of the various controlled substances involved, but did not specifically name those substances, could present a different obstacle to the Government’s ability to rely on these convictions to support a career offender designation at any new sentencing hearing. See, e.g., *United States v. Lopez*, 536 F. Supp.2d 218, 221-222 (D. Conn. 2008) (finding that, to determine whether Connecticut conviction for possession with intent to distribute narcotics qualifies as a serious drug offense under 18 U.S.C. § 924(e), court had to use the modified cate-

In any event, the actual innocence exception should not apply to excuse compliance with AEDPA's statute of limitations. Although a number of courts, including a few courts of appeals, have recognized such an exception, see *Souter v. Jones* 395 F.3d 577, 585 (6th Cir. 2005); *Black v. District Attorney of Philadelphia*, 246 Fed. Appx. 795, 798 (3d Cir. 2007) (unpublished decision); *Garcia v. Portuondo*, 334 F. Supp.2d 446, 461 (S.D.N.Y. 2004); cf. *Gibson v. Klinger*, 232 F.3d 799, 808 (10th Cir. 2000) (suggesting in dicta that equitable tolling would be appropriate where a prisoner is actually innocent), five circuit courts have squarely rejected it. See *Lee v. Lampert*, 610 F.3d 1125, 1131 (9th Cir. 2010); *Escamilia v. Jungwirth*, 426 F.3d 868, 871-72 (7th Cir. 2005); *David v. Hall*, 318 F.3d 343, 347 (1st Cir. 2003); *Cousin v. Lensing*, 310 F.3d 843, 849 (5th Cir. 2002); *Flanders v. Graves*, 299 F.3d 974, 976-78 (8th Cir. 2002). The reasoning of the courts that have declined to recognize such an exception is persuasive.

As recently explained by the Ninth Circuit, Congress, in creating a detailed limitations provision with certain exceptions established within it, had the opportunity to add an exception based on "actual innocence," but it chose not to do so—a choice that the courts are not free to disregard:

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gorical approach because the Connecticut statutes regulate two additional controlled substances (benzylfentanyl and thenylfentanyl) that the federal statutes do not.

The omission of “actual innocence” from the enumerated list of exceptions in the statutory text is significant, as four of our sister circuits have held. Since “[the statute of limitation provision effected by the AEDPA] comprises [a set number of] paragraphs defining its one-year limitations period *in detail* and *adopting very specific exceptions*,” the First Circuit reasoned, “Congress likely did not conceive that the courts would add new exceptions and it is even more doubtful that it would have approved of such an effort.” *David*, 318 F.3d at 346 (emphasis added [by Ninth Circuit]). It is not our place to “engraft an additional judge-made exception onto congressional language that is clear on its face.” *Flanders*, 299 F.3d at 977. We “cannot alter the rules laid down in the text.” *Escamilia*, 426 F.3d at 872. The “one-year limitations period established [by the statute of limitations] contains no explicit exemption for petitions claiming actual innocence,” and we decline to add one. *Cousin*, 310 F.3d at 849.

*Lee*, 610 F.3d at 1129. This approach “accords with the well-established interpretive canon of *expressio unius est exclusio alterius*, that is, the express mention of one thing excludes all others,” *id.*, and is further “buttressed by the explicit enumeration of an actual innocence exception in AEDPA” in the sections concerning second or successive petitions. *Id.* (discussing 28 U.S.C.

§ 2244(b)(2)(B)); *see also* 28 U.S.C. § 2255(h)(1). *See, e.g., TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001) (“[w]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent”) (internal quotation marks and citation omitted).<sup>6</sup>

In addition, there is no basis for concern that the statute of limitations violates the Suspension Clause or other constitutional protections, because it “does not render federal habeas an inadequate or ineffective remedy to test the legality of a . . . . prisoner’s detention. Rather, it leaves petitioners with a reasonable opportunity to have their claims heard,” by bringing them on a timely basis within one of the existing prongs of the statute of limitation. *Id.* (internal quotation marks and citations omitted); *cf. Warren*, 335 F.3d at 79 (stating that the limitations pe-

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<sup>6</sup> In fact, adding an actual innocence tolling exception would be flatly inconsistent with the due diligence requirement established by the statutory scheme for the discovery of new facts supporting a claim for relief. 28 U.S.C. § 2255(f)(4). “A petitioner could discover such facts and then, if they established actual innocence, hold them until he felt the time was right, then availing himself of the actual innocence exception and avoiding the diligence requirement.” *Lee*, 610 F.3d at 1130 n.4 (holding that “[w]e decline to make the diligence requirement superfluous”).

riod, as written, fits appropriately within the overall federal criminal justice process in which “[v]irtually every stage . . . is progressively tailored to further the goal of finality without foreclosing” appropriate relief).<sup>7</sup>

In light of the foregoing, the petitioner’s attempt to excuse the untimeliness of his petition on the grounds of actual innocence fails. He cannot satisfy the demanding standard of establishing actual, factual innocence, and, even if he could, it would be appropriate to conclude that actual innocence cannot constitute an exception to the AEDPA’s statute of limitations.

## **2. The petitioner is not entitled to equitable tolling.**

In the alternative, the petitioner claims that AEDPA’s one-year limitations period should

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<sup>7</sup> This reasoning is unaffected by the recent Supreme Court decision in *Holland v. Florida*, 130 S. Ct. 2549 (2010), which concluded that, as a non-jurisdictional statute of limitations, the AEDPA’s limitations provision is subject to a presumption that equitable tolling applies. The Court concluded that this presumption was not rebutted with regard to these provisions. *Id.* In contrast, there is no basis for a conclusion that the AEDPA’s statute of limitations is presumptively subject to an exception on the basis of actual innocence, “[n]or is the actual innocence exception a species of equitable tolling.” *Lee*, 610 F.3d at 1129 (distinguishing *Holland*).

have been equitably tolled. This argument fails for several reasons.

First, the unavailability of *Savage* is not an “extraordinary circumstance.” In reaching this conclusion, the district court properly emphasized the fact that the petitioner had failed to show he was *prevented* from complying with AEDPA’s time limit or that there was some *obstacle* preventing him from complying. JA196. “Equitable tolling is an extraordinary measure that applies only when [a] plaintiff is *prevented from filing* despite exercising that level of diligence which could reasonably be expected in the circumstances.” *Gonzalez v. Hast*y, 651 F.3d 318, 322 (2d Cir. 2011) (internal quotation marks omitted; emphasis in original). No external force stood in the petitioner’s way. He could have filed a § 2255 at any time, even without the benefit of *Savage*. See *E.J.R.E.*, 453 F.3d at 1098 (holding that the “mere fact” that a favorable ruling was not available “does not change the reality that Appellants were free, at any time, to file their § 2255 petitions . . . before the one-year statute of limitations period had expired.”). This Court has only applied the doctrine of equitable tolling in limited circumstances, such as when a correctional officer intentionally confiscated the petitioner’s § 2255 motion before the filing deadline, or when an attorney failed to file the habeas despite explicit instructions to do so. See, e.g., *Valverde v. Stinson*, 224 F.3d 129, 133 (2d Cir. 2000); *Baldayaque v. United States*, 338 F.3d 145, 150 (2d Cir. 2003).

The unavailability of helpful legal precedent does not constitute such an obstacle. The *Savage* decision, at base, stood for the proposition that, for certain Connecticut narcotics statutes, it is necessary to use the modified categorical approach instead of the categorical approach to analyze whether a violation of that statute is a controlled substance offense under U.S.S.G. § 4B1.2. See *Savage*, 542 F.3d at 966. The building blocks for the decision (*Shepard* and *Taylor*) were, of course, available to the petitioner when he was indicted, pleaded guilty, was sentenced, failed to appeal and failed to file timely his habeas petition. Just like *Savage* himself and other defendants who were raising similar claims, see *United States v. Savage*, No. 3:05CR94(EBB) (sentencing on August 24, 2006); *United States v. Davenport*, No. 3:05CR12(MRK) (sentencing on January 9, 2007); the petitioner could have raised the claim at any time.

Even assuming *arguendo* that the unavailability of the *Savage* decision constituted an extraordinary circumstance, the petitioner has failed to show he acted with reasonable diligence in failing to file the petition prior to October 1, 2009. The district court found, as a matter of fact, that the petitioner had the *Savage* decision available to him since December 19, 2008. JA200. The district court then concluded, correctly, that the petitioner had failed to allege any facts to show that he “acted with reasonable diligence throughout the period he seeks to toll.” *Hizbullahankhamon*, 255 F.3d at 75. JA201.

Although the petitioner claims that he did not know about the *Savage* decision until only weeks before he filed his habeas, if he had acted with reasonable diligence, he easily could have learned about it on or after December 19, 2008, which was only three months after the expiration of the normal one-year time limit. He never argued that his efforts at filing a § 2255 were frustrated by Second Circuit precedent directly contradictory to *Savage* or even by legal research which did not reveal *Savage*. His only argument below and here is that he lacked legal expertise.

That argument and this request for equitable tolling would absolutely render meaningless § 2255(f)'s exceptions to the one-year rule. If an inmate need only show that he was unaware of a favorable court decision to satisfy the stringent requirements for equitable tolling, he would be able, for example, to obtain habeas review based on a helpful, retroactive Supreme Court decision well more than a year after that decision, contrary to § 2255(f)(3), provided that he could show he was unaware of the decision.

In his brief, the petitioner alleges that the district court misapplied the law governing equitable tolling by not accounting for this Court's decision in *Harper v. Ercole*, 648 F.3d 132 (2d Cir. 2011), which was issued after the district court's decision in this case. In *Harper*, this Court held that, once the equitable tolling ends, "the limitations clock resumes" so that the petitioner still gets the full benefit of the one-

year time limit. *See id.* at 134 (holding that, when district court concluded that inmate was entitled to equitable tolling for 90-day hospital stay, it should have allowed him a full year, in addition to the 90-day tolled period, to file his petition). The petitioner claims that he only needed to show that he acted with reasonable diligence during the tolled period. *See* Def.'s Br. at 36.

As a preliminary matter, the petitioner misreads the district court's decision. The court recognized explicitly, relying on pre-*Harper* case law, that the petitioner had to show he acted with reasonable diligence "throughout the period he seeks to toll." JA201. It simply concluded that he had failed to do so. And indeed, he has. The petitioner has failed to show he acted with reasonable diligence during the entire time period, from the date of his judgment of conviction through to the filing of his petition, over two years later. As this Court recognized in *Harper*, "equity will not intervene to reward negligence." *Harper*, 648 F.3d at 138.

More importantly, the district court's broader point was that the petitioner had failed to show a causal relationship between the unavailability of the *Savage* decision and his late filing. JA202. In *Harper*, this Court emphasized that, to obtain equitable tolling, the petitioner must show a *causal* connection between the extraordinary circumstance and the failure to file on time. *See Harper*, 648 F.3d at 137. Here, it was the peti-

tioner's burden to make such a showing, and he failed to do so. He argued that, but for the unavailability of *Savage*, *i.e.*, the extraordinary circumstance, he would have filed his petition on time. Yet, it is undisputed that once he should have become aware of the *Savage* decision, it took him another nine months to file his petition. This time lag absolutely undercuts his claim that the unavailability of *Savage* caused him to file his petition over two years late.

In the end, the district court properly denied the petitioner's § 2255 motion as untimely. The petitioner failed to show both that a claim of actual innocence as to a guidelines enhancement can toll AEDPA's one-year time limit and that he was actually innocent of being a career offender, based on the undisputed facts in the PSR. Moreover, the unavailability of the *Savage* decision was not an extraordinary circumstance which served as an obstacle to the petitioner's ability to file timely the petition.

## **II. The petitioner knowingly and voluntarily waived his right to collaterally attack his sentence in a § 2255 petition.**

As an alternative ground for rejecting the petitioner's *Savage* claim, the district court correctly concluded that he had knowingly and voluntarily waived his right to file a § 2255 motion at the time of his guilty plea.

## **A. Governing law and standard of review**

### **1. Enforcing collateral attack waivers**

This Court has repeatedly upheld the validity of appeal waivers, with the obvious caveat that such waivers must always be knowingly, voluntarily, and competently provided by the defendant. *See United States v. Gomez-Perez*, 215 F.3d 315 (2d Cir. 2000) (“It is by now well-settled that a defendant’s knowing and voluntary waiver of his right to appeal a sentence within a agreed upon guideline range is enforceable.”). The reasons for supporting waivers of direct appeals are equally applicable to waivers of collateral attack under § 2255. *See Garcia-Santos v. United States*, 273 F.3d 506, 509 (2d Cir. 2001). “If this waiver does not preclude a challenge to the sentence as unlawful, then the covenant not to appeal becomes meaningless and would cease to have value as a bargaining chip in the hands of defendants.” *United States v. Yemitan*, 70 F.3d 746, 748 (2d Cir. 1995). “[I]n no circumstance . . . may a defendant, who has secured the benefits of a plea agreement and knowingly and voluntarily waived the right to appeal a certain sentence, then appeal the merits of a sentence conforming to the agreement. Such a remedy would render the plea bargaining process and the resulting agreement meaningless.” *United States v. Salcido-Contreras*, 990 F.2d 51, 53 (2d Cir. 1993).

## **2. Rule 11 canvass**

Under Fed. R. Crim. P. 11(b)(1)(N), before accepting a guilty plea, a district court must place the defendant under oath and “must inform the defendant of, and determine that the defendant understands, . . . the terms of any plea agreement provision waiving the right to appeal or to collaterally attack the sentence.” *Id.* “Any variance from the procedures required by this rule which does not affect substantial rights shall be disregarded.” Fed. R. Crim. P. 11(h).

## **3. Claim of ineffective assistance of counsel**

Although, in general, a writ of habeas corpus will not be allowed to do service for an appeal, see *Reed v. Farley*, 512 U.S. 339, 354 (1994), “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). A person challenging his conviction on the basis of ineffective assistance of counsel bears a heavy burden. In *Strickland*, the Supreme Court held that a defendant 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. See *id.*, 466 U.S. at 688.

“[A] court must indulge a strong presumption that counsel’s conduct falls within the wide

range of reasonably professional assistance.” *Strickland*, 466 U.S. at 689. A defendant’s *post hoc* accusations alone are not sufficient to overcome this strong presumption because a contrary holding would lead to constant litigation by dissatisfied criminal defendants and harm the effectiveness, and potentially even the availability, of defense counsel. *See id.* 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. *See Roe v. Flores-Ortega*, 528 U.S. 470, 482 (2000).

“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)).

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.

*Harrington v. Richter*, 131 S. Ct. 770, 788 (2011) (internal citations and quotation marks omitted); see also *Cullen v. Pinholster*, 131 S. Ct. 1388, 1406-1407 (2011) (holding that 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") (internal quotation marks and ellipsis omitted).

Moreover, to render constitutionally effective assistance, “[a]n attorney is not required to forecast changes or advances in the law.” *Sellan v. Kuhlman*, 261 F.3d 303, 315 (2d Cir. 2001) (internal citations and quotations omitted); see also *Sistrunk v. Vaughn*, 96 F.3d 666, 670 (3d Cir. 1996) (“[I]n making litigation decisions, there is no general duty on the part of defense counsel to anticipate changes in the law.”); *United States v. Fields*, 565 F.3d 290, 296 (5th Cir. 2009) (stating, “The overwhelming majority of circuits to address the issue have suggested that defense counsel’s failure to anticipate, in the wake of *Apprendi*, the rulings in *Blakely* and *Booker* does not render counsel constitutionally ineffective”).

Forecasting advances in the law is not required because “[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms,” *Strickland*, 466 U.S. at 688, an inquiry that is “linked to the practice and expectations of the legal community,” *Padilla v. Kentucky*, 130 S. Ct. 1473, 1482 (2010), as viewed “from counsel’s perspective at the time.” *Strickland*, 466 U.S. at 689. “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.” *Parisi v. United States*, 529 F.3d 134, 141 (2d Cir. 2008) (internal quotation marks and citations omitted).

#### 4. Standard of review

##### a. Unpreserved Rule 11 errors

Where a defendant fails to challenge a Rule 11 defect before sentencing, plain error review applies. *See United States v. Dominguez Benitez*, 542 U.S. 74, 83 (2004). Applying the plain error standard under Fed. R. Crim. P. 52(b), “an appellate court may, in its discretion, correct an error not raised at trial only where the appellant demonstrates that (1) there is an ‘error’; (2) the error is ‘clear or obvious, rather than subject to reasonable dispute’; (3) the error ‘affected the appellant’s substantial rights, which in the ordinary case means’ it ‘affected the outcome of the district court proceedings’; and (4) ‘the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.’” *United States v. Marcus*, 130 S. Ct. 2159, 2164 (2010) (quoting *Puckett v. United States*, 129 S. Ct. 1423, 1429 (2009)); *see also United States v. Deandrade*, 600 F.3d 115, 119 (2d Cir.), *cert. denied*, 130 S. Ct. 2394 (2010).

To “affect substantial rights,” an error must have been prejudicial and affected the outcome of the district court proceedings. *United States v. Olano*, 507 U.S. 725, 734 (1993). This language used in plain error review is the same as that used for harmless error review of preserved

claims, with one important distinction: In plain error review, “[i]t is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice.” *Id.*

This Court has made clear that “plain error” review “is a very stringent standard requiring a serious injustice or a conviction in a manner inconsistent with fairness and integrity of judicial proceedings.” *United States v. Walsh*, 194 F.3d 37, 53 (2d Cir. 1999) (internal quotation marks omitted). Indeed, “[t]he error must be so egregious and obvious as to make the trial judge and prosecutor derelict in permitting it, despite the defendant’s failure to object.” *United States v. Plitman*, 194 F.3d 59, 63 (2d Cir. 1999) (internal quotation marks omitted).

Although the First, Third, Fifth, Sixth, Seventh, Eighth, Ninth and Tenth Circuits have all applied the plain error review to unpreserved claims of error as to Rule 11(b)(1)N), there is not a consensus as to what standard to apply when determining whether the error affected the petitioner’s substantial rights. *Compare Sotirion v. United States*, 617 F.3d 27, 34 (1st Cir. 2010). (applying *Dominguez Benitez* reasonable probability standard); *United States v. Oliver*, 630 F.3d 397, 412 (5th Cir. 2011) (same); *United States v. Froom*, 616 F.3d 773, 777 (8th Cir. 2010) (same) to *United States v. Murdock*, 398 F.3d 491, 497 (6th Cir. 2005) (holding that defendant can establish violation of his substantial rights by showing that error prevented him from un-

derstanding the waiver and that there was no “functional safeguard” to the Rule 11(b)(1)(N) canvass); *United States v. Corso*, 549 F.3d 921, 929 (3d Cir. 2008) (same); *United States v. Sura*, 511 F.3d 654, 662 (7th Cir. 2007) (same); *United States v. Arellano-Gallegos*, 387 F.3d 794, 797 (9th Cir. 2004) (same); *see also United States v. Edgar*, 348 F.3d 867, 872 (10th Cir. 2003) (holding that “an error is prejudicial if the defendant has shown he would not have pleaded guilty if the district court had complied with Rule 11(b)(1)(N).”). This Court has not addressed this issue. But, at a minimum, it is safe to conclude that a petitioner arguing a Rule 11(b)(1)(N) error must show that (1) the district court made a plain error; (2) either the waiver was unknowing and involuntary, or, but for the error, the defendant would not have pleaded guilty; and (3) the error affected the fairness and integrity of the judicial proceedings. *See United States v. Torrellas*, 455 F.3d 96, 103 (2d Cir. 2006); JA216 (portion of district court’s decision setting out plain error standard).

Still, separate and apart from the plain error standard, “[a] defendant will rarely, if ever, be able to obtain relief for Rule 11 violations under § 2255.” *Dominguez Benitez*, 542 U.S. at 83 n.9. “To successfully challenge a conviction based on a Rule 11 violation, a petitioner must establish that the violation constituted a ‘constitutional or jurisdictional’ error, or establish that the error resulted in a ‘complete miscarriage of justice,’ or in a proceeding ‘inconsistent with the rudimen-

tary demands of fair procedure.” *Zhang v. United States*, 506 F.3d 162, 168 (2d Cir. 2007). The petitioner must also show that the Rule 11 violation was prejudicial. *See United States v. Vaval*, 404 F.3d 144, 151 (2d Cir. 2005).

**b. Ineffective assistance of counsel**

“[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 Monzon*, 359 F.3d at 119; *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; *Gordon*, 156 F.3d at 379.

**B. Discussion**

**1. The district court complied with Rule 11**

The facts related to this issue are undisputed. As set forth above, in the written plea agreement, the petitioner waived his right to collaterally attack his sentence provided that it did not exceed 188 months’ incarceration. During the plea canvass, the district court confirmed with the petitioner that he understood fully all of the terms of the agreement and had ample time to review them with his attorney. JA72. The court also confirmed with defense counsel that he thought the petitioner understood all of the terms of the agreement. JA72. In reviewing the

plea agreement, the prosecutor accurately summarized the waiver and explained its terms. JA76.

Immediately following this explanation, the court asked the petitioner about the waiver. The court said that it wanted to “focus” the petitioner “on this waiver.” JA76. It advised the petitioner that he was waiving his right to appeal his sentence so long as his sentence did not exceed 188 months, “even if you thought that the way in which I got to your sentence might be wrong.” JA77. It did not use the words “collateral attack” during this colloquy. JA77. The court advised that the petitioner was giving up a “valuable right” and confirmed that he had discussed the waiver with counsel. JA77. The court also confirmed with counsel that he was satisfied that the waiver was knowing and voluntary.

The district court’s omission did not constitute error. Nothing in Rule 11 requires the court, and not the prosecutor, to summarize the waiver, and here, it is undisputed that the prosecutor accurately summarized the waiver. Instead, Rule 11 demands that the court insure that the waiver itself is knowing and voluntary. That is exactly what the court did. It addressed the petitioner immediately after the prosecutor had spelled out the appeal/collateral attack waiver and made sure he understood it, his counsel had reviewed it with him and, in his counsel’s view, he knew what he was doing in agreeing to the waiver. JA76-JA77. It cannot be seriously disputed that the petitioner did not understand

that he was giving up his right to challenge his sentence. As the First Circuit stated, in rejected an almost identical claim, “Although it would have been preferable for the magistrate judge to specifically refer to the waiver of the right to collateral challenge as well as the waiver of the right to direct appeal, the judge’s inquiry adequately confirmed [the petitioner’s] understanding that he was giving up the important right to challenge his sentence after conviction.” *Sotirion*, 617 F.3d at 35.

In his brief, the petitioner argues that advising him about his appeal waiver was not enough to cover the collateral attack waiver because a habeas is so far removed from the sentencing. *See* Def.’s Br. at 47. But the underlying point from *Sotirion* remains true: the petitioner absolutely understood that he was surrendering *any* right to challenge a sentence that did not exceed 188 months.

## **2. The waiver was knowing and voluntary**

Even if this Court concludes that the district court committed a Rule 11 error, however, an examination of the full plea colloquy shows that the petitioner’s waiver was knowing and voluntary, so that any Rule 11 violation did not affect his substantial rights. The petitioner confirmed that he read and fully understood the entire plea agreement and that, when he signed the agreement, he had done so “freely and voluntarily.” JA80. He listened as the prosecutor accurately

described the waiver and advised the court that he understood that waiver, had reviewed it with his lawyer and was willing to enter into it. And his lawyer also confirmed that he and the petitioner had gone through the waiver and that the petitioner completely understood it. A plain reading of the plea colloquy rebuts any claim that the waiver was not knowing and voluntary.

Moreover, any suggestion that the waiver was somehow unknowing because the court failed to use the words “collateral attack” during its questions about the waiver is absolutely undermined by the fact that, at sentencing, the court told the petitioner that he had waived his “right to appeal or collaterally attack” his sentence, and the petitioner did not, at that time, object or attempt to withdraw his plea. JA129. Also, at no time during the lengthy habeas proceedings did the petitioner ever claim that he had not understood the waiver. As the district court concluded, “The fact that Mr. Tellado did not claim in his § 2255 motion that he had not understood the waiver in his plea agreement, . . . along with Mr. Tellado’s signed plea agreement, Mr. Tellado’s statements at his plea allocution, and Mr. Tellado’s failure to seek to withdraw his plea, all support the conclusion that Mr. Tellado’s plea agreement was entered into knowingly and voluntarily, and with awareness of his waiver of collateral attack rights.” JA222 (internal citations, quotation marks, ellipses and brackets omitted). At base, the petitioner understood that he was forever sacrificing his right to challenge any sentence

that did not exceed 188 months' incarceration, even if he later believed that sentence suffered from some defect.

**3. The petitioner's decision to plead guilty was not affected by the court's alleged Rule 11 error**

As set forth above, in determining whether an unpreserved Rule 11 error affects a petitioner's substantial rights, an alternative to determining whether the district court's omission rendered the waiver itself unknowing is to determine whether there is any evidence in the record to support the proposition that the petitioner would not have pleaded guilty had the district court not omitted the words "collateral attack" from its canvass. *See Dominguez Benitez*, 542 U.S. at 84. A plain reading of the plea canvass reveals that the petitioner pleaded guilty to take responsibility for his offense conduct, to obtain various benefits in the plea agreement, including the Government's commitments not to file a second offender notice and not to seek a sentence above the bottom of the guideline range, and because he was, in fact, guilty of the charged offense. The petitioner has pointed to nothing in the record to suggest that the court's omission of the words "collateral attack" impacted his decision to plead guilty. Indeed, as the district court pointed out in its ruling, at sentencing, the court explicitly advised the petitioner that he had given up his right to collaterally attack his conviction and sentence, and the

petitioner did not respond at all, and certainly did not attempt to withdraw his guilty plea.

**4. Any Rule 11 error did not seriously affect the fairness of judicial proceedings**

Even assuming *arguendo* that the district court committed a Rule 11 error in omitting the words “collateral attack” from its canvass and that this omission affected the petitioner’s substantial rights, it is difficult to understand how the omission could have seriously affected “the fairness, integrity or public reputation of judicial proceedings.” *Marcus*, 130 S. Ct. at 2164. Again, the petitioner challenges the Rule 11 colloquy for the first time on habeas review. He never moved to withdraw his guilty plea, despite having been told at sentencing that he had sacrificed his right to file a future habeas, and he never filed a direct appeal, understanding from his plea agreement that he had waived that right.

The district court here did not ignore the waiver provision or inadvertently skip over it. To the contrary, it stopped the prosecutor in the middle of his recitation of the provisions of the plea agreement so that it could question the petitioner and his attorney about the appeal/collateral attack waiver. In this context, it is hard to understand how the fairness of the proceedings could be questioned at all. To the extent that the petitioner claims that the fairness and integrity of the proceedings are called into question by his designation as a career of-

fender, that argument misses the point, as the operative question here is whether the alleged Rule 11 error constitutes plain error, not whether the petitioner's classification as a career offender constitutes plain error.

### **5. The waiver should be enforced**

The petitioner tries to suggest that, because the waiver was based on a "false premise," *i.e.*, that he was a career offender, it should not be enforced. There are two relevant points here. First, at the time of the petitioner's plea, which occurred more than one year prior to when *Savage* was decided, he was a career offender and was properly classified as such by his lawyer, the prosecutor and the court. Indeed, a plain reading of the corrected state plea transcript for his 2003 sale convictions shows no apparent *Savage* problem.

Second, it is well settled that a defendant's "inability to foresee that subsequently decided cases would create new appeal issues does not supply a basis for failing to enforce an appeal waiver. On the contrary, the possibility of a favorable change in the law after a plea is simply one of the risks that accompanies pleas and plea agreements." *United States v. Morgan*, 406 F.3d 135, 137 (2d Cir. 2005). If a petitioner could invalidate a valid appeal or collateral attack waiver based on a positive development in the law, then the very purpose of the waiver itself would be undermined. The fact that the petitioner "might have bargained differently . . . is simply

not relevant to whether [a] plea is enforceable.” *United States v. Roque*, 421 F.3d 118, 123 (2d Cir. 2005) (finding that a defendant who had entered into a plea agreement before the Supreme Court’s decision in *Booker* could not challenge his sentence on the grounds that he had negotiated the plea in the “false belief” that the Guidelines were mandatory).

## **6. Claims of ineffective assistance do not undermine the waiver**

Finally, the petitioner claims that the waiver should not be enforced because trial counsel was ineffective for negotiating it.<sup>8</sup> *See* Def.’s Br. at 61. This argument fails for several reasons. First, the petitioner does not challenge the effectiveness of the advice that he received in connec-

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<sup>8</sup> A plain reading of the petitioner’s opening brief reveals that he has claimed only ineffective assistance as it relates to the enforceability of the collateral attack waiver and has abandoned the separate claim of ineffective assistance raised for the first time in his motion to amend his petition. *See* Def.’s Br. at 2 (asserting that district court’s decision should be reversed because the petitioner is actually innocent of being a career offender, is entitled to equitable tolling, and entered into a collateral attack waiver that is not enforceable). Regardless, in the Government’s view, should this Court disagree with the two procedural grounds under which the district court rejected the petition, it should remand the case back to the district court for a full resolution of merits of the petition and any other outstanding procedural defenses.

tion with the waiver. At most, he claims that the waiver itself was inadvisable because it was based on the wrong conclusion that the petitioner was a career offender. This claim is foreclosed by the waiver. *See Djelevic*, 161 F.3d at 107 (“If we were to allow a claim of ineffective assistance of counsel at sentencing as a means of circumventing plain language in a waiver agreement, the waiver of appeal provision would be rendered meaningless.”).

Second, as the district court found, there was no “manifest deficiency” in counsel’s performance based on the information available to him at the time. JA229. “While the legal building blocks of the Second Circuit’s decision in *Savage* existed at th[e] time Mr. Tellado entered his guilty plea, the simple fact is that *Savage* was not yet controlled case law.” JA229. Even his own counsel has recognized that, prior to *Savage*, and going all the way back to the enactment of the guidelines, all defense counsel, *regardless of their experience level in federal court*, treated Connecticut sale of narcotics convictions as categorical controlled substance offenses under U.S.S.G. § 4B1.2. As the district court noted, “Indeed, Mr. Tellado previously argued that ‘a reasonable attorney would not be expected to have raised a *Savage*-type claim prior to the publication of the Second Circuit’s opinion in *Savage*.’”<sup>9</sup> JA230; GA223 (citing four different

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<sup>9</sup> Counsel has included in the Joint Appendix information about how many federal cases the petition-

statements in two different filings wherein the petitioner represented that a “reasonable attorney” could not have been expected to raise a *Savage* claim prior to the *Savage* decision).

The petitioner’s trial counsel acted as any reasonable attorney would have under prevailing precedent at the time. Faced with the probability of the Government’s filing of a second offender notice and a resulting guideline incarceration range of 262-327 months, he negotiated a plea agreement in which the Government agreed not to file the notice and in which he was asked to waive his appeal and collateral attack rights to the bottom of the guideline range, instead of the top. In this agreement, counsel also was able to retain all of his rights to request a sentence below the guideline range and bind the Government to seek a sentence at the bottom of the career offender range.

Thus, having knowingly and voluntarily waived his right to appeal and collaterally attack his sentence, the petitioner is now bound by that waiver and, as a result, cannot challenge his sentence. A plain review of the plea and sentencing transcripts reveals that the petitioner

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er’s trial counsel had handled when he negotiated the plea agreement in this case. This information is irrelevant. Counsel himself admits that he and other similarly experienced attorneys had not foreseen *Savage* and had always assumed that Connecticut sale convictions counted categorically as career offender predicates.

fully understood his waiver and knew that, as long as he did not receive a sentence in excess of 188 months, he had sacrificed his right to ever challenge that sentence in any post-conviction proceeding.

### Conclusion

For the foregoing reasons, the judgment of the district court should be affirmed. To the extent that this Court disagrees with the district court's analysis of the statute of limitations and waiver issues, the Government respectfully requests that it remand the case back to the district court for further proceedings to address the underlying merits of the petition itself, as well as additional procedural arguments not addressed here on appeal, such as whether the petitioner's direct challenge to his sentence was barred because it is a non-constitutional claim that was not raised on direct appeal.<sup>10</sup>

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<sup>10</sup> In *McCoy v. United States*, No. 3:09cv1960(MRK), slip. op. (D. Conn. Aug. 4, 2011), the same district court dismissed a habeas petition raising a direct challenge to the sentence and an ineffective assistance claim. In *McCoy*, there were no statute of limitations or waiver issues; instead, the court dismissed the petition because the petitioner had failed to establish "cause" and "prejudice" as to the unpreserved direct challenge to his sentence and because the petitioner's counsel was not ineffective for failing to foresee *Savage*. The court issued a certificate of appealability as to the ineffective assistance claim, but not

Dated: February 14, 2012

Respectfully submitted,

DAVID B. FEIN  
UNITED STATES ATTORNEY  
DISTRICT OF CONNECTICUT

A handwritten signature in black ink, reading "Robert M. Spector". The signature is written in a cursive style with a prominent "R" and "S".

ROBERT M. SPECTOR  
ASSISTANT U.S. ATTORNEY

Sandra S. Glover  
Assistant United States Attorney (of counsel)

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as to the direct challenge, and this Court recently denied McCoy's motion to expand the certificate to include the direct challenge. *See McCoy v. United States*, No. 11-3457, Order (2d Cir. Feb. 9, 2012).

**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 15,933 words, exclusive of the Table of Contents, Table of Authorities, Addendum, and this Certification. On November 3, 2011, this Court granted both parties leave to file briefs of up to 16,500 words in length.

A handwritten signature in black ink that reads "Robert M. Spector". The signature is written in a cursive style with a prominent initial "R" and "M".

ROBERT M. SPECTOR  
ASSISTANT U.S. ATTORNEY

## **Addendum**

**28 U.S.C. § 2255. Federal custody; remedies on motion attacking sentence**

...

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

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

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

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

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

**Conn. Gen. Stat. § 21a-277. Penalty for illegal manufacture, distribution, sale, prescription, dispensing**

(a) Any person who manufactures, distributes, sells, prescribes, dispenses, compounds, transports with the intent to sell or dispense, possesses with the intent to sell or dispense, offers, gives or administers to another person any controlled substance which is a hallucinogenic substance other than marijuana, or a narcotic substance, except as authorized in this chapter, for a first offense, shall be imprisoned not more than fifteen years and may be fined not more than fifty thousand dollars or be both fined and imprisoned; and for a second offense shall be imprisoned not more than thirty years and may be fined not more than one hundred thousand dollars, or be both fined and imprisoned; and for each subsequent offense, shall be imprisoned not more than thirty years and may be fined not more than two hundred fifty thousand dollars, or be both fined and imprisoned.

(b) Any person who manufactures, distributes, sells, prescribes, dispenses, compounds, transports with intent to sell or dispense, possesses with intent to sell or dispense, offers, gives or administers to another person any controlled substance, except a narcotic substance, or a hal-

lucinogenic substance other than marijuana, except as authorized in this chapter, may, for the first offense, be fined not more than twenty-five thousand dollars or be imprisoned not more than seven years or be both fined and imprisoned; and, for each subsequent offense, may be fined not more than one hundred thousand dollars or be imprisoned not more than fifteen years, or be both fined and imprisoned.

**U.S.S.G. § 4B1.2. Definitions of Terms Used in Section 4B1.1**

...

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

## **Fed. R. Crim. P. 11. Pleas**

...

(b) Considering and Accepting a Guilty or Nolo Contendere Plea.

(1) Advising and Questioning the Defendant. Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following:

...

(N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence.

...

(d) Withdrawing a Guilty or Nolo Contendere Plea. A defendant may withdraw a plea of guilty or nolo contendere:

(1) before the court accepts the plea, for any reason or no reason; or

(2) after the court accepts the plea, but before it imposes sentence if:

(A) the court rejects a plea agreement under

Rule 11(c)(5); or

(B) the defendant can show a fair and just reason for requesting the withdrawal.

...

(h) Harmless Error. A variance from the requirements of this rule is harmless error if it does not affect substantial rights.