

# 11-3457

*To Be Argued By:*  
ROBERT M. SPECTOR

---

---

**United States Court of Appeals**

**FOR THE SECOND CIRCUIT**

**Docket No. 11-3457**

—  
TRANEL MCCOY,  
*Petitioner-Appellant,*

-vs-

UNITED STATES OF AMERICA,  
*Respondent-Appellee.*

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

---

---

**BRIEF FOR THE UNITED STATES OF AMERICA**

---

---

DAVID B. FEIN  
*United States Attorney  
District of Connecticut*

ROBERT M. SPECTOR  
*Assistant United States Attorney*  
SANDRA S. GLOVER  
*Assistant United States Attorney (of counsel)*

## Table of Contents

Table of Authorities .....	iii
Statement of Jurisdiction .....	x
Statement of Issue Presented for Review.....	xi
Preliminary Statement.....	1
Statement of the Case .....	3
Statement of Facts and Proceedings	
Relevant to this Appeal.....	8
A. The offense conduct.....	8
B. Second offender notices.....	11
C. Sentencing proceeding .....	12
D. The direct appeal .....	15
E. The <i>Madera</i> decision.....	16
F. The <i>Savage</i> decision .....	17
G. Application of <i>Madera and</i> <i>Savage</i> to 21 U.S.C. § 851 enhancement.....	19
H. Section 2255 petition .....	25

I. Ruling on the amended habeas petition.....	31
Summary of Argument .....	37
Argument.....	40
I. The petitioner has failed to establish under both prongs of <i>Strickland</i> that his trial coun- sel was constitutionally ineffective .....	40
A. Governing law and standard of review.....	40
B. Discussion .....	46
1. The petitioner’s trial counsel did not render deficient performance.....	46
2. Any deficiency in counsel’s performance did not prejudice the petitioner.....	54
Conclusion .....	57
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>Armenti v. United States</i> , 234 F.3d 820 (2d Cir. 2000) .....	xii
<i>Brecht v. Abrahamson</i> , 507 U.S. 619 (1993).....	41
<i>Brunson v. Higgins</i> , 708 F.2d 1353 (8th Cir. 1983).....	52
<i>Carter v. United States</i> , 731 F. Supp.2d 262 (D. Conn. 2010) .....	50
<i>Chalmers v. Mitchell</i> , 73 F.3d 1262 (2d Cir. 1996) .....	xii
<i>Ciak v. United States</i> , 59 F.3d 296 (2d Cir. 1995) .....	41
<i>Coleman v. United States</i> , 329 F.3d 77 (2d Cir. 2003) .....	46
<i>Cullen v. Pinholster</i> , 131 S. Ct. 1388 (2011).....	44, 45, 49

<i>Fountain v. United States</i> , 357 F.3d 250 (2d Cir. 2004) .....	46
<i>Harrington v. Richter</i> , 131 S. Ct. 770 (2011).....	44, 49, 50, 52
<i>Harrington v. United States</i> , 3:08cv1864(SRU) (D. Conn. May 10, 2011) .....	51
<i>Hill v. United States</i> , 368 U.S. 424 (1962).....	40
<i>Honeycutt v. Mahoney</i> , 698 F.2d 213 (4th Cir. 1983).....	53
<i>Linstadt v. Keane</i> , 239 F.3d 191 (2d Cir. 2001) .....	43
<i>Massaro v. United States</i> , 538 U.S. 500 (2003).....	42
<i>Napoli v. United States</i> , 32 F.3d 31 (2d Cir. 1994), <i>amended on</i> <i>reh'g on other grounds</i> , 45 F.3d 680 (2d Cir. 1995) .....	41
<i>North Carolina v. Alford</i> , 400 U.S. 25 (1970).....	29, 47, 48
<i>Padilla v. Kentucky</i> , 130 S. Ct. 1473 (2010).....	45, 49

<i>Parisi v. United States</i> , 529 F.3d 134 (2d Cir. 2008) .....	45, 49
<i>Reed v. Farley</i> , 512 U.S. 339 (1994).....	42
<i>Roe v. Flores-Ortega</i> , 528 U.S. 470 (2000).....	42
<i>Shepard v. United States</i> , 544 U.S. 13 (2005).....	16, 19, 25, 33, 54
<i>Sistrunk v. Vaughn</i> , 96 F.3d 666 (3d Cir. 1996) .....	44
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984).....	<i>passim</i>
<i>Taylor v. United States</i> , 495 U.S. 575 (1990).....	19, 24, 25, 33, 54
<i>United States v. Abbott</i> , 574 F.3d 203 (3d Cir. 2009), <i>cert. granted</i> , 130 S. Ct. 1284 (Jan. 25, 2010) .....	6, 27, 28
<i>United States v. Aguirre</i> , 912 F.2d 555 (2d Cir. 1990) .....	43

<i>United States v. Cohens</i> , No. 3:07cr195(EBB), 2008 WL 3824758, (D. Conn. Aug. 13, 2008).....	17, 19, 20, 48
<i>United States v. Fields</i> , 565 F.3d 290 (5th Cir. 2009).....	44, 54
<i>United States v. Gaskin</i> , 364 F.3d 438 (2d Cir. 2004) .....	54
<i>United States v. Gordon</i> , 156 F.3d 376 (2d Cir. 1998) (per curiam).....	46
<i>United States v. Gould</i> , 529 F.3d 274 (5th Cir. 2008), <i>cert. granted</i> , 130 S. Ct. 1284 (Jan. 25, 2010) .....	6, 28
<i>United States v. Hayman</i> , 342 U.S. 205 (1952).....	40
<i>United States v. Jackson</i> , 301 F.3d 59 (2d Cir. 2002) .....	<i>passim</i>
<i>United States v. Lopez</i> , 536 F. Supp.2d 218 (D. Conn. 2008) .....	17, 19, 20, 48
<i>United States v. Madera</i> , 521 F. Supp.2d 149 (D. Conn. 2007) .....	<i>passim</i>

<i>United States v. McCoy</i> , No. 07-0648-cr (L) (2d Cir. Dec. 17, 2008) .....	2, 5, 15
<i>United States v. Monzon</i> , 359 F.3d 110 (2d Cir. 2004) .....	46
<i>United States v. Savage</i> , 542 F.3d 959 (2d Cir. 2008) .....	<i>passim</i>
<i>United States v. Sellan</i> , 261 F.3d 303 (2d Cir. 2001) .....	30, 44, 47, 50
<i>United States v. Whitley</i> , 529 F.3d 150 (2d Cir. 2008) .....	6, 27, 28
<i>United States v. Williams</i> , 558 F.3d 166 (2d Cir. 2009) .....	6, 27, 28

### Statutes

18 U.S.C. § 924 .....	<i>passim</i>
18 U.S.C. § 3147 .....	<i>passim</i>
18 U.S.C. § 3553 .....	14, 31, 39, 54, 57
21 U.S.C. § 802 .....	20, 21, 22, 24
21 U.S.C. § 811 .....	23
21 U.S.C. § 841 .....	<i>passim</i>

21 U.S.C. § 851.....	<i>passim</i>
28 U.S.C. § 2253.....	x
28 U.S.C. § 2255.....	<i>passim</i>
Conn. Gen. Stat. § 21a-240.....	18
Conn. Gen. Stat. § 21a-242.....	23
Conn. Gen. Stat. § 21a-277.....	<i>passim</i>

**Rules**

Fed. R. App. P. 4.....	x
------------------------	---

**Guidelines**

U.S.S.G. § 4B1.1.....	20, 35, 48
U.S.S.G. § 4B1.2(b).....	18

**Other Authorities**

Conn. Public Acts 1986, No. 96, § 1.....	23
21 C.F.R. § 1308.11.....	24

21 C.F.R. § 1308.12 .....	22
50 Fed. Reg. 43698 (Oct. 29, 1985) .....	23
51 Fed. Reg. 43025 (Nov. 28, 1986).....	23

## 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 August 4, 2011, the district court denied the defendant's motion for relief under 28 U.S.C. § 2255. Joint Appendix ("JA") 146-JA165. On that same date, pursuant to 28 U.S.C. § 2253(c)(1)(B), the court issued a certificate of appealability as to one issue: whether the petitioner's trial counsel had rendered constitutionally ineffective assistance of counsel. JA164.

Judgment entered on August 9, 2011. JA166. On August 25, 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). JA171.

## **Statement of the Issue Presented for Review**

Did the petitioner's trial counsel provide constitutionally ineffective assistance in abiding by prevailing professional norms and failing to challenge the government's second offender notice using an argument that was not first recognized, in the second offender context, until well over two years after the sentencing in this case?<sup>1</sup>

---

<sup>1</sup> In his brief, the petitioner expands his claim of ineffective assistance to include appellate counsel. *See* Def.'s Br. at 5, 8. He did not raise this claim below. In his amended habeas petition, and the memorandum in support of that petition, both of which were submitted by counsel appointed in connection with the § 2255 proceeding, the petitioner claimed only that his trial counsel was ineffective for failing to challenge the § 851 notice. JA90, JA103-JA105. In his reply brief, submitted in response to the government's opposition, he referenced, for the first time, a claim of ineffective assistance of appellate counsel, but did not articulate at all how his appellate counsel, who was the same attorney as trial counsel, was ineffective beyond his failure to challenge the § 851 notice at sentencing. JA143. In its ruling denying the petition, the district court confined itself to the claim of ineffective assistance of trial counsel and did not address the effectiveness of appellate counsel. JA147, JA161. And in its ruling granting a certificate of appealability, the district court only certified the issue of whether trial counsel was ineffec-

---

tive. JA164. As a result, the issue of whether appellate counsel rendered constitutionally defective performance is not before this Court. *See Armienti v. United States*, 234 F.3d 820, 824 (2d Cir. 2000) (“We will not address a claim not included in the certificate of appealability.”); *Chalmers v. Mitchell*, 73 F.3d 1262, 1268, n.1 (2d Cir. 1996) (concluding that the failure to raise and argument as an independent ground in a habeas petition precludes a party from raising that issue as a claim on appeal.). Even if the issue were before the Court, however, it should be analyzed and rejected under the same framework that applies to the claim of ineffective assistance of trial counsel. Regardless of the exact wording of the petitioner’s claim, he is, in essence, alleging ineffective assistance in connection with the failure to challenge the § 851 notice at sentencing.

# United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 11-3457

---

TRANEL MCCOY,  
*Petitioner-Appellant,*

-vs-

UNITED STATES OF AMERICA,  
*Respondent-Appellee.*

---

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

---

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

---

### **Preliminary Statement**

In December 2004 and April 2006, the petitioner was charged in two separate indictments with conspiracy to distribute five grams or more of crack cocaine, possession with intent to distribute five grams or more of crack cocaine, possession with intent to distribute marijuana and possession of a firearm in furtherance of a drug trafficking crime. Prior to trial, the government filed a second offender notice based on the alle-

gation that the petitioner had sustained a prior conviction for a felony drug offense, which caused the five year mandatory minimum incarceration term on the two crack offenses to increase to ten years. A jury convicted him of all four counts, and, at sentencing, the district court imposed concurrent 120-month incarceration terms on the two crack offenses and the one marijuana offense, a consecutive 60-month incarceration term on the firearms conviction, and a consecutive one-month incarceration term for commission of the offenses while on federal pre-trial release, for a total effective sentence of 181 months in prison.

The petitioner filed a direct appeal, and this Court affirmed his conviction by summary order. *See United States v. McCoy*, No. 07-0648(L) (2d Cir. Dec. 17, 2008). He then filed a timely habeas petition which argued, *inter alia*, that (1) his sentence was unlawful because the second offender notice was invalid, and (2) his trial counsel was ineffective for failing to challenge the second offender notice. The district court denied the § 2255 motion. As to the substantive attack on the second offender notice, the court rejected the claim because the petitioner had not raised it below and had failed to show cause or prejudice in connection with this procedural default. As to the ineffective assistance of counsel claim, the court found that the petitioner had failed to satisfy either prong of *Strickland* and

that trial counsel was not ineffective for failing to foresee subsequent changes in how the government is required to establish the existence of a prior felony drug offense under 21 U.S.C. § 841(b). The district court only granted a certificate of appealability as to the ineffective assistance issue, and this Court denied the petitioner's motion to expand the certificate to include the direct challenge to the sentence.

On appeal, the petitioner argues that the district court erred in concluding that the petitioner's ineffective assistance claim failed under both the performance and prejudice prongs of *Strickland*. For the reasons that follow, this Court should affirm the district court's ruling.

### **Statement of the Case**

On December 14, 2004, a grand jury in Hartford returned a superseding indictment against the petitioner and several other individuals alleging various narcotics violations. JA1-JA5. Specifically, the superseding indictment charged the petitioner in Count One with conspiracy to distribute five grams or more of cocaine base, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B) and 846. JA1-JA2. The petitioner was released on bond on November 16, 2004. JA10 (docket entry).

On December 22, 2005, the court issued an order revoking the petitioner's pretrial release. JA14 (docket entry). On April 12, 2006, a grand

jury in Hartford returned an indictment against the petitioner in a separate case charging him in Count One with possession with intent to distribute five grams or more of cocaine base, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B), in Count Two with possession with intent to distribute marijuana, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(D), and in Count Three with possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c). JA34-JA37. All three counts also cited 18 U.S.C. § 3147(1) based on the fact that the petitioner had committed the felony offenses while on federal pretrial release. JA34-JA37. In addition, on April 14, 2006, the government filed a second offender notice under 21 U.S.C. § 851 in both cases based on the petitioner's prior drug felony conviction, which increased the applicable penalties for the cocaine base and marijuana charges. JA24-JA26, JA51-JA53.

On July 14, 2006, the district court granted, absent objection, the government's motion for joinder of the conspiracy charge in the December 14, 2004 superseding indictment, and the narcotics and firearms charges in the April 12, 2006 indictment. JA15 (docket entry). On August 9, 2006, a trial jury found the petitioner guilty of all four charged offenses in both cases. JA16, JA27-JA30, JA45.

On February 13, 2007, the district court (Mark R. Kravitz, J.) sentenced the defendant to

a total effective term of 181 months' imprisonment and four years' supervised release. Specifically, the district court imposed concurrent terms of incarceration of 120 months on the convictions for conspiracy to distribute five grams or more of cocaine base, possession with intent to distribute five grams or more of cocaine base, and possession with intent to distribute marijuana. JA31-JA33, JA60-JA62. The court imposed consecutive terms of incarceration of 60 months on the conviction for possession of a firearm in furtherance of a drug trafficking crime, and one month based on the defendant's commission of felony offenses while on federal pretrial release. JA60-JA62. Judgments in both cases entered on February 14, 2007. JA20, JA48-JA49.

The petitioner filed a direct appeal, and, on December 17, 2008, this Court affirmed his convictions by summary order. *See United States v. McCoy*, No. 07-0648(L) (2d Cir. Dec. 17, 2008).

On December 2, 2009, the petitioner filed a timely motion pursuant to 28 U.S.C. § 2255, challenging his sentence. JA64 (docket entry). On that same date, the petitioner filed a motion to appoint counsel in connection with his § 2255 motion. JA64 (docket entry). On January 21, 2010, the petitioner submitted a *pro se* amended petition. JA65 (docket entry). The district court granted the motion to appoint counsel, and on February 11, 2010, appointed counsel to represent the petitioner. JA64-JA65 (docket en-

tries). On March 15, 2010, the petitioner's counsel filed a memorandum in support of the § 2255 motion. JA65.

On May 19, 2010, the district court denied the amended § 2255 petition as to all of the claims raised therein except for the claim that the court's sentence as to the § 924(c) conviction was unlawful under *United States v. Williams*, 558 F.3d 166 (2d Cir. 2009), and *United States v. Whitley*, 529 F.3d 150 (2d Cir. 2008). JA70, JA82. As to that challenge, the court indicated that it would consider it after the Supreme Court resolved the continuing viability of those two decisions in the then-pending cases of *United States v. Abbott*, 574 F.3d 203 (3d Cir. 2009), *cert. granted*, 130 S. Ct. 1284 (Jan. 25, 2010), and *United States v. Gould*, 529 F.3d 274 (5th Cir. 2008), *cert. granted*, 130 S. Ct. 1284 (Jan. 25, 2010). JA70, JA82. The court stated that the petitioner could renew his § 2255 petition after *Abbott* and *Gould* were decided. JA82. Since the *Abbott* and *Gould* effectively overruled *Williams* and *Whitley*, the petitioner never renewed his § 2255 motion as to the § 924(c) claim.

On October 26, 2010, the petitioner filed a motion to amend his § 2255 petition to challenge his sentence based on claims that the second offender notices filed in his cases were defective and that his trial counsel was ineffective for failing to challenge the notices. JA83-JA84. He argued that these new claims related back to the

claims in his original petition. JA83. On February 16, 2011, the district court granted the petitioner's motion to amend the original petition. JA66 (docket entry). On March 17, 2011, the petitioner filed the amended § 2255 motion which raised these two additional claims. JA85-JA93.

On August 4, 2011, the district court dismissed the amended § 2255 motion and rejected the two new claims raised by the petitioner. JA146-JA165. At the conclusion of the written ruling, the district court granted a certificate of appealability only as to the claim of ineffective assistance of trial counsel. JA164. Judgment entered on August 9, 2011. JA166.

On August 25, 2011, the petitioner filed with the district court a motion to expand the certificate of appealability to include the issue of whether his challenge to the second offender notice was procedurally defaulted under the cause and prejudice standard. JA169. On August 25, 2011, the petitioner filed a timely notice of appeal as to the August 9, 2011 judgment. JA171.

On September 15, 2011, the district court denied the motion to expand the certificate of appealability. JA68. On September 23, 2011, the petitioner filed a motion with this Court to expand the certificate to include the substantive challenge to the government's second offender notice. JA184-JA187. On February 17, 2012, this Court denied that motion. JA213.

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

### **A. The offense conduct**

Based on the evidence presented by the government at trial, the jury reasonably could have found the following facts: In June 2004, the FBI commenced a ten-month investigation, code named “Operation Big Boy,” targeting a crack cocaine trafficking organization operating in Hartford, Connecticut. *See* Pre-Sentence Report (“PSR”) ¶ 10. As part of the investigation, which included the use of wiretaps, the FBI identified a crack cocaine supplier named Clayton Robinson, who provided crack cocaine, in bulk quantities to numerous Hartford drug dealers, including the petitioner. *See* PSR ¶¶ 11-12, 14.

The petitioner typically purchased crack cocaine from Robinson in seven-gram quantities. *See* PSR ¶ 14. From August 17, 2004 through September 1, 2004, he engaged in four separate seven-gram transactions with Robinson. *See* PSR ¶ 14.

On November 9, 2004, a federal grand jury returned an indictment charging the petitioner in a narcotics conspiracy. *See* PSR ¶ 16. The FBI arrested him at his residence the next day. *See* PSR ¶ 16. After being advised of his rights, the petitioner admitted that he purchased crack cocaine from Robinson, advised that the crack

was for his friends and claimed that he was not a drug dealer. *See* PSR ¶ 16.

On November 16, 2004, the petitioner was released on a \$75,000 non-surety bond which was co-signed by his spouse. *See* PSR ¶¶ 2, 17; JA10.<sup>2</sup> He was also ordered to reside in his home at 40 Elmer Street, in Hartford. JA71; Tr. at 98.<sup>3</sup> To enforce this condition and the curfew that was imposed, the court ordered that the petitioner be subjected to electronic monitoring. Tr. at 99.

The police later received information that the petitioner was still selling drugs from his residence. *See* PSR ¶ 18. After conducting surveillance which confirmed the existence of narcotics-related activity in and around the petitioner's residence, the police used a confidential informant to purchase crack cocaine from the petitioner at his residence on December 7, 2005 and December 12, 2005. *See* PSR ¶¶ 18-19. Based on these purchases, the police obtained a search warrant and executed it on December 20, 2005. *See* PSR ¶ 20.

---

<sup>2</sup> The PSR states that the petitioner was released on bond on November 12, 2004; *see* PSR ¶ 2, the criminal docket sheet states that the petitioner was released on bond on November 16, 2004. JA10.

<sup>3</sup> The full, 764-page trial transcript covers the proceedings on August 4, 2006, August 7, 2006, August 8, 2006 and August 9, 2006 and will be referred to as "Tr." followed by the page number of the transcript.

After making entry, the police found several adults, including the petitioner, and eight juveniles inside the second floor apartment. *See* PSR ¶ 20. During the search, officers found in the petitioner's front pocket a small container with several small rocks of crack cocaine, with a net weight of approximately 4.68 grams. *See* PSR ¶ 21; JA72. A search of the petitioner's bedroom revealed a black pouch containing approximately \$1700 in cash under the bed, and narcotics and a loaded firearm in an entertainment center to the right of the bed. *See* PSR ¶ 21; JA72. Specifically, they found a baggie containing several rocks of crack cocaine, with a net weight of 11.46 grams, a plate containing a razor blade and cocaine residue, a bag containing several smaller baggies of marijuana, with a net weight of 11.4 grams, some packaging material, a scale and a fully-loaded .45 caliber handgun that had the safety off. *See* PSR ¶ 21; JA72.

At the time that the officers found the crack cocaine in the entertainment center, they overheard the defendant and his wife engage in a conversation about it. JA72. The two were sitting just outside the bedroom, on a couch in the living room, while the search of the bedroom was being done and could observe what was happening in the master bedroom. JA72. The defendant's wife became very upset when she learned that the officers had found crack cocaine in the bedroom and began to cry. JA72. In an attempt

to calm her down, the defendant stated, “Don’t worry. They know it’s mine. They know you had nothing to do with it.” JA72.

On April 12, 2006, a grand jury in Hartford returned a separate indictment against the petitioner based on the contraband seized from him and his residence on December 20, 2005. JA34-JA37. The indictment charged him in Count One with possession with intent to distribute five grams or more of cocaine base, in Count Two with possession with intent to distribute marijuana, and in Count Three with possession of a firearm in furtherance of a drug trafficking crime. JA34-JA37. All three counts cited 18 U.S.C. § 3147(1) based on the fact that the petitioner had committed the felony offenses while on federal pretrial release. JA34-JA37.

### **B. Second offender notices**

On April 14, 2006, the government filed second offender notices against the petitioner in both cases. JA24, JA51. The notices alleged that, on or about May 31, 1996, the petitioner had been convicted “of Sale of Narcotics (Docket Number CR96-0485879-S), in violation of Conn. Gen. Stat. § 21a-277(a), in the Connecticut Superior Court.” JA24, JA51. Both notices explained that, as a result of this prior felony drug offense, the petitioner faced enhanced penalties as to the drug charges, including a mandatory minimum term of 120 months in prison as to

each of the crack cocaine offenses. JA25, JA52. In the absence of the notice, the petitioner would only have faced a mandatory minimum term of 60 months in prison as to these offenses. JA148.

### **C. Sentencing proceeding**

The Pre-Sentence Report (“PSR”) found that the base offense level, under Chapter Two of the Sentencing Guidelines, was 30 by virtue of the fact that the narcotics offenses for which the defendant was convicted involved the possession with the intent to distribute of approximately 44 grams of cocaine base. *See* PSR ¶ 30. The PSR added three levels based on the fact that the defendant committed the second offense while on pretrial release for the first offense. *See* PSR ¶ 31. The PSR did not make any further adjustments and concluded that the total adjusted offense level was 33. *See* PSR ¶ 37.

As to criminal history, the PSR found that the defendant was in Criminal History Category II because he had accumulated two criminal history points from a 1998 conviction for threatening and a 1996 conviction for sale of narcotics. *See* PSR ¶¶ 39-41. Paragraph 39 of the PSR detailed the facts underlying the sale of narcotics conviction listed in the two second offender notices. *See* PSR ¶ 39.

At an adjusted offense level of 33 and a Criminal History Category II, the PSR concluded that the guideline incarceration range applicable to

the defendant's narcotics convictions was 151-188 months. *See* PSR ¶ 75. According to the PSR, the range increased to 211-248 months to account for the mandatory 60-month consecutive sentence required by the defendant's conviction for a violation of 18 U.S.C. § 924(c). *See* PSR ¶ 75.

The petitioner never challenged the second offender notice, and the parties and the district court assumed that the mandatory minimum term of incarceration as to the crack cocaine offenses was 120 months. JA149.

Sentencing occurred on February 13, 2007. The court adopted the factual statements contained in the PSR and concluded that the guideline incarceration range was 211-248 months. JA148-JA149. The court imposed a non-guideline sentence of 181 months' incarceration, which was comprised of concurrent 120-month terms on the crack cocaine and marijuana convictions, a consecutive 60-month sentence on the firearm conviction and a consecutive one-month sentence for committing the offenses in the second case while on federal pretrial release on the first case. JA31-JA33, JA60-JA62, JA149.

In its written judgment, the court explained its justification for the non-guideline sentence as follows:

The Court imposed a non-Guidelines' sentence insofar as the violation of 18

U.S.C. § 3147 is concerned. . . . The Court concluded that a sentence of 181, or one additional month under 18 U.S.C. § 3147, was sufficient but not greater than necessary to achieve the purposes of a criminal sentence, taking into account all of the factors set forth in 18 U.S.C. § 3553(a), including defendant's relatively low criminal history category and his family circumstances. The Court did so, because the Government represented to the Court that it had filed the second offender notice, which increased defendant's mandatory minimum on the drug offenses, from 5 years (60 months) to ten years (120 months) because defendant had committed his second offense while on release. According to the Government, it would not have filed the second offender notice but for that fact since defendant's first offense was committed over 10 years before and while the defendant was 19. Thus, the Government stated that [the] defendant would receive an additional 60 months imprisonment effectively because he had committed a felony while on release and further represented that no further increase in the length of defendant's sentence was needed for deterrence or any other purpose. Nonetheless, the Court concluded that 18 U.S.C. § 3147 requires the Court to impose at

least some period of imprisonment when a defendant commits a felony offense while on release, which is why the Court imposed an additional month of imprisonment to run consecutively to all other sentences. Therefore, [the] defendant received an effective total sentence of 181 months.

JA60.

#### **D. The direct appeal**

Judgments entered on February 14, 2007. JA20, JA49. On February 21, 2007, the petitioner filed a timely notice of appeal. JA20, JA49. In the appeal, he claimed, first, that the district court erred in denying his Rule 29 motion for judgment of acquittal as to the count charging him with possession of a firearm in furtherance of a drug trafficking crime, and, second, that the district court erred in denying his motion to suppress the physical evidence seized from his residence on December 20, 2005 based on his claim that the warrant affiants intentionally omitted material information regarding the confidential informant used in the investigation. JA109. On December 17, 2008, this Court affirmed the petitioner's conviction by summary order. *See United States v. McCoy*, No. 07-0648-cr(L) (2d Cir. Dec. 17, 2008).

### E. The *Madera* decision

On March 5, 2007, a district court held, for the first time, that a conviction under Conn. Gen. Stat. § 21a-277(a) was not categorically a conviction for a “serious drug offense” under 18 U.S.C. § 924(e) because two substances, benzylfentanyl and thenylfentanyl, which have been “included in the Connecticut schedules of controlled substances as narcotics since 1987,” “have not been listed on the federal controlled substance schedules since 1986.” *United States v. Madera*, 521 F. Supp.2d 149, 154-155 (D. Conn. 2007). As a result, the court concluded that it was necessary to use “the modified categorical approach endorsed by [*Shepard v. United States*, 544 U.S. 13 (2005)]” to establish that the § 21a-277(a) convictions qualified as serious drug offenses. *See id.* at 152 (internal quotation marks omitted). In particular, the government would have to submit a court record, such as a certified copy of conviction or a guilty plea transcript, to establish the type of controlled substance involved in the underlying state offense. *See id.*

In so ruling, the court rejected the government’s arguments that (1) the federal ban on the controlled substance “fentanyl” was an analog of benzylfentanyl and thenylfentanyl and, therefore, encompassed the two substances, and (2) Connecticut’s failure to enforce its ban on ben-

zylfentanyl and thenylfentanyl prohibits any “nongeneric” interpretation of § 21a-277(a)’s scope. *See id.* at 156-157. As the court explained, “Comparing the federal and state controlled substance schedules is a simple matter of comparing entries on two lists. . . . While the Court is sympathetic to the government’s argument that it is highly unlikely that any of Madera’s subject convictions involved benzyl- or thenylfentanyl, Madera has established that § 21a-277(a) proscribes conduct that does not constitute a serious drug offense under 18 U.S.C. § 924(e).” *Id.* (footnote omitted); *see also United States v. Lopez*, 536 F. Supp.2d 218, 221-222 (D. Conn. 2008) (holding, *inter alia*, that it is necessary to use modified categorical approach to analyze whether convictions under Conn. Gen. Stat. § 21a-277(a) qualify as serious drug offenses under § 924(e) because the Connecticut statute prohibits the sale of two substances, benzylfentanyl and thenylfentanyl, not prohibited by the federal statutes); *United States v. Cohens*, No. 3:07cr195(EBB), 2008 WL 3824758, at \*4-\*5 (D. Conn. Aug. 13, 2008) (same).

#### **F. 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)<sup>4</sup> 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).

---

<sup>4</sup> Although *Savage* involved a conviction under Conn. Gen. Stat. § 21a-277(b), whereas *Madera*, *Cohens* and *Lopez* involved convictions under to Conn. Gen. Stat. § 21a-277(a), the two provisions are substantively identical insofar as both incorporate the same definition of “sale.” *See Savage*, 542 F.3d at 965 (quoting definition of “sale,” under Conn. Gen. Stat. § 21a-240(50), as “any form of delivery[,] which includes barter, exchange or gift, or *offer therefor*.”) (emphasis in original; internal quotation marks 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. *See 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*, 544 U.S. at 26 (relying on *Taylor v. United States*, 495 U.S. 575, 602 (1990)); *see Savage*, 542 F.3d at 966.

**G. Application of *Madera* and *Savage* to 21 U.S.C. § 851 enhancement**

It was not immediately apparent in the aftermath of the district court decisions in *Madera*, *Lopez* and *Cohens*, and this Court’s decision in *Savage* that any of the legal principles discussed therein had any application to the use of prior felony drug offenses to enhance a sentence under 21 U.S.C. § 841(b). The decisions in *Ma-*

*dera*, *Lopez* and *Cohens* dealt with the question of whether a prior conviction counted as a “serious drug offense” under 18 U.S.C. § 924(e), and the decision in *Savage* dealt with the question of whether a prior conviction counted as a “controlled substance offense” under U.S.S.G. § 4B1.1. None of these cases addressed the long-accepted use of the categorical approach to determine whether a defendant has been convicted of a prior felony drug offense under § 841(b), a determination which, on its surface, appears to be far more simple because a qualifying offense under § 841(b) only has to involve a conviction that was a felony and that involved, at base, the simple possession of a drug. See 21 U.S.C. § 802(44).

In particular, the penalty provisions set forth in 21 U.S.C. § 841(b)(1) apply enhanced incarceration terms and fine amounts for defendants who commit the offense of conviction after having sustained a conviction for a “felony drug offense.” Under the applicable definitions section of the Controlled Substances Act (“CSA”), the term “felony drug offense” “means an offense that is punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances.” 21 U.S.C. § 802(44). Each category of substance included

in the definition is itself a defined category of substance under the CSA. For example, the term “narcotic drug” is defined as follows:

The term ‘narcotic drug’ means any of the following whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:

(A) Opium, opiates, derivatives of opium and opiates, including their isomers, esters, ethers, salts, and salts of isomers, esters, and ethers, whenever the existence of such isomers, esters, ethers, and salts is possible within the specific chemical designation . . . .

(B) Poppy straw and concentrate of poppy straw.

(C) Coca leaves . . . .

(D) Cocaine . . . .

(E) Ecgonine . . .

(F) Any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subparagraphs (A) through (E).

21 U.S.C. § 802(17); see also 21 U.S.C. §§ 802(16) (defining marijuana), 802(41) (defining anabolic steroid), 802(9) (defining depressant or stimu-

lant substance). These categories of substance are controlled in various places within the federal Schedules of Controlled Substances. *See, e.g.*, 21 C.F.R. § 1308.12 (listing as Schedule II controlled substances “opium” and “opiate,” substances specifically identified in the definition of “narcotic drug” in the CSA).

Conn. Gen. Stat. § 21a-277(a) makes it a felony offense to engage in conduct with respect to two categories of substances on Connecticut’s Controlled Substances Schedules: “hallucinogenic substance[s] other than marijuana” and “narcotic substance[s].” *Id.* The primary question with respect to the categorical analysis of this statute is whether these two categories, at the time of a defendant’s conviction, included substances not covered by the categories of federally controlled substances enumerated in the definition of felony drug offense at 21 U.S.C. § 802(44). *See United States v. Jackson*, 301 F.3d 59, 61 (2d Cir. 2002) (stating that courts start with a “categorical approach” in determining whether a prior conviction qualifies as a predicate offense, looking only to the “fact of conviction” and “the statutory definition of the prior offense rather than to the underlying facts of a particular offense.”).

The answer, in short, is that, as the district court first recognized in *Madera*, since November 1986, Conn. Gen. Stat. § 21a-277(a) has been over-inclusive in relation to 21 U.S.C. § 802(44). This is so because in May 1986, in an effort to

conform its controlled substance schedules to federal law, the State of Connecticut listed on its Controlled Substance Schedule I two obscure chemicals, thenylfentanyl and benzylfentanyl, which it categorized as “narcotic substances,” but these substances have not been controlled as narcotics under federal law since November 29, 1986, when DEA’s temporary, emergency scheduling of them expired as a matter of law.

In 1985, the DEA added those two chemicals (and others) on a temporary, emergency basis to the federal Schedule of Controlled Substances – and those additions were published in the Federal Register. *See* 50 Fed. Reg. 43698 (Oct. 29, 1985). In May 1986, the Connecticut legislature added all of the newly scheduled chemicals to its own list, to ensure that state and federal law tracked each other. *See* Conn. Public Acts 1986, No. 96, § 1 (amending Connecticut’s Controlled Substances Schedules, then codified at Conn. Gen. Stat. § 21a-242(a)). Based on later federal testing, however, it was determined that thenylfentanyl and benzylfentanyl were not pharmacologically active, and so on November 29, 1986, their emergency listing was allowed to expire. *See* 51 Fed. Reg. 43025 (Nov. 28, 1986); 21 U.S.C. §§ 811(a)(1) and 811(h). That expiration was not flagged in the Federal Register or the Code of Federal Regulations, and so Connecticut never removed those two chemicals from their own listings. Indeed, those substances remain

listed in part (g) of the federal Schedule I with no notation about the date of their expiration. *See* 21 C.F.R. § 1308.11(g). Consequently, despite a pronounced overall trend in Connecticut's regulation of controlled substances toward conformance with federal scheduling, and notwithstanding that these obscure substances have in all likelihood never served as the basis of a single prosecution or conviction, categorical reliance on a conviction under Conn. Gen. Stat. § 21a-277(a) would be precluded because of the abstract theoretical possibility that a defendant might have been convicted of conduct relating to thenylfentanyl and benzylfentanyl. When the state statute criminalizes both conduct included in the relevant federal statute and conduct not covered by the federal statute, courts use the modified categorical approach to examine sources beyond the mere fact of a conviction. *See Taylor*, 495 U.S. at 602.

On June 29, 2009, the government submitted a brief in connection with the sentencing in *United States v. Jackson*, 3:06cr151(MRK), acknowledging for the first time that, during the relevant period, Conn. Gen. Stat. § 21a-277(a) criminalized conduct involving narcotic substances (benzylfentanyl and thenylfentanyl) not covered by the federal definition of a "felony drug offense" used in 21 U.S.C. §§ 802(44) and 841(b)(1). *See* Sentencing Memorandum of United States at 7-15, *United States v. Jackson*,

3:06CR151(MRK) (D. Conn. June 29, 2009). As a result, in analyzing whether a prior conviction under § 21a-277(a) qualifies as a “felony drug offense” since the government’s concession in *Jackson*, it is necessary to use the modified categorical approach discussed in *Taylor*, *Shepard* and *Savage*.

#### **H. Section 2255 petition**

On December 2, 2009, the petitioner filed a § 2255 motion challenging his sentence. A64. In his initial motion, he raised several claims: (1) the trial court erred in denying his motion to suppress evidence; (2) the trial court erred in denying the motion for judgment of acquittal; (3) the trial court erred in its supplemental instructions to the jury which were given after the jury indicated its inability to reach a verdict as to a portion of the charges; (4) defense counsel was ineffective for failing to object to this supplemental instruction; (5) defense counsel was ineffective for failing to use the petitioner’s prior medical records in support of a defense that the crack cocaine possessed on December 20, 2005 was for personal use; (6) defense counsel was ineffective for failing to withdraw as counsel after the petitioner complained of an “irreconcilable conflict”; (7) defense counsel was ineffective for preventing the petitioner from testifying on his own behalf; (8) defense counsel was ineffective for failing to subpoena the government’s confidential informant to testify at trial and failing to subpoena

the petitioner's sister-in-law to testify at a post-verdict hearing; (9) defense counsel was ineffective for failing to investigate the petitioner's alibi defense; and (10) the petitioner's *Miranda* rights were violated when he was arrested on November 10, 2004. JA110. On that same date, the petitioner filed a motion to appoint counsel in connection with his § 2255 motion. JA64. The district court granted the motion to appoint counsel. JA64.

On January 21, 2010, the petitioner submitted a Motion to Amend his § 2255 petition. A65. In the amended petition, the petitioner abandoned the claims in his initial motion and replaced them with the following claims: (1) defense counsel was ineffective for failing to investigate or hire an investigator to review the petitioner's pretrial probation and medical records to support a potential defense that the crack cocaine seized from him and his apartment on December 20, 2005 was possessed for personal use; (2) defense counsel was ineffective for depriving the petitioner of his right to testify; (3) defense counsel was ineffective for failing to subpoena the government's confidential informant to testify at trial and failing to subpoena the petitioner's sister-in-law and the mother of a government witness to testify at a post-verdict hearing regarding the alleged violation of a sequestration order; (4) defense counsel was ineffective for failing to investigate the petitioner's alibi defense;

and (5) the district court's sentence as to the § 924(c) conviction was unlawful under this Court's decisions in *Williams*, 558 F.3d 166, and *Whitley*, 529 F.3d 150. JA110-JA111.

On February 11, 2010, the district court appointed CJA counsel to represent the petitioner in this proceeding. JA65. On February 12, 2010, the court directed newly appointed counsel to file any supplemental brief on or before March 15, 2010. JA65. On March 15, 2010, petitioner's counsel filed a memorandum in support of the § 2255 motion. JA65. In that memorandum, counsel argued only two of the issues raised in the amended § 2255 petition: (1) that defense counsel was ineffective for failing to subpoena the petitioner's sister-in-law to testify at a post-verdict hearing regarding the alleged violation of a sequestration order; and (2) that the court's sentence as to the § 924(c) conviction was unlawful under *Williams* and *Whitley*. JA111.

On May 19, 2010, the district court issued a fourteen-page Ruling and Order which denied the amended § 2255 as to all of the claims raised therein except for the claim that the court's sentence as to the § 924(c) was unlawful. JA69-JA82. As to that challenge, the court indicated that it would consider it after the Supreme Court resolved the continuing viability of those two decisions in the then-pending cases of *United States v. Abbott*, 574 F.3d 203 (3d Cir. 2009), *cert. granted*, 130 S. Ct. 1284 (Jan. 25, 2010),

and *United States v. Gould*, 529 F.3d 274 (5th Cir. 2008), *cert. granted*, 130 S. Ct. 1284 (Jan. 25, 2010). JA70. The court stated that it would “await a decision from the Supreme Court in *Gould* and *Abbott*, after which [the petitioner] may renew his § 2255 petition regarding his sentence.” JA70. In *Abbott* and *Gould*, the Supreme Court overruled this Court’s decisions in *Williams* and *Whitley* and, therefore, the petitioner never renewed his § 2255 motion as to the § 924(c) sentencing issue. JA111-JA112.

On October 26, 2010, the petitioner filed a motion to amend his § 2255 motion to challenge his sentence based on claims that the second offender notices were defective and that his trial counsel was ineffective for failing to challenge the notices. JA83-JA84. He argued that these new claims related back to the claims in his original petition. JA83. On February 16, 2011, the district court granted the petitioner’s motion to amend. JA66. On March 17, 2011, the petitioner filed the amended § 2255 motion which raised these two additional arguments. JA85-JA93. First, he maintained that his sentence was “erroneously based upon an 851 enhancement” which increased the mandatory minimum penalty from five years to ten years. JA90. Second, he claimed that his trial attorney was ineffective for failing to challenge or object to the § 851 enhancement. JA90. In making these arguments, the petitioner, relying on a transcript of the

guilty plea for the Connecticut sale of narcotics offense listed in the second offender notices, pointed out that he had pleaded guilty to the offense under the *Alford* doctrine<sup>5</sup> and, therefore, had not admitted to the facts underlying the conviction. JA99-JA101. As a result, despite the fact that the state offense involved the petitioner's possession with intent to distribute 26 bags of cocaine, it could not serve as the basis for a § 851 enhancement because the petitioner never admitted to his criminal conduct. JA100-JA101.

On May 17, 2011, the government submitted its response to the amended § 2255 motion. JA107. It conceded that, “had the procedural history in this case been different and had the petitioner been facing sentencing now in the underlying criminal case, the government would not be able to rely on the plea transcript to establish that the petitioner’s 1996 sale of narcotics conviction qualified as a prior felony drug [offense]” because “the petitioner pleaded guilty pursuant to the *Alford* doctrine” and “was not asked whether he agreed with the prosecutor’s recitation of the factual basis.” JA123. As to the direct challenge to the sentence, however, the government argued that the petitioner’s claim should be denied for procedural default because he had not raised it below, had not shown cause for the default, and had failed to establish prejudice stemming from the alleged error. JA123.

---

<sup>5</sup> *North Carolina v. Alford*, 400 U.S. 25 (1970).

As to the ineffective assistance claim, the government argued first and foremost that the petitioner's counsel was "not required to forecast changes or advances in the law" in order to provide effective assistance. JA128 (citing *United States v. Sellan*, 261 F.3d 303, 315 (2d Cir. 2001)). As the government asserted,

*Savage* was not decided until approximately eighteen months after sentencing, in September 2008. Moreover, *Savage*'s applicability to the 851 context, which involves decidedly different issues than the career offender and armed career criminal contexts, was not determined until approximately June 29, 2009, when the Government conceded its applicability by withdrawing a second offender notice before this Court in *United States v. Jackson*, 3:06cr151(MRK), recognizing for the first time that the modified categorical approach applied to the consideration of whether a conviction under Conn. Gen. Stat. § 21a-277(a) qualified as a prior drug felony offense under 21 U.S.C. § 851.

JA128.

In addition, the government claimed that any deficiency in counsel's performance did not prejudice the petitioner. On this issue, the government pointed out that the court "imposed a non-

guideline sentence that was significantly below the guideline range of 211-248 months and slightly above the 180 month mandatory minimum term.” JA131. The government noted, “In imposing its sentence, the Court did not appear to be troubled by the application of the mandatory minimum terms governing the crack cocaine convictions and the § 924(c) conviction.” JA131. “Instead, the Court focused on whether to enhance the penalty as a result of the petitioner’s commission of the offense while on federal pre-trial release and, in the end, concluded that an enhancement greater than one month was not necessary because the Government’s filing of the second offender notice was largely motivated by the fact that the petitioner had committed crimes while on release.” JA131. As the government argued, “According to the written judgment in this case, the 181-month sentence reflected the Court’s view of the proper balancing of the factors set forth in 18 U.S.C. § 3553(a). If that is the case, then there is not a ‘substantial . . . likelihood of a different result,’ . . . had the petitioner’s counsel decided to challenge the conviction underlying the second offender notices.” JA131 (citation omitted).

### **I. Ruling on the amended habeas petition**

On August 4, 2011, the district court issued a 20-page written memorandum of decision denying the newly amended § 2255 motion. JA146-

JA165. After reviewing the extensive procedural history of the case, JA146-JA150, the court addressed first the petitioner's direct challenge to his sentence. It accepted the parties' collective position that, if the petitioner were sentenced anew, he would not be treated as a second offender because the government could not establish that his 1996 sale of narcotics conviction qualified as a felony drug offense under the modified categorical approach. JA154-JA155. It also accepted the parties' view that the petitioner had failed to challenge the second offender notice below and, therefore, had to show cause for the default and prejudice stemming from the error. JA155.

The court concluded that the petitioner had failed to establish cause because, although *Savage* was not decided until 2008, "the legal basis" for the challenge to the second offender notice existed well before then and certainly existed at the time of the sentencing in this case. JA156. As the court explained, the discrepancy between the state and federal narcotics statute, as well as the standard for application of the modified categorical approach, existed long before the petitioner's sentencing. JA156. As a result, the petitioner had failed to establish that the basis for his challenge was not "reasonably available" to him during the pendency of his case. JA156-JA158 (noting that the Supreme Court's decision in *Shepard* was available two years prior to the

petitioner's sentencing and its decision in *Taylor* was available seventeen years prior to his sentencing). Indeed, the court cited to *Madera* and a 2003 immigration decision by this Court as examples of instances in which a defendant had raised similar challenges based on the discrepancy between the Connecticut and federal narcotics laws. JA158.

The court also concluded that the petitioner had failed to establish prejudice. JA158. Applying the same standard that governs the analysis of ineffective assistance claims, the court concluded that the petitioner had failed to show prejudice because his 181-month sentence was 30 months below the applicable guideline range. JA160. The court explained:

[T]he Court decided to apply a non-Guidelines sentence with respect to the § 3147 enhancement because the Government represented that it only had decided to file a second offender notice because Mr. McCoy committed the offenses in the 3:06cr100 case while on release in the 3:04cr336 case and that it believed that a further increase in Mr. McCoy's sentence was not necessary. Had the second offender enhancement not applied, it is likely that the Government would have argued for a more significant § 3147 enhancement. Moreover, as the Court noted during the sentencing, had

Mr. McCoy faced a lower statutory minimum, the Court would have imposed a much greater enhancement for Mr. McCoy's commission of offenses while on release. Mr. McCoy thus cannot demonstrate a reasonable probability that, but for the erroneous application of the second offender enhancement, he would have received a lesser sentence.

JA160-JA161.

Next, the court found that the ineffective assistance of counsel claim failed because the petitioner had not satisfied either the performance or the prejudice prong of *Strickland*. JA161. As to the performance prong, the court found that, under "prevailing professional norms" at the time of the petitioner's sentencing, defense counsel had accepted without question that a felony conviction in Connecticut for sale of narcotics qualified as a prior felony drug offense under 21 U.S.C. § 841(b). JA161. The court held:

Although, as the Court has already noted, the legal basis for Mr. McCoy's sentencing claim existed at the time he was sentenced, it is also true, as the Government observes, that until the Second Circuit's decision in *Savage* and the sentencing before this Court in *Jackson*, defense counsel in this district had proceeded with the long-held belief that prior Connecticut convictions for sale of

narcotics qualified categorically as controlled substance offenses under U.S.S.G. § 4B1.1 and felony drug offenses under 21 U.S.C. § 841(b)(1).

JA161 (internal quotation marks omitted). The court noted that *Madera*, the first district court decision to recognize the difference between the Connecticut and federal narcotics statutes, issued three weeks after the petitioner's sentencing and that the government did not concede *Madera's* application to the second offender context until June 2009. JA162. "Evaluated from counsel's perspective at the time, . . . the decision . . . not to object to the § 851 second offender enhancement was not unreasonable." JA162 (internal quotation marks omitted). Finally, the court noted that the petitioner's counsel was particularly effective in arguing successfully for an incarceration term that was thirty months below the guideline range. JA162.

As to *Strickland's* second prong, the court reiterated its procedural default ruling and found that counsel's failure to challenge the second offender notice did not prejudice the petitioner because a successful challenge would not have impacted the ultimate sentence. JA163. The court explained that it had viewed the § 851 enhancement, along with the consecutive one-month sentence, as an appropriate penalty for the petitioner's commission of offenses while on pretrial release. JA163. The court found that the petition-

er had failed to demonstrate a “reasonable probability” that, “but for counsel’s failure to object to the § 851 enhancement,” he would have received a shorter sentence. JA163.

At the conclusion of its decision, the court addressed the issue of whether a certificate of appealability should be granted based on the “substantial showing of the denial of a constitutional right.” JA164. The court decided to grant a certificate of appealability only as to the ineffective assistance claim, and not as to the procedural default issue. It explained:

In this case, the Court is confident that the performance of Mr. McCoy’s trial counsel was not constitutionally deficient and that Mr. McCoy was not prejudiced by his counsel’s alleged error. However, the Court also believes that reasonable jurists could debate the Court’s assessment of Mr. McCoy’s ineffective assistance of counsel claim. . . . Therefore, the Court grants a COA with regard to Mr. McCoy’s ineffective assistance of counsel claim, which is the only constitutional claim included in his amended petition.

JA164.

On August 25, 2011, the petitioner filed with the district court a motion to expand the certificate of appealability to include the issue of whether his challenge to the second offender no-

tice was procedurally defaulted under the cause and prejudice standard. JA169. On September 15, 2011, the district court denied that motion. JA68. It explained:

The Court gave careful thought to the Certificate of Appealability (“COA”) that it issued in its Ruling and Order of August 4, 2011. Having considered the arguments for an expanded COA made in Petitioner Tranel McCoy’s Motion of August 25, 2011, the Court maintains its earlier opinion that Mr. McCoy’s ineffective assistance of counsel claim is the only constitutional claim he has raised that reasonable jurists might find debatable. . . . For that reason, Mr. McCoy’s Motion for Issuance of a Certificate of Appealability is DENIED. Mr. McCoy may request an expanded COA from the Second Circuit.

JA68 (internal citation omitted).

On September 23, 2011, the petitioner filed a similar motion to expand the certificate of appealability with this Court, and, on February 17, 2012, this Court denied that motion. JA184-JA187, JA213.

### **Summary of Argument**

The petitioner’s trial counsel was not constitutionally ineffective for failing to challenge the

second offender notice in this case; the district court properly concluded that the petitioner failed to satisfy both the performance and the prejudice prongs of *Strickland*.

The Supreme Court and this Court have reiterated that counsel's performance must be analyzed in light of the prevailing professional norms at the time. Although subsequent changes in the law may create new grounds for relief for a petitioner, an attorney cannot be expected to predict or anticipate those changes, especially when no other attorneys at the time are making similar claims. Here, at the time of the petitioner's trial in 2006 and his sentencing in 2007, it was well-accepted that a felony conviction in Connecticut for narcotics sale or possession categorically qualified as a prior felony drug offense under 21 U.S.C. § 841(b). Indeed, even the nuanced differences between the Connecticut and federal narcotics statutes' definition of "sale" first recognized by this Court in *Savage* in 2008 did not, at that time, undermine this conclusion because, unlike in the career offender context, a second offender qualifier need not involve the element of distribution. It was not until June 2009, over three years after the government filed the second offender notices in this case, that it first recognized the need to apply the modified categorical approach to the question of whether any Connecticut narcotics conviction qualified as a prior felony drug offense. Certainly, if it took

the government, the defense bar and the district court over two years after the district court's decision in *Madera* and almost a year after this Court's decision in *Savage* to apply the modified categorical approach in the second offender context, the petitioner's attorney cannot be faulted for failing to anticipate this analysis.

Moreover, as the district court explained, even had the petitioner's counsel successfully challenged the second offender notice, it would not have impacted his overall sentence. The court imposed a 181-month non-guideline sentence, which was thirty months below the guideline range and one month above the mandatory minimum, because it determined that such a sentence reflected the § 3553(a) factors. For the petitioner to prevail in his habeas petition, he must establish that any deficiency in counsel's performance prejudiced him. Since he is unable to show that a successful challenge to the second offender notice would have resulted in a lower sentence, he cannot establish this second prong of *Strickland*.

## Argument

### **I. The petitioner has failed to establish under both prongs of *Strickland* that his trial counsel was constitutionally ineffective.**

The petitioner's § 2255 motion was properly dismissed both because his counsel did not render deficient performance by failing to challenge his second offender designation and because any deficiency did not impact the overall sentence.

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

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 v. Washington*, 466 U.S. 668, 693 (1984) (recognizing the “profound importance of finality in criminal proceedings”).

“[N]ot every asserted error of law can be raised on a § 2255 motion.” *Napoli v. United States*, 32 F.3d 31, 35 (2d Cir. 1994), *amended on reh’g on other grounds*, 45 F.3d 680 (2d Cir. 1995) (internal quotation marks omitted). “The grounds provided in section 2255 for collateral attack on a final judgment in a federal criminal case are narrowly limited, and it has long been settled law that an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment.” *Id.* (internal quotation marks omitted). “[R]elief is available under § 2255 only for a constitutional error, a lack of jurisdiction in the sentencing court, or an error of law that constitutes a fundamental defect which inherently results in a complete miscarriage of justice.” *Id.* (internal quotation marks omitted). “Constitutional errors will not be corrected through a writ of habeas corpus unless they have had a ‘substantial and injurious effect,’ that is, unless they have resulted in ‘actual prejudice.’” *Id.* (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 623, 637-38 (1993)).

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 *Strickland*, 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.” *Id.*, 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).

The second element of the *Strickland* test requires a defendant to show that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different . . . .” *Strickland*, 466 U.S. at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Cullen*, 131 S. Ct. at 1403 (internal

quotation marks omitted). “That requires a substantial, not just conceivable, likelihood of a different result.” *Id.* (internal quotation marks omitted).

“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 properly dismissed because he did not satisfy either prong of *Strickland*. As set forth below, his trial counsel’s failure to challenge the second offender notice did not constitute deficient performance, and, to the extent that it did, any deficiency did not prejudice the petitioner.

### **1. The petitioner’s trial counsel did not render deficient performance.**

At this juncture, there is no dispute that, because the petitioner pleaded guilty to his prior

Connecticut sale of narcotics conviction under the *Alford* doctrine and did not admit to the factual basis underlying the guilty plea, this conviction cannot serve as the basis for the petitioner's designation as a second offender. The petitioner relies on this fact alone to argue that his trial counsel was ineffective for failing to challenge the notice. The analysis requires more, however. Counsel's decision must be evaluated through the lens of the relevant time period. "[A]n attorney is not required to forecast changes or advances in the law" in order to provide effective assistance. *See Sellan*, 261 F.3d at 315.

*Madera* was not decided until March 2007, and *Savage* was not decided until September 2008. Moreover, application of the modified categorical approach to the § 851 context, which involves decidedly different issues than the armed career criminal and career offender contexts in *Madera* and *Savage*, was not determined until approximately June 29, 2009, when the government conceded its applicability by withdrawing a second offender notice before the district court in *United States v. Jackson*, 3:06cr151(MRK). In *Jackson*, the government recognized for the first time that the modified categorical approach was necessary to determine whether a conviction under Conn. Gen. Stat. § 21a-277(a) qualified as a prior drug felony offense under 21 U.S.C. §§ 841(b) and 851.

Prior to *Jackson*, *Madera* and *Savage*, “it had always been the case in Connecticut that convictions for violating Conn. Gen. Stat. § 21a-277(a), whether derived from *Alford* pleas or not, counted as . . . predicates. No one even challenged that universally accepted belief.” Memorandum of Petitioner at 13, *Tellado v. United States*, No. 3:09CV1572(MRK) (D. Conn. Oct. 12, 2010); *see also* Memorandum of Petitioner at 11-12, *Tellado v. United States*, No. 3:09CV1572(MRK) (D. Conn. Nov. 8, 2010) (“In the seventeen years that the sentencing guidelines had been applied in this District, no lawyer had discovered that the state and federal provisions were not coterminous. . . . This lack of recognition was not the result of poor lawyering on the part of the bar. Instead, the failure of anyone to recognize and raise the differences between the state and federal provisions was due to the byzantine drafting of the state statutory scheme.”). Until the district court’s decisions in *Madera*, *Lopez* and *Cohens*, this Court’s decision in *Savage* and the government’s concession in *Jackson*, defense counsel in Connecticut had proceeded with the long-held belief that prior Connecticut convictions for sale of narcotics qualified categorically as serious drug offenses under 18 U.S.C. § 924(e), controlled substance offenses under U.S.S.G. § 4B1.1, and felony drug offenses under 21 U.S.C. § 841(b)(1).

The Supreme Court recently expressed its dissatisfaction with lower court decisions that have misapplied the *Strickland* standard on ineffective assistance. See *Richter*, 131 S. Ct. at 788; *Cullen*, 131 S. Ct. at 1406. According to the Court, “[t]he question is whether an attorney’s representation amounted to incompetence under prevailing professional norms, not whether it deviated from best practices or most common custom.” *Richter*, 131 S. Ct. at 788. Here, it appears to be absolutely uncontested that the “prevailing professional norms” at the time of the sentencing in this case did not contemplate use of the modified categorical approach for deciding whether a Connecticut sale of narcotics conviction qualified as a felony drug offense under 21 U.S.C. § 841(b). Thus, using “[t]he proper measure of attorney performance,” namely, “reasonableness under prevailing professional norms,” as examined from “counsel’s perspective at the time,” *Strickland*, 466 U.S. at 688-89, the performance of the petitioner’s counsel cannot be considered constitutionally ineffective. See also *Padilla*, 130 S. Ct. at 1482 (attorney performance inquiry is “linked to the practice and expectations of the legal community”); *Parisi*, 529 F.3d at 141 (“To counteract this inclination to evaluate counsel’s performance against insight gained only through the passage of time, *Strickland* requires that [w]hen assessing whether or not counsel’s performance fell below an objective standard of reasonableness . . . under prevailing

professional norms, we must consider the circumstances counsel faced at the time of the relevant conduct and . . . evaluate the conduct from counsel’s point of view.”) (internal quotation marks and citations omitted).

The petitioner relies on the district court’s decision in *Carter v. United States*, 731 F. Supp.2d 262, 268 (D. Conn. 2010), which granted a habeas petition for ineffective assistance where the trial attorney failed to challenge a defendant’s status as an armed career criminal under 18 U.S.C. § 924(e). That decision is not persuasive because the district court there gave no consideration to the case law holding that counsel need not forecast changes or advances in the law in order to provide effective assistance, *see, e.g., Sellan*, 261 F.3d at 315, or to the fact that the arguments leading to the *Savage* decision had not even been raised until significantly later. Indeed, the court in *Carter* did what the Supreme Court has since warned against; it focused on the question of whether Carter’s counsel should have challenged his armed career criminal status, rather than on whether his failure to do so constituted “incompetence under prevailing professional norms.” *Richter*, 131 S. Ct. at 788.

This case actually presents a legal landscape that was even harder to foresee than the one in *Carter* because it involves applying the modified categorical approach to the determination of

whether a Connecticut narcotics felony is a “prior felony drug offense” under 21 U.S.C. § 841(b). Before the government’s concession in *Jackson* in June 2009 (ten months after *Savage* and almost twenty-eight months after *Madera*), it had always been accepted that any felony narcotics conviction in Connecticut qualified categorically as a prior felony drug offense, and no one contemplated that the highly technical differences in the federal and state controlled substance schedules could lead to a different result.<sup>6</sup>

The petitioner also argues that the district court here placed him in a “Catch 22 situation” by finding that his claim was not so novel as to overcome the “cause” portion of the procedural

---

<sup>6</sup> Moreover, the district court’s decision in *Carter* stands in stark contrast to three other district court decisions (including the one in this case) which have either explicitly held that the failure to anticipate *Savage* does not constitute deficient performance, or implicitly suggested that conclusion. *Compare Carter*, 731 F. Supp.2d at 43-44 to *McCoy v. United States*, 3:09cv1960(MRK), slip op. at 15-16 (D. Conn. Aug. 4, 2011); *Tellado v. United States*, 3:09cv1572(MRK), slip. op. at 44-45 (D. Conn. July 13, 2011); *Harrington v. United States*, 3:08cv1864(SRU), slip op. at 12 n. 3 (D. Conn. May 10, 2011) (noting that defense counsel should not be faulted for failing to raise a claim that was based on case law that developed after the petitioner’s sentencing).

default standard, and yet concluding that counsel was not deficient because the argument was new and novel at the time of the sentencing in this case. *See* Def.'s Br. at 17-18. But this argument mischaracterizes the district court's decision. As the court explained, the reason that the petitioner failed to establish cause for failing to raise the challenge below is because the argument underlying *Savage* and *Jackson* was "reasonably available" to him and nothing external (such as unfavorable Supreme Court or Second Circuit precedent) stood in the petitioner's way or prevented him from making it. JA156-JA157. At the same time, however, given the prevailing professional norms at the time and the defense bar's long held position that Connecticut narcotics felony convictions categorically qualified under § 851, it was not *unreasonable* for trial counsel in this case to fail to challenge the second offender designation. JA162-JA163 (quoting *Richter* and noting the difference between "incompetence under 'prevailing professional norms'" and a deviation from "best practices").

"The failure to anticipate a change in the law will not generally constitute ineffective assistance of counsel . . . ." *Brunson v. Higgins*, 708 F.2d 1353, 1356 (8th Cir. 1983). Where a defense was not viable at the time a case was tried, defense counsel cannot be viewed as incompetent for failing to raise it. *See id.* at 1357. "Regard-

less of whether other attorneys may have been filing challenges [of the sort omitted by defendant's attorney], and regardless of the information available to [defendant's] attorney on the [issue that was omitted], we must conclude that he cannot be found to have fallen below the standard of customary skill and diligence for failure to present what was at the time a speculative, rather than an established, defense." *Id.* at 1358. Defense counsel here cannot be faulted for failing to raise a challenge that no other attorney was raising at the time, that was not recognized as a legitimate basis for objection until over two years later and that was and continues to be a highly technical objection based on the arcane differences between the state and federal narcotics statutes and the short-form charging documents typically used in Connecticut state courts. *See Honeycutt v. Mahoney*, 698 F.2d 213, 216-17 (4th Cir. 1983) (holding that failure to anticipate change in law "foreshadowed by" Supreme Court and federal appellate court precedent not ineffective assistance).

Just as defense counsel have not been considered ineffective for failing to anticipate *Blakely* and *Booker* despite the prior ruling in *Apprendi*, trial counsel in this case was not ineffective for failing to anticipate use of the modified categorical approach to the question of whether a Connecticut sale of narcotics conviction qualifies as a prior felony drug offense under 21 U.S.C.

§ 841(b) despite the prior decisions in *Shepard* and *Taylor*. See *Fields*, 565 F.3d at 296 (“The overwhelming majority of circuits . . . have suggested that defense counsel’s failure to anticipate . . . the rulings in *Blakely* and *Booker* does not render counsel constitutionally ineffective”). In conducting an ineffectiveness inquiry, a reviewing court should “not view the challenged conduct through the ‘distorting’ lens of hindsight but ‘from counsel’s perspective at the time.’” *United States v. Gaskin*, 364 F.3d 438, 469 (2d Cir. 2004) (quoting *Strickland*, 466 U.S. at 689)).

**2. Any deficiency in counsel’s performance did not prejudice the petitioner.**

Even if the Court disagrees with the government and the district court and concludes that trial counsel’s performance in not challenging the second offender notices was deficient, a finding does not automatically follow that this deficiency was prejudicial. To the contrary, as the district court explained in its ruling denying the habeas petition, a successful challenge to the second offender notice would not have impacted the ultimate sentence in this case. The 181-month sentence reflected the district court’s view of the proper balancing of the § 3553(a) factors. As the court explained, its main consideration in imposing a sentence that was thirty months below the guideline range was the weight to give to

the petitioner's commission of several felony offenses while on pretrial release. In the end, it decided that the one-month consecutive sentence was sufficient for the § 3147 violation because the petitioner had already received an additional sixty months as a result of the filing of the second offender notice.

Any question about the effect of a successful challenge to the second offender notice was resolved by the district court's ruling. As the court explained, it imposed a non-guideline sentence that was significantly below the guideline range of 211-248 months and slightly above the 180 month mandatory minimum term. It was not troubled by the application of the mandatory minimum terms governing the crack cocaine convictions and the § 924(c) conviction. In focusing on the extent of the § 3147 enhancement, the court noted that, according to the government, it had filed the second offender notices largely because of the petitioner's commission of crimes while on release.

The petitioner's argument as to prejudice is necessarily limited as a result of the explicit statements by the district court that its ultimate sentence here was not impacted by the second offender notice. He does not disagree with this conclusion, but instead argues two basic points. First, he claims that any deficiency which increases a mandatory minimum must be prejudicial. Second, he argues that, post-sentencing,

the district court cannot truly know the impact of a successful challenge to the second offender notice so that re-sentencing is necessary to allow the court to consider all of counsel's arguments without being restrained by the 180-month mandatory minimum. *See* Def.'s Br. at 21-22.

Neither point has merit. First, there is no dispute that a deficiency which causes a mandatory minimum to increase can be, and often is, prejudicial. But the issue under *Strickland's* second prong remains the same; *i.e.*, whether the alleged deficiency impacted the ultimate sentence. Here, the guideline range and the ultimate sentence were both higher than the mandatory minimum sentence established by the second offender notices, so that the failure to challenge the notices did not impact the ultimate sentence. Moreover, although in some cases, the removal of a mandatory minimum after sentencing has the potential to influence a district court's sentencing decision, even where the original sentence was higher than the mandatory minimum, in this case, the district court explicitly stated both in its original written judgment and in its ruling on the habeas petition that a lower mandatory minimum incarceration term would not have lowered its sentence.

In the end, the petitioner cannot escape from the basic premise, set forth in the district court's ruling, that his 181-month incarceration term would not have changed had his attorney suc-

cessfully challenged the second offender notice. That sentence reflected the court's careful balancing of the § 3553(a) factors and specific view as to how to treat the petitioner's commission of serious felony offenses while on federal pretrial release.

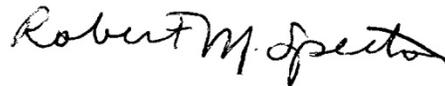
### **Conclusion**

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

Dated: July 5, 2012

Respectfully submitted,

DAVID B. FEIN  
UNITED STATES ATTORNEY  
DISTRICT OF CONNECTICUT



ROBERT M. SPECTOR  
ASSISTANT U.S. ATTORNEY

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

**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 12,579 words, exclusive of the Table of Contents, Table of Authorities, Addendum, and this Certification.

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**

**Effective: March 9, 2006 to April 14, 2009**

**21 U.S.C. § 802. Definitions**

\* \* \*

**(9)** The term “depressant or stimulant substance” means--

**(A)** a drug which contains any quantity of barbituric acid or any of the salts of barbituric acid; or

**(B)** a drug which contains any quantity of (i) amphetamine or any of its optical isomers; (ii) any salt of amphetamine or any salt of an optical isomer of amphetamine; or (iii) any substance which the Attorney General, after investigation, has found to be, and by regulation designated as, habit forming because of its stimulant effect on the central nervous system; or

**(C)** lysergic acid diethylamide; or

**(D)** any drug which contains any quantity of a substance which the Attorney General, after investigation, has found to have, and by regulation designated as having, a potential for abuse because of its depressant or stimulant effect on the central nervous system or its hallucinogenic effect.

\* \* \*

**(16)** The term “marihuana” means all parts of the plant *Cannabis sativa* L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin. Such term does not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination.

**(17)** The term “narcotic drug” means any of the following whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:

**(A)** Opium, opiates, derivatives of opium and opiates, including their isomers, esters, ethers, salts, and salts of isomers, esters, and ethers, whenever the existence of such isomers, esters, ethers, and salts is possible within the specific chemical designation. Such term does not include the isoquinoline alkaloids of opium.

**(B)** Poppy straw and concentrate of poppy straw.

**(C)** Coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed.

**(D)** Cocaine, its salts, optical and geometric isomers, and salts of isomers.

**(E)** Ecgonine, its derivatives, their salts, isomers, and salts of isomers.

**(F)** Any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subparagraphs (A) through (E).

\* \* \*

**(44)** The term “felony drug offense” means an offense that is punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances.

\* \* \*

**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 hallucinogenic 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.