No. 13-1677

IN THE

Supreme Court of the United States

JADEN DUKE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE AMES CIRCUIT

BRIEF FOR PETITIONER

The Franklin E. Kameny Memorial Team

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Oral Argument:

November 18, 2014, 7:30 p.m.
Ames Courtroom
Harvard Law School

QUESTIONS PRESENTED

1. Whether counsel renders ineffective assistance in violation of the Sixth Amendment by refusing, notwithstanding the defendant's express instructions, to file a notice of appeal when the defendant's plea agreement included an appeal waiver.

2. Whether a prisoner who was erroneously sentenced as a career offender may challenge his sentence under 28 U.S.C. § 2255 when the error is revealed by an intervening change of law.

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JURISDICTION

The judgment of the court of appeals was entered on April 30, 2014. The petition for a writ of certiorari was granted on September 15, 2014. This Court has jurisdiction under 28 U.S.C. § 1254(1) (2012).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Pertinent constitutional, statutory, and regulatory provisions are reproduced in an appendix to this brief.

STATEMENT OF THE CASE

1. For the past five years, all that Jaden Duke has wanted is a chance. A chance to stand before a judge and be accepted for what he is — a man who has made mistakes — and for what he is not — a career offender. A chance to ask a court to consider whether it is fair and just to anchor a two-decades long prison sentence to a guidelines range built upon a legal fallacy. A chance to try, however unlikely, to come home to his kids a little sooner.

But Duke's efforts so far have been for naught. Though he repeatedly told his counsel, Milton Fountain, that he wanted a direct appeal, Fountain refused to file the required notice. J.A. 29. And when Duke moved the district and circuit courts in Ames to "set aside or correct [his] sentence" under 28 U.S.C. § 2255 (2012), he found no relief. J.A. 9, 31. So, for now, Duke sits in year six of a sentence more than twenty-one years long, punished for being something that all parties agree he is not. J.A. 4.

2. Duke is no doubt a flawed man. Orphaned at the age of eight, he has tried to be for his children — Aubrey, now eight, and Damien, now ten — the father he never knew. J.A. 16, 18. But he has been derailed by his own fallibility, and now, by three brushes with the law. In 1999, that meant a charge for marijuana possession. J.A. 3, 15. In 2004, it was possession with intent to sell cocaine, for which Duke served ten months' imprisonment and two years' probation. *Id.*

And most recently, in February 2009, Duke was charged with possession with intent to distribute cocaine base, in violation of 21 U.S.C. § 841(a)(1) (2006). J.A. 10. Duke accepted responsibility for his actions and pleaded guilty by agreement with the government, which moved to dismiss a second count for firearm possession. J.A. 11. To this point, Duke's story was unremarkable: Like 97% of federal convictions, his came from a guilty plea. *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012). And like two-thirds of plea agreements, Duke's included a clause stating that he waived most of his rights to direct appeal. J.A. 12; *see also* Nancy J. King & Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 Duke L.J. 209, 231 (2005).

3. At Duke's sentencing, however, things began to change. The district court branded Duke a "career offender," believing that he had twice before been convicted of a felony drug offense "punishable by imprisonment for a term exceeding one year." J.A. 3; U.S. Sentencing Guidelines Manual § 4B1.2(b) (2008). This despite the fact that Duke's 1999 marijuana conviction "was only eligible for up to 8 months' community punishment [and] no imprisonment." J.A. 15. Under then-settled circuit law, all that mattered was that "the maximum aggravated sentence that could be imposed for a defendant with the worst possible criminal history" crossed the one-year mark. J.A. 4 (citing *United States v. Rice*, -- F.3d -- (Ames Cir. 2006)).

The application of the career-offender enhancement dramatically increased Duke's punishment. Absent the enhancement, Duke would have

had a criminal history category of IV and a baseline offense level of 34. J.A. 16. Taking into account a three-level reduction for acceptance of responsibility, Duke would have faced a guidelines range of 12 years, 7 months to 15 years, 8 months. *Id.*

Section 4B1.1, however, drove Duke's criminal history category to VI and his offense level to 37. J.A. 15. As a result, Duke's baseline range was pegged at 30 years to life. *See* U.S.S.G. ch. 5, pt. A. Even with the reduction for acceptance of responsibility, he was confronted with a guidelines range spanning from 21 years, 10 months to 27 years, 3 months, several years above what it otherwise would have been. J.A. 15.

Though the sentencing judge was "troubled" by the fact that § 4B1.1 had "nearly doubled [Duke's] sentencing range," she felt obligated to defer to Congress's "determin[ation] that career offenders should receive harsh sentences." J.A. 19. She thus sentenced him to 21 years and 10 months in prison — a sentence commensurate with his "status as a career offender" — but told him "[t]hings would be different if you were not a career offender." *Id.*

4. Duke was devastated. As he explained to his counsel, there was no difference between the sentence he received and life in prison; his "kids [would] be grown up by the end either way." J.A. 22. Fountain "went over the language of the plea agreement" with Duke, though, and told him that "an appeal wasn't an option." J.A. 25. As Fountain explained, "filing an appeal would breach the plea agreement and so permit the government to withdraw

the concessions it had made." J.A. 5. But Duke was resolute: he "didn't care about the waiver," and he "wanted to appeal no matter what" because the risk of a longer sentence was worth the chance to see his kids grow up. J.A. 22.

In the belief that he was "trying to help [Duke]," Fountain disregarded his client's express instructions and flatly refused to file a notice of appeal. J.A. 26. As a result, the 14-day window for filing the notice came and went, and on November 14, 2009, Duke's sentence became final. J.A. 4.

5. The following year, it became clear that Duke never should have been punished as a career offender. In June 2010, the Supreme Court rejected a hypothetical-offender approach similar to that previously endorsed by the Ames Circuit in *Rice*. *See Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577, 2589 (2010). Shortly thereafter, the Ames Circuit relied on *Carachuri-Rosendo* in overruling *Rice*, holding that "courts must look at the actual defendant's conviction, and not at a hypothetical offender, to determine whether a prior conviction was punishable by more than one year in prison." J.A. 4 (citing *United States v. Sanchez*, -- F.3d -- (Ames Cir. 2010)).

In light of *Sanchez*, it is now undisputed that Duke's decade-old charge for marijuana possession should never have exposed him to the severely aggravated punishment afforded by the career-offender enhancement. *Id.*

6. On November 3, 2010, Duke filed a § 2255 petition in the U.S. District Court for the District of Ames. *Id.* Duke's petition asserted two claims. First, he alleged that Fountain's refusal to file a notice of appeal

deprived him of his Sixth Amendment right to the effective assistance of counsel. *Id.* Second, he challenged his sentence based on the erroneous application of the career-offender enhancement. *Id.* After an evidentiary hearing, the district court "found as [a] factual matter that Duke had unequivocally asked Fountain to appeal and Fountain had failed to do so." J.A. 6. Nevertheless, the court denied relief on both of Duke's claims because (1) his plea agreement contained an appeal waiver and (2) his sentence fell below the statutory maximum. J.A. 31. Because the "lower courts have divided on both issues," however, the district court granted a certificate of appealability. *Id.*

Duke timely appealed, and the Ames Circuit affirmed. J.A. 9. Addressing the ineffective-assistance question, the court declined to adopt the view of the majority of the circuits that — in light of *Roe v. Flores-Ortega*, 528 U.S. 470 (2000) — counsel who disregards a client's express instructions to file a notice of appeal is constitutionally ineffective, notwithstanding a valid appeal waiver. J.A. 6. Analyzing the claim under *Strickland v. Washington*, 466 U.S. 668 (1984), the Ames Circuit held that Fountain's refusal was not deficient performance and did not prejudice Duke. J.A. 7. Turning to Duke's second claim, the court noted that the career-offender error presented "a difficult and close question." J.A. 9. Nonetheless, the court held that the error was not cognizable. *Id.* Duke filed a petition for a writ of certiorari, and this Court granted the petition on September 15, 2014. J.A. 1.

SUMMARY OF THE ARGUMENT

1. The Sixth Amendment guaranteed more to Jaden Duke than the mere presence of an attorney; it guaranteed him the "effective assistance" of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). But even with counsel by his side, Duke retained "ultimate authority to make certain fundamental decisions regarding [his] case," including the decision whether to appeal. *Jones v. Barnes*, 463 U.S. 745, 751 (1983). Because it is "[t]he defendant, and not his lawyer" who will "bear the personal consequences" of this decision, *Faretta v. California*, 422 U.S. 806, 834 (1975), only he can properly weigh all the competing considerations — which include the presence of a valid appeal waiver. Once Duke had made and expressly relayed his ultimate choice to appeal, his attorney Milton Fountain was bound to effectuate that decision.

Strickland's two-prong test governs the question of whether "counsel was constitutionally ineffective for failing to file a notice of appeal" that his client expressly requested. *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000). Under the first prong, counsel performs deficiently if his "representation [falls] below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. Fountain's inaction in the face of Duke's explicit request for an appeal was unreasonable, as it contravened both Supreme Court precedent and prevailing professional norms.

This Court has articulated an unqualified duty to file an appeal when so directed. In *Flores-Ortega*, the Court discussed the role of an appeal waiver, but only with respect to whether an attorney has a duty to *consult* with the defendant about taking an appeal. *See* 528 U.S. at 480–81. With respect to the duty to *file*, the Court was clear: "Counsel performs in a professionally unreasonable manner only by failing to follow the defendant's express instructions with respect to an appeal." *Id.* at 478. The American Bar Association ("ABA") standards agree, allocating the decision whether to appeal solely to the defendant, with no exception for defendants who have signed an appeal waiver as part of their plea agreements. *See* ABA Standards for Criminal Justice, Criminal Appeals 21-2.2(b) (3d ed. 1999).

Moreover, counsel who believes his client's appeal would be fruitless has several professionally reasonable alternatives available to him. He may continue to consult with his client; he may present the case regardless of his reservations; or, as a last resort, he may request permission to withdraw and submit a brief encapsulating "anything in the record that might arguably support the appeal." *Anders v. California*, 386 U.S. 738, 744 (1967). He may not, however, do nothing. Because Fountain substituted his own decision for his client's carefully considered choice, his performance was deficient under *Strickland*.

The second prong of *Strickland* then asks whether counsel's "deficient performance prejudiced the defense." 466 U.S. at 687. In cases like Duke's,

where counsel's deficient performance has led to "forfeiture of [the] proceeding itself," prejudice must be presumed, for a court cannot evaluate the reliability of a proceeding that never took place. *Flores-Ortega*, 528 U.S. at 483; *see also United States v. Cronic*, 466 U.S. 648, 658–59 (1984). Thus, rather than inquiring into the merits of a defendant's undeveloped claims, courts simply ask whether "there is a reasonable probability that, but for counsel's deficient [performance], he would have timely appealed." *Flores-Ortega*, 528 U.S. at 484.

The logic underlying this prejudice presumption does not yield in the face of a waiver. For one, it is unreasonable to expect "indigent, perhaps *pro se*, defendant[s]" to present all of their potentially meritorious arguments without the aid of counsel below. *Id.* at 486. And, even in cases with a waiver, counsel's deficient performance has still deprived the defendant of his entire appeal. Requiring a court to conduct a counterfactual inquiry into the merits of that nonexistent proceeding would be problematic: an appeal waiver never extinguishes all of a defendant's appellate claims, *see Campusano v. United States*, 442 F.3d 770, 774 (2d Cir. 2006), and the government may always decline to raise the waiver as an affirmative defense, *see, e.g.*, *Nunez v. United States*, 546 F.3d 450, 452 (7th Cir. 2008). Thus a court confronted with a valid waiver still need only ask whether, "but for" counsel's deficient performance, the defendant would have appealed. Because Duke clearly expressed his desire to appeal, he was prejudiced under *Strickland*'s second prong.

By flatly refusing to file a notice of appeal, despite Duke's repeated requests, Fountain appropriated a crucial decision reserved solely to his client — thereby rendering ineffective assistance of counsel. Duke is now entitled to an out-of-time appeal; to let this usurpation stand would be "to imprison [Duke] in his privileges and call it the Constitution." *Adams v. United States ex rel. McCann*, 317 U.S. 269, 280 (1942).

2. Duke is not now, nor has he ever been, a career offender. J.A. 4. Yet the sentencing court erroneously affixed that label to him, depriving Duke of his liberty on the order of years of his life. This is precisely the kind of error that habeas review exists to correct. Duke should be afforded relief under 28 U.S.C. § 2255 (2012) now that an intervening change of law has demonstrated that he was erroneously sentenced as a career offender.

A nonconstitutional, nonjurisdictional error of law is cognizable on § 2255 review when it "results in a complete miscarriage of justice" and "present(s) exceptional circumstances where the need for the remedy afforded by the writ of *habeas corpus* is apparent." *Davis v. United States*, 417 U.S. 333, 346 (1974) (alteration in original) (citation omitted). This standard reflects the purpose of the writ: to correct grievous errors of law that result in the "wrongful deprivation" of liberty. *Sunal v. Large*, 332 U.S. 174, 189 (1947) (Rutledge, J., dissenting).

An error in the application of the career-offender enhancement subjects a defendant to the worst punishment the law permits, based on a status he

does not deserve. It incorrectly saddles him with "a legal presumption that . . . he belonged in a special category reserved for the violent and incorrigible," *Narvaez v. United States*, 674 F.3d 621, 629 (7th Cir. 2011), a "category of offender subject to particularly severe punishment," *Buford v. United States*, 532 U.S. 59, 60 (2001). All this on the basis of a predicate conviction that should never have qualified him for the enhancement.

This Court has held, with "no room for doubt," that punishing a defendant "for an act that the law does not make criminal" effects a complete miscarriage of justice. *Davis*, 417 U.S. at 346. So too when a defendant is kicked to the harshest corner of the Sentencing Table for an act that cannot be punished under the career-offender enhancement. *See* U.S. Sentencing Guidelines Manual § 4B1.1 (2008). Indeed, this Court has already suggested that "a defendant given a sentence enhanced [under § 4B1.1] for a prior conviction is entitled to a reduction if the earlier conviction is vacated." *Johnson v. United States*, 544 U.S. 295, 303 (2005). The outcome should be no different if the earlier conviction never qualified in the first place.

The consequences of this error are devastating. Defendants punished as career offenders have an average sentence three times longer than non-career offenders. *See Spencer v. United States*, 727 F.3d 1076, 1089 (11th Cir. 2013), *vacated pending reh'g en banc* (11th Cir. 2014). This fact should be of no surprise. The enhancement launches a defendant's guidelines range skyward,

and sentences follow suit. *See Peugh v. United States*, 133 S. Ct. 2072, 2084 (2013) (noting that the Guidelines are "the lodestone of sentencing").

The power of both the Guidelines and the career-offender enhancement were brought to bear at Duke's sentencing. The erroneous application of § 4B1.1 "nearly doubled" Duke's guidelines range. J.A. 19. The judge viewed him through the lens of his "status as a career offender" and felt obligated to sentence him commensurate with that status. *Id.* This resulted in a sentence more than six years above the ceiling of Duke's proper guidelines range. J.A. 15–16. As the judge told him, "[t]hings would be different if you were not a career offender." J.A. 19.

It is of no moment that Duke was sentenced below the statutory maximum. The text of § 2255 clearly contemplates relief *both* for sentences "in excess of the maximum authorized by law" *and* for sentences "imposed in violation of the . . . laws of the United States." 28 U.S.C § 2255(a). Moreover, this Court has never required a habeas petitioner show to a legal certainty that the result below would have been different without the error. *See, e.g.*, *Escoe v. Zerbst*, 295 U.S. 490, 494 (1935).

The miscarriage of justice visited upon Duke was exposed by an intervening change of law occurring after his opportunity for appeal had passed. J.A. 4. As in *Davis*, such an intervening change of law rendered direct appeal inadequate to remedy the error. *See* 417 U.S. at 342. Duke's case thus

presents "exceptional circumstances where the need for the remedy afforded by the writ of *habeas corpus* is apparent." *Id.* at 346.

Finally, the Court should not turn a blind eye to this grave injustice out of concern for the minimal prudential interests implicated by granting relief. This case will not open the floodgates: the career-offender enhancement is rarely applied and near-unique in effect. And the few petitioners who clear the substantive and procedural hurdles to § 2255 review will confront judges armed with an array of tools that narrow the legal issues and minimize administrative burdens.

Nor should finality concerns impede relief. It is fair to say that "without finality there can be no justice. But it is equally true that, without justice, finality is nothing more than a bureaucratic achievement." *Gilbert v. United States*, 640 F.3d 1293, 1337 (11th Cir. 2011) (Hill, J., dissenting).

ARGUMENT

I. Milton Fountain's failure to file a notice of appeal when expressly directed to do so by Jaden Duke constituted ineffective assistance of counsel.

The Sixth Amendment guarantees to every criminal defendant "the Assistance of Counsel for his defence." U.S. Const. amend. VI. This right accords defendants more than the mere presence of an attorney; it demands the "effective assistance" of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). Counsel is perhaps the "most fundamental of rights" afforded to defendants because "it is through counsel that all other rights of the accused are protected." *Penson v. Ohio*, 488 U.S. 75, 84 (1988). But this right complements — rather than supplants — the defendant's right to exercise his personal autonomy in making certain fundamental decisions critical to his case. One of those decisions is whether to appeal. *Jones v. Barnes*, 463 U.S. 745, 751 (1983). When Fountain refused to file a notice of appeal after Duke expressly requested he do so, Fountain deprived Duke of that fundamental choice and thereby provided ineffective assistance of counsel.

The test set forth in *Strickland* governs claims "that counsel was constitutionally ineffective for failing to file a notice of appeal." *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000). Under *Strickland*, a defendant must show that (1) "counsel's representation fell below an objective standard of reasonableness," 466 U.S. at 688, and that (2) counsel's deficient performance was "prejudicial to the defense," *id.* at 692. This Court has "long held that a lawyer who disregards specific instructions from the defendant to file a notice

of appeal acts in a manner that is professionally unreasonable." *Flores-Ortega*, 528 U.S. at 477. And when counsel's deficient performance leads to the "forfeiture of [the appellate] proceeding itself," prejudice must be presumed. *Id.* at 483. Because Duke made clear his desire to appeal irrespective of the waiver, Fountain's inaction — in direct contravention of Duke's wishes — satisfies both prongs of the *Strickland* test. Duke is therefore entitled to an out-of-time appeal.

A. The choice to appeal belongs solely to the defendant.

The text of the Sixth Amendment establishes the primacy of the defendant by explicitly allocating its procedural safeguards directly to him. U.S. Const. amend. VI (listing the rights that "the accused shall enjoy"). It is thus the accused who is due these rights, rather than defense counsel acting as proxy. While the Amendment "speaks of the 'assistance' of counsel, . . . an assistant, however expert, is still an assistant. The language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant — not an organ of the state . . . ." *Faretta v. California*, 422 U.S. 806, 820 (1975).

It is the defendant, not counsel, who "has the ultimate authority to make certain fundamental decisions regarding [his] case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal." *Barnes*, 463 U.S. at 751. This allocation of rights and responsibilities is proper because it is "[t]he defendant, and not his lawyer or the State, [who] will bear

the personal consequences" of his choices. *Faretta*, 422 U.S. at 834. Even when a defendant's decision is "ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.'" *Id.* (quoting *Illinois v. Allen*, 397 U.S. 337, 350–51 (1970) (Brennan, J., concurring)). To bind Duke to a unilateral choice made by his counsel, in direct contravention of his wishes, and to label this usurpation "effective," is ultimately to "imprison [him] in his privileges" all while "call[ing] it the Constitution." *Adams v. United States ex rel. McCann*, 317 U.S. 269, 280 (1942).

B. Fountain's refusal to file a notice of appeal when expressly directed to do so by Duke constituted deficient performance, notwithstanding the waiver.

Under *Strickland*'s first prong, counsel performs deficiently when his "representation f[alls] below an objective standard of reasonableness." 466 U.S. at 688. Fountain's obstinance in the face of Duke's request fell far short of his responsibilities under Supreme Court precedent and prevailing professional norms, both of which allocate the decision whether to appeal to the defendant alone. Fountain had several professionally reasonable alternatives, but chose the only option not available to him — he did nothing. His performance was therefore objectively unreasonable and so satisfies *Strickland*'s first prong.

1. Supreme Court precedent dictates that counsel acts in a professionally unreasonable manner when he disregards a defendant's express instructions to file a notice of appeal.

This Court has repeatedly recognized "that the accused has the ultimate authority" to decide whether to pursue an appeal. *Barnes*, 463 U.S. at 751. In this vein, the Court in *Flores-Ortega* held that when a defendant "reasonably demonstrate[s] to counsel that he [is] interested in appealing," counsel performs deficiently by failing "to consult with the defendant about an appeal." 528 U.S. at 480. *Flores-Ortega* is but one case in a line of precedent that requires counsel to consult regarding a fundamental decision which has been allocated to the defendant alone. For instance, the decision to accept a plea, like the decision to appeal, ultimately belongs to the defendant. *Barnes*, 463 U.S. at 751. Counsel therefore has an affirmative duty to communicate a formal plea offer to the defendant. *See Missouri v. Frye*, 132 S. Ct. 1399, 1408 (2012). And when consulting with the defendant about the plea offer, counsel cannot misinform or fail to inform him about the consequences of his plea. *See Lafler v. Cooper*, 132 S. Ct. 1376, 1386 (2012) (elements of the crime); *Padilla v. Kentucky*, 559 U.S. 356, 374 (2010) (deportation consequences).

But the duty to consult can serve no meaningful purpose if counsel is free to disregard the defendant's express wishes. Consultation is a means, not an end. The duty to consult about whether to appeal, like the duty to consult about whether to plead, exists only to enable the defendant to exercise his autonomy in making that choice. Thus, the Court has said that once "counsel consults with the defendant, the question of deficient performance is easily

answered: Counsel performs in a professionally unreasonable manner only by failing to follow the defendant's express instructions with respect to an appeal." *Flores-Ortega*, 528 U.S. at 478.

This commitment to the defendant's autonomy does not yield in the face of an appeal waiver. While *Flores-Ortega* stated that an appeal waiver might impact whether there is a duty to consult, *id.* at 480, the Court nonetheless articulated an *unqualified* duty to file a notice of appeal when so instructed by the defendant, *id.* at 477. And even with respect to the duty to consult, the Court suggested that the waiver alone would not be sufficient to extinguish counsel's obligations. *See id.* at 480. Rather, the Court treated the existence of the waiver as one among many factors relevant to determining whether counsel had such a duty. *Id.* If the waiver alone does not eliminate the qualified duty to consult, it certainly does not extinguish the unqualified duty to file an appeal when expressly directed to do so.

While the waiver is a factor for counsel to consider in deciding whether to consult, it is a factor for the defendant to consider in deciding whether to appeal. Counsel, acting as the defendant's advisor, must inform him about the potential consequences of violating the appeal waiver. *See id.* at 480; *cf. Padilla*, 559 U.S. at 374. But respect for the defendant's autonomy means recognizing that he must make the decision for himself. Not all defendants are created equal. Some may place significant value on a slim possibility of a reduced sentence. *See, e.g.*, *United States v. Pham*, 722 F.3d 320, 322 (5th Cir.

2013) (finding deficient performance, despite a waiver, where counsel failed to consult with a defendant who wanted to appeal to have any chance of caring for his ailing wife). Others may prefer a longer prison sentence to other possible consequences. *See Padilla*, 559 U.S. at 368 (recognizing that "[p]reserving the client's right to remain in the United States may be more important to the client than any potential jail sentence" (alteration in original) (internal quotation marks omitted)). It is the defendant's prerogative to weigh these types of considerations against the risks associated with violating an appeal waiver. But once a defendant has made the decision to appeal — which is his alone to make — counsel is obligated to respect that decision, waiver be damned.

Fountain met his first duty under *Flores-Ortega*: he consulted with Duke about the possibility of an appeal the day after Duke was sentenced to 21 years, 10 months in prison. J.A. 21. Fountain was diligent in informing Duke of the consequences of pursuing an appeal despite the waiver, and Duke fully understood that appealing could lead to an increase, rather than a decrease, in his sentence. J.A. 21–22. Regardless, "Duke unequivocally asked Fountain to appeal." J.A. 29. Duke was most concerned that his sentence would prevent him from "be[ing] a dad to [his] kids," who would be in their mid-twenties by the time he was released. J.A. 18. To Duke, there was no difference between twenty-one years and life in prison — "[his] kids [would] be grown up by the

end either way." J.A. 22. Nevertheless, Fountain refused to file the notice of appeal, thus breaching his second duty under *Flores-Ortega*.

2. Counsel's refusal to file a notice of appeal in the face of express instructions violates prevailing professional norms.

"Prevailing norms of practice as reflected in American Bar Association ["ABA"] standards . . . are guides to determining what is reasonable." *Strickland*, 466 U.S. at 688. This Court has relied heavily on the ABA Standards when evaluating counsel's performance under *Strickland*. *See, e.g.*, *Rompilla v. Beard*, 545 U.S. 374, 387–88 (2005); *Wiggins v. Smith*, 539 U.S. 510, 524–25 (2003).

The relevant ABA Standards applicable at the time of Duke's sentencing are pellucid. First, they explicitly allocate the decision whether to appeal to the defendant: "[w]hile counsel should do what is needed to inform and advise defendant, the decision whether to appeal . . . must be the defendant's own choice." ABA Standards for Criminal Justice, Criminal Appeals 21-2.2(b) (3d ed. 1999). Second, the Standards distinguish the defendant's personal decision to appeal from the decisions that are reserved to counsel. *Compare* ABA Standards for Criminal Justice, Defense Function 4-5.2(a)(v) ("The decisions which are to be made by the accused after full consultation with counsel include . . . whether to appeal."), *with id.* at 4-5.2(b) ("Strategic and tactical decisions should be made by defense counsel after consultation with the client where feasible and appropriate. Such decisions include what witnesses to call, . . . and what evidence should be introduced," among others.).

Finally, the Standards draw no distinction between defendants who have signed appeal waivers and those who have not. To read such a distinction into the Standards would deprive them of force in the vast majority of criminal cases. Nearly all criminal cases now result in plea agreements. *Frye*, 132 S. Ct. at 1407 (recognizing that "[n]inety-seven percent of federal convictions . . . are the result of guilty pleas"). Of those plea agreements, almost two-thirds include some form of appeal waiver. Nancy J. King & Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 Duke L.J. 209, 231 (2005) (finding appeal waivers in 65.2% of a random sample of plea bargains). It cannot be that the ABA Standards, which define counsel's responsibilities with respect to criminal appeals, would have such limited application.

The ABA Standards' instructions to Fountain were clear: file the notice of appeal. By refusing to do so, Fountain directly contravened prevailing professional norms.

3. Fountain failed to pursue any of the professionally reasonable alternatives available to counsel who believes an appeal would be ill-advised.

If Fountain believed an appeal would have been "frivolous," J.A. 26, there were other avenues available to him besides the unreasonable decision to do nothing. In fact, prevailing professional norms and Supreme Court precedent have laid out a menu of options for counsel to choose from in similar circumstances. For one, the relevant ABA Standards recommend that "counsel

should endeavor to persuade the client to abandon a wholly frivolous appeal." ABA Standards for Criminal Justice, Defense Function 4-8.3(b). Fountain could have continued to consult with Duke — over the course of multiple meetings, if necessary — in an attempt to convince him that the costs of violating the appeal waiver outweighed the probability of a successful appeal. In the event that persuasion was unsuccessful and Duke chose "to proceed with an appeal against the advice of counsel," then Fountain should have "present[ed] the case, so long as such advocacy [did] not involve deception of the court." *Id.* at 4-8.3(c). The ABA Standards do not suggest, however, that the appropriate resolution to a disagreement over whether to pursue an appeal is for counsel to make the decision himself.

If Fountain was truly unwilling to present Duke's case, then he had an out. In *Anders v. California*, this Court held that, if "counsel finds a case to be wholly frivolous, after a conscientious examination," then he should "request permission to withdraw" and submit a brief "referring to anything in the record that might arguably support the appeal." 386 U.S. 738, 744 (1967).[1] Several circuits have suggested that this avenue is appropriate in cases identical to Duke's: "*even after a waiver*, a lawyer who believes the requested appeal would be frivolous is bound to file the notice of appeal and submit a brief pursuant to *Anders* . . . ." *Campusano v. United States*, 442 F.3d 770, 771–72 (2d Cir. 2006) (Sotomayor, J.) (emphasis added); *see also Campbell v.*

[1] Though this Court has since held that the precise framework outlined in *Anders* is optional, it continues to require that courts adopt some procedure to "adequately safeguard a defendant's right to appellate counsel." *Smith v. Robbins*, 528 U.S. 259, 265 (2000).

United States, 686 F.3d 353, 358 (6th Cir. 2012); *United States v. Poindexter*, 492 F.3d 263, 271 (4th Cir. 2007). With an *Anders* brief in hand, Duke would have retained the opportunity to appeal and received the best arguments in support of his case. *See Campusano*, 442 F.3d at 776.

But Fountain did not continue to consult with Duke to persuade him to forgo an appeal. He did not present the best arguments in support of Duke's case. He did not file an *Anders* brief. He did nothing. This Court's precedent and prevailing professional norms required that Fountain do more. He was not entitled to substitute his decision for that of his client. So when Fountain "fail[ed] to follow [Duke]'s express instructions," he performed in a "professionally unreasonable manner," thus satisfying *Strickland*'s first prong. *Flores-Ortega*, 528 U.S. at 478.

C. Because Duke would have appealed even in the face of the waiver, he was prejudiced by Fountain's refusal to file a notice of appeal.

1. Prejudice must be presumed when counsel's deficient performance forces a defendant to forfeit an entire appellate proceeding.

Under *Strickland*'s second prong, "the defendant must show that [counsel's] deficient performance prejudiced the defense." 466 U.S. at 687. This Court has recognized that the precise prejudice inquiry must "turn[] on the magnitude of the deprivation of the right to effective assistance of counsel." *Flores-Ortega*, 528 U.S. at 482; *see also United States v. Cronic*, 466 U.S. 648, 658 (1984); *Penson*, 488 U.S. at 88–89. If counsel's deficiency leads to "the forfeiture of [the] proceeding itself," then prejudice must be presumed. *Flores-*

Ortega, 528 U.S. at 483. Fountain's deficient performance here did not merely deprive Duke of a "*fair* judicial proceeding." *Id.* Instead, as in *Flores-Ortega*, Duke was "deprived of a notice of appeal and, hence, an appeal altogether." *Id.* In such cases, where the deprivation is complete, the proper prejudice inquiry is whether there exists "a reasonable probability that, *but for* counsel's deficient [performance]," the defendant would have timely appealed. *Id.* at 484 (emphasis added).

Application of this standard in cases such as Duke's "breaks no new ground." *Id.* at 485. In other contexts where a defendant has been similarly denied an entire proceeding, this Court has employed this same "but for" presumption, asking only whether the defendant would have pursued the proceeding otherwise. *See, e.g.*, *Hill v. Lockhart*, 474 U.S. 52, 59 (1985) (holding that, in the plea bargain context, the defendant need only "show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial"). Critically, when applying this standard, courts do not inquire into the defendant's likelihood of success in the forfeited proceeding. In the plea context, for instance, this Court has asked only whether a defendant would have gone to trial and not what the outcome of that trial would have been. *See, e.g.*, *Lafler,* 132 S. Ct. at 1388 ("The fact that respondent is guilty does not mean that . . . he suffered no prejudice from his attorney's deficient performance during plea

bargaining."); *Hill*, 474 U.S. at 59 (allowing defendants to show prejudice even if they have previously pleaded guilty).

So too in the appellate context. In *Rodriquez v. United States*, the Court declined to inquire into the strength of a defendant's appellate arguments when counsel neglected to file a notice of appeal as requested. 395 U.S. 327, 330 (1969). By refusing to treat the "denial of the right to appeal as a species of harmless error" even where the appeal was meritless, the Court afforded all defendants "whose right to appeal ha[d] been frustrated" the ability to "be treated exactly like any other appellants." *Id.* No other appellant is required to show likely success on the merits to get in the courthouse door. Defendants "should not be given an additional hurdle to clear just because their rights were violated at some earlier stage in the proceeding." *Id.*

2. Prejudice must be presumed even in the face of a valid appeal waiver.

An appeal waiver does not extinguish a defendant's right to appeal; rather, it simply decreases the likelihood the appeal will succeed on the merits. Since courts do not require a "further showing . . . of the merits" when counsel's deficient performance has deprived a defendant of the entire appellate proceeding, the waiver does not impact the nature of the prejudice inquiry.[2] *Flores-Ortega*, 528 U.S. at 486. The vast majority of circuits agree:

[2] While a waiver does not affect the *question* a court asks, it may be relevant to determining, in the absence of express instructions, whether a defendant would have appealed "but for" counsel's error. *See Flores-Ortega*, 528 U.S. at 480. But where, as here, the defendant explicitly instructed counsel to file the appeal, the merits of his claims — and the waiver's impact on them — are irrelevant, as there is more than a "reasonable probability" that "but for" counsel's deficient performance "he would have timely appealed." *Id.* at 484.

even when there is a valid appeal waiver, the only question to ask is whether the defendant would have appealed. *See, e.g.*, *Campusano v. United States*, 442 F.3d 770 (2d Cir. 2006); *United States v. Poindexter*, 492 F.3d 263 (4th Cir. 2007); *United States v. Tapp*, 491 F.3d 263 (5th Cir. 2007); *Campbell v. United States*, 686 F.3d 353 (6th Cir. 2012); *Watson v. United States*, 493 F.3d 960 (8th Cir. 2007); *United States v. Sandoval-Lopez*, 409 F.3d 1193 (9th Cir. 2005); *United States v. Garrett*, 402 F.3d 1262 (10th Cir. 2005); *Gomez-Diaz v. United States*, 433 F.3d 788 (11th Cir. 2005).

There are compelling reasons for courts to avoid considering the merits of a forfeited appeal, which are not undermined by a waiver. First, expecting § 2255 petitioners to marshal all possible meritorious arguments on collateral review ignores their circumstances. Counsel's unreasonable decision to take an early exit without filing a notice of appeal denies petitioners any meaningful opportunity to develop their appellate claims. These petitioners will not have merits briefs. Nor will they have the last resort of a professionally reasonable attorney — an *Anders* brief — laying out the best version of their case. *See Campusano*, 442 F.3d at 777. And some of these petitioners will likely have been denied even the opportunity to consult with their attorneys about taking an appeal. *See, e.g.*, *Flores-Ortega*, 528 U.S. at 480; *see also Poindexter*, 492 F.3d at 272 n.8 ("The assistance of counsel is essential to the defendant during this ten-day period, because it is through the assistance of counsel that the defendant can make an informed decision

concerning whether there are viable issues to raise on appeal."). This problem is just as acute in the presence of the waiver, which contracts and complicates the potential arguments a defendant can raise. Requiring a merits analysis, waiver or no, would force "an indigent, perhaps *pro se*, defendant to demonstrate that his hypothetical appeal might have had merit before any advocate has ever reviewed the record in his case in search of potentially meritorious grounds for appeal." *Flores-Ortega*, 528 U.S. at 486.

Second, while courts "normally apply a 'strong presumption of reliability' to judicial proceedings," evaluating the merits of a proceeding that never took place is inherently unreliable. *Id.* at 482 (quoting *Smith v. Robbins*, 528 U.S. 259, 286 (2000)). The waiver does not change the fact that there has been no appeal to which the court can afford a presumption of reliability. It merely attaches specific consequences to the choice to appeal, rather than extinguishing the right altogether. *See Campusano*, 442 F.3d at 775 ("[A] waiver does not signal an end to our concern for a defendant's right to participate fully in decisions about whether to appeal."). Defendants can always bring certain types of claims even in the face of the waiver. *Id.* at 774 (noting waivers are unenforceable when (i) not made knowingly or voluntarily, (ii) based on constitutionally impermissible factors, (iii) the government breached the plea agreement, or (iv) when the sentencing court failed to enumerate a rationale for the defendant's sentence).

Even with respect to claims arguably covered by the waiver, the government may opt not to raise the waiver as an affirmative defense. *E.g.*, *Nunez v. United States*, 546 F.3d 450, 452 (7th Cir. 2008) (recognizing the government "may freely give up its protection" under an appeal waiver). The government may particularly decline to do so where, as here, an intervening change of law makes clear that a defendant was unfairly punished. *See, e.g.*, *Jones v. United States*, 689 F.3d 621, 624 n.1 (6th Cir. 2012). Without the benefit of an actual appeal, a court cannot reliably predict how the proceeding would have unfolded. So although success on the merits may be rare, these sorts of cases "are not inconceivable, and we do not cut corners when Sixth Amendment rights are at stake." *Campusano*, 442 F.3d at 777.

3. Duke was prejudiced because he expressly instructed Fountain to file a notice of appeal.

"[B]y instructing counsel to perfect an appeal, [a defendant] objectively indicate[s] his intent to appeal and [is] entitled to a new appeal without any further showing." *Flores-Ortega*, 528 U.S at 485 (citing *Rodriquez*, 395 U.S. at 330). The record is explicit on this point: after an evidentiary hearing, the district court found that "Duke unequivocally asked Fountain to appeal." J.A. 29. Fountain and Duke discussed the possibility of appeal the day after Duke's sentence came down. J.A. 21. Fountain informed Duke about the consequences of taking an appeal, including the drawbacks to violating the waiver. Duke, fully informed, remained resolute: "I said I didn't care about the waiver and I wanted to appeal no matter what." J.A. 22. And the

message was not lost on Fountain: "He insisted that he wanted to appeal anyway." J.A. 25.

D. Duke is entitled to an out-of-time appeal.

An out-of-time appeal is necessary to right this unjustifiable wrong and to restore to Duke a critical choice concerning his personal liberty. *See, e.g.*, *Gomez-Diaz*, 433 F.3d at 793. Granting this relief will not overburden the judicial system. Cases like Duke's are likely to be extremely rare, as few defendants will be eager to risk "los[ing] the benefit of the bargain" they just struck. *Padilla*, 559 U.S. at 373 (rejecting floodgates concerns with respect to defendant's collateral attack on a plea because "[t]he nature of relief secured . . . impose[d] its own significant limiting principle"); *cf.* Nancy J. King, *Plea Bargains that Waive Claims of Ineffective Assistance – Waiving* Padilla *and* Frye, 51 Duq. L. Rev. 647, 670 n.5 (2013) (noting that "even without a waiver, few defendants challenge their pleas").

It is undeniable that the drafters of the "Bill of Rights . . . understood the inestimable worth of free choice." *Faretta*, 422 U.S. at 833–34. The choice whether to appeal is afforded solely to the defendant because it is he, not counsel, who will "bear the personal consequences of [his] decision[]." *Id.* at 834. Duke's choice here was clear. Yet Fountain, whose constitutional duty was to *safeguard* Duke's rights, refused to respect his decision. By depriving Duke of his rightful choice, Fountain rendered him a prisoner of his own "best interest[s]." J.A. 26. It cannot be that, by providing Duke with counsel, the

Constitution robbed him of his freedom to choose: the constitutional rights that "were contrived as protections for the accused" cannot and "should not be turned into fetters." *Adams*, 317 U.S. at 280.

II. Duke may challenge his sentence on collateral review now that an intervening change of law has demonstrated that he was erroneously sentenced as a career offender.

Jaden Duke is not now, nor has he ever been, a career offender. J.A. 4, 29. Yet at his 2009 sentencing, the district court branded him as such, mistakenly believing that Duke had twice before been convicted of a felony drug offense "punishable by imprisonment for a term exceeding one year." U.S. Sentencing Guidelines Manual § 4B1.2(b) (2008). This despite the fact that one of Duke's two predicate convictions — a 1999 marijuana possession offense — "was only eligible for up to 8 months' community punishment [and] no imprisonment." J.A. 15. That the sentencing court acted in error is uncontested. J.A. 4. *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577 (2010), and *United States v. Sanchez*, -- F.3d -- (Ames Cir. 2010), have made clear that his decade-old marijuana charge should never have been used to "almost double" his sentencing range. J.A. 9.

The only question that remains is whether this error should persist, or whether Duke has a right, cognizable on collateral review, "not to stand before the court as a career offender when the law does not impose that label on him." *Narvaez v. United States*, 674 F.3d 621, 629 (7th Cir. 2011). Because the erroneous application of the career-offender enhancement radically amplified

his punishment, this Court should afford Duke the opportunity to stand for resentencing, free of its distortive weight.

A. As Congress intended, U.S. Sentencing Guidelines § 4B1.1 severely aggravates punishment for those defendants who are deemed to be career offenders.

In 1984, Congress gave the U.S. Sentencing Commission a stark directive: to reserve for certain categories of recidivists the harshest punishment the law permits. *See* 28 U.S.C. § 994(h) (2012). That command represented a sharp departure from much of Congress's delegation to the Commission. Absent was the Commission's traditional discretion to exercise its own judgment in flexibly tailoring the guidelines to accommodate the unique characteristics of each offense and each defendant. *Cf. United States v. LaBonte*, 520 U.S. 751, 757, 762 (1997) ("Broad as [the Commission's] discretion may be, however, it must bow," *id.* at 757, to the "unambiguous" directive in § 994(h), *id.* at 762.). In its place Congress ordered the Commission to place a trip wire that, once set off, would automatically kick all qualifying defendants to the harshest corner of the Sentencing Table.

That command gave rise to § 4B1.1, which created "a category of offender subject to particularly severe punishment." *Buford v. United States*, 532 U.S. 59, 60 (2001). For defendants with two qualifying prior violent crime or controlled substance offenses, the career-offender enhancement "specif[ies] a sentence to a term at or near the maximum term authorized." 28 U.S.C. § 994(h). To that end, § 4B1.1 operates along both axes of the Sentencing

Table: First, every "career offender" is relegated to criminal history category VI, the highest category. *See* U.S.S.G. § 4B1.1(b). Second, the defendant's offense level automatically jumps to a new platform pegged at or near the statutory maximum. *See id.*

Section 4B1.1 has lived up to Congress's promise, "result[ing] in some of the most severe sentences imposed under the guidelines." U.S. Sentencing Comm'n, *Fifteen Years of Guidelines Sentencing* 133 (2004). For instance, in 2012, *non*-career offenders who already had a criminal history category of VI received a median sentence of 5 years' imprisonment. *Spencer v. United States*, 727 F.3d 1076, 1089 (11th Cir. 2013), *vacated pending reh'g en banc* (11th Cir. 2014). By contrast, career offenders faced a median sentence of 12 years and 7 months — 2.5 times as long. *Id.*

Duke too felt the astonishing force of § 4B1.1. Though he faced only community punishment for one of his predicate offenses and served 10 months in prison for the other, the Presentence Report branded Duke a career offender. J.A. 14–15. With that wire tripped, Duke's guidelines range jumped to a baseline of 30 years to life. J.A. 15; U.S.S.G. ch. 5, pt. A. Troubled though she was by the fact that the "enhancement ha[d] nearly doubled [Duke's] sentencing range," J.A. 19, the district judge felt obligated to bow to Congress's command: to treat career offenders as "malefactor[s] deserving of far greater punishment than that usually meted out for an otherwise similarly situated individual." *Narvaez*, 674 F.3d at 629. As a result, Duke now sits in year six

of a sentence more than two decades long, a punishment handed down because he was thought to be what the law now clearly says he is not.

B. Duke's challenge to the erroneous application of the career-offender enhancement is cognizable on collateral review under 28 U.S.C. § 2255.

Over time, "the Great Writ . . . has grown to achieve its grand purpose—the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty." *Jones v. Cunningham*, 371 U.S. 236, 243 (1963). Where it would once issue only to "determine points of jurisdiction . . . and constitutional questions," the writ of habeas corpus is now available — as Judge Learned Hand first proposed — "whenever else resort to it is necessary to prevent a complete miscarriage of justice." *United States ex rel. Kulick v. Kennedy*, 157 F.2d 811, 813 (2d Cir. 1946), *rev'd sub nom. Sunal v. Large*, 332 U.S. 174 (1947).

In *Davis v. United States*, 417 U.S. 333 (1974), the Court embraced this view of federal habeas while interpreting 28 U.S.C. § 2255. There, the Court held that § 2255 encompasses challenges to sentences infected with nonconstitutional, nonjurisdictional errors of law, so long as those errors (1) represent "a fundamental defect which inherently results in a complete miscarriage of justice," and (2) "present[] exceptional circumstances where the need for the remedy afforded by the writ of *habeas corpus* is apparent." *Davis*, 417 U.S. at 346 (quoting *Hill v. United States*, 368 U.S. 424, 428 (1962)) (internal quotation marks omitted).

That standard is met here. The sentencing court's erroneous application of the career-offender enhancement branded Duke a recidivist deserving of the harshest punishment the law can impose, and catapulted his sentence years beyond what it should have been. And because that error came to light only through an intervening correction in the law, Duke has no option but to turn to § 2255 for relief.

1. Erroneous application of the career-offender enhancement to Duke resulted in a complete miscarriage of justice.

The miscarriage-of-justice standard articulated in *Davis* is a reflection of the fact that the errors of law cognizable on habeas review defy easy categorization. *See Whiteside v. United States*, 748 F.3d 541, 548 (4th Cir.) ("The Supreme Court has provided only the general contours of what constitutes a complete miscarriage of justice."), *vacated pending reh'g en banc* (4th Cir. 2014). The import of the standard, however, is clear: habeas relief should be available to correct "flagrant" errors of law, *Sunal*, 332 U.S. at 179, where necessary to the "preservation of personal liberty and assurance against its wrongful deprivation," *id.* at 189 (Rutledge, J., dissenting). In this vein, the standard requires that, to be cognizable, an error must cross "a threshold of minimum seriousness." Christopher D. Cerf, Note, *Federal Habeas Corpus Review of Nonconstitutional Errors: The Cognizability of Violations of the Interstate Agreement on Detainers*, 83 Colum. L. Rev. 975, 1008 (1983). Measured against this standard, the consequences of erroneous applications of

§ 4B1.1 are of sufficient "character or magnitude" to warrant postconviction relief. *See Hill*, 368 U.S. at 428.

a. The nature of a career-offender error is to subject a defendant to the worst punishment the law permits on the basis of a status he does not deserve.

In *Davis*, this Court left "no room for doubt" that punishing a defendant "for an act that the law does not make criminal" would effect a complete miscarriage of justice. 417 U.S. at 346. The difference between the error in *Davis* and the error here "is one of degree, not of kind." *Welch v. United States*, 604 F.3d 408, 415 (7th Cir. 2010). Make no mistake: Duke was punished for an act that the law no longer deems punishable under § 4B1.1.

This Court has already suggested that erroneous application of the career-offender enhancement results in a complete miscarriage of justice. *See Johnson v. United States*, 544 U.S. 295, 303–04 (2005). The Court in *Johnson* explained that its cases applying § 4B1.1 on collateral review "assume . . . that a defendant given a sentence enhanced for a prior conviction is entitled to a reduction if the earlier conviction is vacated." *Id.* at 303 (citing *Custis v. United States*, 511 U.S. 485 (1994); *Daniels v. United States*, 532 U.S. 374 (2001)). The outcome should be no different if the earlier conviction never qualified in the first place. In *both* cases, the defendant was "sentenced on the basis of assumptions concerning his criminal record which were materially untrue." *Townsend v. Burke*, 334 U.S. 736, 741 (1948). In *both* cases, the defendant was punished for "an act that the law does not consider a prerequisite for career offender status." *Hawkins v. United States*, 706 F.3d

820, 830 (7th Cir.) (Rovner, J., dissenting), *opinion supplemented on denial of reh'g*, 724 F.3d 915 (7th Cir. 2013), *and cert denied*, 134 S. Ct. 1280 (2014).

When a defendant's punishment is driven skyward by erroneous application of the career-offender enhancement, he stands a world apart from those petitioners who can allege only a "technical violation" of a procedural rule. *United States v. Timmreck*, 441 U.S. 780, 784 (1979). This Court has repeatedly denied § 2255 relief for procedural rule violations absent aggravating "circumstances *that cause additional prejudice to the defendant*." *Reed v. Farley*, 512 U.S. 339, 357 (1994) (Scalia, J., concurring in part and concurring in the judgment). For example, relief has been unavailable for violations of Federal Rule of Criminal Procedure 11, *Timmreck*, 441 U.S. at 785, and Rule 32(a), *Hill*, 368 U.S. at 429, absent a showing that the defendant was actually prejudiced by the mistake.

But when a court erroneously drops the career-offender enhancement onto the scales of justice, it commits more than a mere "judicial slip." *Reed*, 512 U.S. at 349 (opinion of Ginsburg, J.) (discussing *Hill* and *Timmreck*). Instead, that error cuts to the heart of the "substantive law of federal sentencing." *Spencer*, 727 F.3d at 1087. The error robs a defendant of a punishment carefully tailored to his crime, *see* 28 U.S.C. § 994(c)–(d), and instead reflexively pegs his punishment "at or near the maximum term authorized" by law, *id.* § 994(h). It undeservedly forces a defendant to stand before the court saddled with "a legal presumption that . . . he belonged

in a special category reserved for the violent and incorrigible." *Narvaez*, 674 F.3d at 629.

At Duke's sentencing, the judge had no choice but to view him through the lens of his "status as a career offender." J.A. 19. To avoid sentencing disparities, she felt obligated to treat career offenders alike, and therefore punished him commensurate with that status. J.A. 19; *see also* 18 U.S.C. § 3553(a)(6) (2012). The presentence report had labeled Duke a career offender, and "[n]o amount of evidence in mitigation or extenuation could erase that branding or its effect on his sentence." *Narvaez*, 674 F.3d at 629.

b. Career-offender errors have devastating consequences.

In 2011, for defendants who, like Duke, began with a criminal history category below VI, § 4B1.1 elevated their median guidelines range from 92–115 months to 262–327 months. *See* U.S. Sentencing Comm'n, *Report on the Continuing Impact of* United States v. Booker *on Federal Sentencing*, pt. C: Career Offenders, at 8 (2012), http://www.ussc.gov/news/congressional-testimony-and-reports/booker-reports/report-continuing-impact-united-states-v-booker-federal-sentencing; U.S.S.G. ch. 5, pt. A. And as the guidelines are driven skyward for career offenders, their sentences follow suit. Thus while the mean sentence for non-career offenders in all criminal history categories in 2012 was 53 months, career offenders had a mean sentence of 163 months — a threefold increase. *Spencer*, 727 F.3d at 1089.

That the application of the enhancement causes sentences to skyrocket is no surprise. "[T]he Guidelines act as a powerful anchor in current federal

judicial sentencing." Mark W. Bennett, *Confronting Cognitive "Anchoring Effect" and "Blind Spot" Biases in Federal Sentencing: A Modest Solution for Reforming a Fundamental Flaw*, 104 J. Crim. L. & Criminology 489, 526 (2014). That "anchoring effect" results from the fact that "[t]he federal system adopts procedural measures intended to make the Guidelines the lodestone of sentencing." *Peugh v. United States*, 133 S. Ct. 2072, 2084 (2013). For example, sentencing judges are first required to calculate correctly the applicable guidelines range, and failure to do so constitutes reversible error. *Gall v. United States*, 552 U.S. 38, 49–51 (2007). Should a judge wish to depart from the guidelines, she must explain the basis for the departure, with more significant departures requiring more compelling justifications. *Id.* at 51. The net effect of these requirements is that "*the Guidelines are in a real sense the basis for the sentence*." *Peugh*, 133 S. Ct. at 2083 (quoting *Freeman v. United States*, 131 S. Ct. 2685, 2692 (2011) (plurality opinion)) (internal quotation mark omitted).

Appellate review of federal sentences for reasonableness reinforces the anchoring power of the Guidelines, *id.*, in part because many courts of appeals apply a presumption of reasonableness to within-guidelines sentences. *See United States v. Dorcely*, 454 F.3d 366, 376 (D.C. Cir. 2006) (collecting cases from the 4th, 5th, 6th, 7th, 8th, and 10th circuits). Together, the calculation, justification, and reasonableness requirements create a system where, "[i]n the usual sentencing, . . . the judge will use the Guidelines range as the starting

point in the analysis and impose a sentence within the range." *Peugh*, 133 S. Ct. at 2083 (alteration in original) (quoting *Freeman*, 131 S. Ct. at 2692) (internal quotation marks omitted).

The power of both the Guidelines and the career-offender enhancement are evident in Duke's case. The floor of Duke's inflated guidelines sat a full 6 years and 2 months above the ceiling of his proper range. J.A. 15–16. The judge saw "no grounds to depart *from the guidelines range*" and sentenced him to the lowest end of that range. J.A. 19 (emphasis added).

It is a near certainty that, without the erroneous career-offender enhancement, Duke would have been sentenced far below the 21 years, 10 months he received. The sentencing judge herself said "[t]hings would be different if you were not a career offender." *Id.* And it is not hard to see why that would be true. Above-guidelines sentences are exceedingly rare, sitting at only 1.8% of sentences imposed in fiscal year 2010. U.S. Sentencing Comm'n, *2010 Annual Report* 34. Rarer still are upward departures for the offense to which Duke pleaded guilty: only 1% of drug trafficking offenders received above-guidelines sentences that year. U.S. Sentencing Comm'n, *2010 Sourcebook of Federal Sentencing Statistics* tbl.27.

Of course, we cannot know exactly how much lower Duke's punishment would have been without the error. Duke has not yet been afforded the opportunity to stand before a sentencing judge free of the distortive effects of the career-offender label. Instead, he has been deprived of his liberty — on the

order of several years of his life — for something the law no longer deems punishable by § 4B1.1. The error, in other words, effected "a complete miscarriage of justice." *Davis*, 417 U.S. at 346.

2. The gravity of the error is not diminished by the fact that Duke's sentence was not "in excess of the maximum authorized by law."

Despite acknowledging that it was "perhaps likely[] that Duke would have received a lower sentence" absent the career-offender error, the Ames Circuit denied relief "because Duke was sentenced below the statutory maximum" and could conceivably receive "the same sentence on remand." J.A. 9. This argument — also made by Judge Posner in *Hawkins*, 706 F.3d at 823–25 — is inconsistent with the text of § 2255 and this Court's habeas precedent.

The text of § 2255 clearly contemplates challenges to sentences imposed below the applicable statutory maximum. Section 2255(a) provides relief *both* for sentences "in excess of the maximum authorized by law," *and* for sentences "imposed in violation of the . . . laws of the United States." 28 U.S.C. § 2255(a). To offer relief only to those sentenced in excess of the statutory maximum would thus create surplusage out of "laws of the United States." *See, e.g.*, *Hohn v. United States*, 524 U.S. 236, 249 (1998); *Gustafson v. Alloyd Co.*, 513 U.S. 561, 574–75 (1995).

Furthermore, this Court has not drawn so crude a line when interpreting § 2255. If the universe of nonconstitutional errors of law under § 2255 were limited to violations of a statutory maximum, then the Court could have dispensed summarily with procedural cases such as *Hill* and *Timmreck*.

Indeed, the petitioner in *Johnson* would have been eligible for the exact same sentence on remand, yet the Court nevertheless suggested that his claim would have been cognizable had he brought it within the statute of limitations. *See* 544 U.S. at 303.

Habeas relief has never required that a petitioner show, to a legal certainty, that his punishment would change. For example, this Court has granted relief to a petitioner whose probation was revoked without the statutorily required hearing, notwithstanding the State's argument that a new hearing "is likely to be futile because the judge has made it plain how his discretion will be exercised." *Escoe v. Zerbst*, 295 U.S. 490, 494 (1935). So too when a petitioner's erroneous sentence was imposed under a completely discretionary system and fell below the statutory maximum. *See United States v. Tucker*, 404 U.S. 443, 446–49 (1972) (reliance on subsequently invalidated state-court convictions); *cf. Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980) (rejecting State's argument — that jury could reimpose the same sentence on remand — because the chance of a lower sentence was "substantial"). The fact that the original judge would have had discretion to impose the same punishment even absent the error was of no matter to the Court in these cases, because "[t]he judge [was] without the light whereby his discretion must be guided." *Escoe*, 295 U.S. at 494.

3. The intervening change of law in this case is an "exceptional circumstance" warranting collateral review.

Echoing the traditional concern that habeas corpus should not "do service for an appeal," *Sunal*, 332 U.S. at 178, the test articulated in *Davis* limited § 2255 relief to those "exceptional circumstances where the need for the remedy afforded by the writ of *habeas corpus* is apparent."[3] 417 U.S. at 346 (citation omitted) (internal quotation mark omitted). Collateral relief, in other words, is limited to claims for which direct appeal would be an inadequate remedy. *See, e.g.*, *Bowen v. Johnston*, 306 U.S. 19, 27 (1939).

Duke's claim crosses this threshold because it arises from a change in law that occurred after his sentence became final. In *Davis*, this Court held that the petitioner's claim was cognizable because he alleged that an intervening circuit decision validated the legal position he had taken on direct appeal.[4] *See* 417 U.S. at 342, 346–47. As the circuits have made explicit, errors exposed by a subsequent change in law present "exceptional circumstances" that render direct appeal inadequate. *See, e.g.*, *United States*

[3] It is unclear whether the "exceptional circumstances" prong persists as a standalone requirement for finding nonconstitutional, nonjurisdictional errors of law to be cognizable on § 2255 review. *See* Cerf, *supra*, at 1011; *see also, e.g.*, *United States v. Addonizio*, 442 U.S. 178, 185 (1979) (recounting the *Davis* test without the "exceptional circumstances" requirement). Regardless, the requirement is satisfied here.

[4] Unlike the petitioner in *Davis*, Duke did not actually raise his claim on direct appeal. *See* J.A. 4. Separate from the "exceptional circumstances" requirement, failure to raise a claim on direct appeal may sometimes result in the procedural default of that claim on § 2255 review. S*ee, e.g.*, *Jones v. United States*, 178 F.3d 790, 796 (6th Cir. 1999). However, procedural default is a defense that the government must raise affirmatively. *Id.* In this case, the Government has waived all procedural arguments besides cognizability. J.A. 5 at n.2. Thus, the fact that Duke did not dispute his career-offender enhancement on direct review does not bar § 2255 relief.

v. Roane, 378 F.3d 382, 396 n.7 (4th Cir. 2004); *Jones v. United States*, 178 F.3d 790, 796 (6th Cir. 1999).

C. The minimal prudential concerns associated with granting § 2255 relief should yield in the face of such a grievous error.

Two oft-invoked prudential concerns have motivated the lower-court decisions foreclosing § 2255 relief for career-offender errors: judicial resources and finality. Neither is seriously threatened by resentencing Duke and other prisoners in his position.

Ruling for Duke will not open the floodgates of § 2255 relief because the career-offender enhancement is both rarely applied and near-unique in effect. Section 4B1.1 is used to enhance only 3% of federal sentences, *see* U.S. Sentencing Comm'n, *2010 Sourcebook*, *supra,* at tbl.22, and the percentage of cases in which it is *erroneously* used is smaller still. Furthermore, only three other guidelines enhancements — the other § 4B1 provisions for criminal livelihood, armed career criminals, and repeat and dangerous sex offenders against minors — stem from a specific congressional mandate and approach the severity with which the career-offender enhancement operates. *See Spencer*, 727 F.3d at 1089. Only these enhancements have similar trip-wire effects, which catapult a defendant's guidelines range on the basis of qualifying prior convictions. *See* U.S.S.G. §§ 4B1.3–4B1.5.

These qualities separate the career-offender enhancement from the wider universe of guidelines errors. It is certainly true that "an ordinary misapplication of the guidelines" is not cognizable on collateral review, even

when illuminated by an intervening change of law. *United States v. Mikalajunas*, 186 F.3d 490, 496 (4th Cir. 1999) (two-level enhancement for restraining victim); *see also, e.g.*, *Burke v. United States*, 152 F.3d 1329, 1332 (11th Cir. 1998) (obstruction-of-justice enhancement). But the career-offender enhancement "is not merely a vanilla-flavored application of Guideline calculations." *Spencer*, 727 F.3d at 1089. Rather, it is one of the very few guidelines errors capable of resulting in a complete miscarriage of justice.

Moreover, there are several hurdles that already impede § 2255 petitions and thereby protect judicial resources. First, the "exceptional circumstances" requirement weeds out a large number of cases where there has not been an intervening change of law or another major post-appeal development. *See, e.g.*, *Roane*, 378 F.3d at 396 n.7. Second, some changes in sentencing law do not apply retroactively on collateral review and are thus unavailable to § 2255 movants.[5] *See, e.g.*, *Varela v. United States*, 400 F.3d 864, 868 (11th Cir. 2005). Finally, the text of § 2255 requires that petitioners navigate several procedural obstacles. *See*, *e.g.*, 28 U.S.C. § 2255(f) (one-year statute of limitations); *id.* § 2255(h) (limits on second or successive motions).

[5] By declining to argue — either in the courts below or in its brief in opposition to certiorari — that *Sanchez* cannot be applied retroactively on collateral review, the Government has waived any such argument. Retroactivity "is not 'jurisdictional' in the sense that this Court . . . *must* raise and decide the issue *sua sponte*," *Collins v. Youngblood*, 497 U.S. 37, 41 (1990), and the Court has consistently chosen not to do so when the argument was not raised below or at the certiorari stage. *See, e.g.*, *Schiro v. Farley*, 510 U.S. 222, 229 (1994) ("Although we undoubtedly have the discretion to reach the State's *Teague* argument, *we will not do so* in these circumstances." (emphasis added)); *Godinez v. Moran*, 509 U.S. 389, 397 n.8 (1993) (refusing to address retroactivity "because petitioner did not raise a *Teague* defense in the lower courts or in his petition for certiorari").

Those career-offender enhancement claims that clear these hurdles will not substantially burden the judges they come before. Section 2255 itself endows judges with a variety of tools to minimize administrative burdens. Most motions can be resolved on a paper record, *Spencer*, 727 F.3d at 1091, and the prisoner need not be transported to the hearing, 28 U.S.C. § 2255(c). A judge can summarily dismiss the motion without a hearing if she determines based on the existing record "that the prisoner is entitled to no relief," *id.* § 2255(b), an option judges regularly employ. *See, e.g.*, *Anderson v. United States*, 762 F.3d 787, 792 (8th Cir. 2014). And judges are capable of correcting a discrete sentencing error without revisiting any other aspect of the sentence. *See, e.g.*, *United States v. Walterman*, 408 F.3d 1084, 1085 (8th Cir. 2005); *cf. Dillon v. United States*, 560 U.S. 817, 826 (2010) (noting that, when correcting sentences pursuant to retroactive amendments to the Guidelines, district courts simply implement a "limited adjustment to an otherwise final sentence and not a plenary resentencing proceeding").

Additionally, these cases will involve minimal judicial fact-finding. For instance, the facts of Duke's case have not changed since his sentencing. His conviction is still final, and his guilt uncontested. At Duke's resentencing, the judge can adopt the existing presentence report with no additional fact-finding. The only thing that *will* change is his guidelines range, now dramatically lighter absent the weight of the career-offender error.

Lastly, there is no finality interest at stake here that would justify turning a blind eye to the injustice that has been visited upon Duke. The federalism motivations that traditionally animate finality concerns are absent when courts craft a federal fix to a federal problem. *See McCleskey v. Zant*, 499 U.S. 467, 491 (1991). Furthermore, revisiting sentences raises fewer finality concerns than reopening convictions. Resentencings do not confront the "stale evidence" problem to the same degree as retrials, *see Henderson v. Kibbe*, 431 U.S. 145, 154 n.13 (1977), because judges can rely on the trial record and original presentence report, *see Spencer*, 727 F.3d at 1091. While convictions are society's final say on whether the law has been violated, fixing an error in sentencing merely ensures that a convicted offender receives the punishment society believes to be fair and just. *See Whiteside*, 748 F.3d at 555 n.14 ("In short, we simply do not share the view that the criminal justice system is somehow harmed when defendants are sentenced according to a proper understanding and application of the law.").

If the Court denies relief here, it will send a clear message: sentencing a defendant to more than 21 years in prison on the basis of a status he does not deserve is an error too trivial to warrant the minimal imposition necessary to correct it. There is no need to sacrifice Duke's liberty at the altar of "bureaucratic achievement." *Id.* at 555 (citation omitted). This Court should not value "what's 'finished' over what's 'right' and thereby blink[] at a profound miscarriage of justice." *Id.* at 556 (Davis, J., concurring).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed. Petitioner respectfully requests remand for resentencing or, in the alternative, for an out-of-time appeal.

October 17, 2014 Respectfully submitted,

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APPENDIX

The Sixth Amendment to the Constitution of the United States

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

28 U.S.C. § 2255 (2012)
(selected subsections)

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

(b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

(c) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

* * *

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

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

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

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

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

* * *

(h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

* * *

28 U.S.C. § 994 (2012)
(selected subsections)

* * *

(c) The Commission, in establishing categories of offenses for use in the guidelines and policy statements governing the imposition of sentences of probation, a fine, or imprisonment, governing the imposition of other authorized sanctions, governing the size of a fine or the length of a term of probation, imprisonment, or supervised release, and governing the conditions of probation, supervised release, or imprisonment, shall consider whether the following matters, among others, have any relevance to the nature, extent, place of service, or other incidents [sic] of an appropriate sentence, and shall take them into account only to the extent that they do have relevance—

(1) the grade of the offense

(2) the circumstances under which the offense was committed which mitigate or aggravate the seriousness of the offense;

(3) the nature and degree of the harm caused by the offense, including whether it involved property, irreplaceable property, a person, a number of persons, or a breach of public trust;

(4) the community view of the gravity of the offense;

(5) the public concern generated by the offense;

(6) the deterrent effect a particular sentence may have on the commission of the offense by others; and

(7) the current incidence of the offense in the community and in the Nation as a whole.

(d) The Commission in establishing categories of defendants for use in the guidelines and policy statements governing the imposition of sentences of probation, a fine, or imprisonment, governing the imposition of other authorized sanctions, governing the size of a fine or the length of a term of probation, imprisonment, or supervised release, and governing the conditions of probation, supervised release, or imprisonment, shall consider whether the following matters, among others, with respect to a defendant, have any relevance to the nature, extent, place of service, or other incidents of an appropriate sentence, and shall take them into account only to the extent that they do have relevance—

(1) age;

(2) education;

(3) vocational skills;

(4) mental and emotional condition to the extent that such condition mitigates the defendant's culpability or to the extent that such condition is otherwise plainly relevant;

(5) physical condition, including drug dependence;

(6) previous employment record;

(7) family ties and responsibilities;

(8) community ties;

(9) role in the offense;

(10) criminal history; and

(11) degree of dependence upon criminal activity for a livelihood.

The Commission shall assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders.

* * *

(h) The Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years old or older and—

(1) has been convicted of a felony that is—

(A) a crime of violence; or

(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and chapter 705 of title 46; and

(2) has previously been convicted of two or more prior felonies, each of which is—

(A) a crime of violence; or

(B) an offense described in section 401 of the Controlled Substances Act (21 U.S.C. 841), sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act (21 U.S.C. 952(a), 955, and 959), and chapter 705 of title 46.

* * *

U.S. Sentencing Guidelines Manual § 4B1.1 (2008)

(selected subsections)

(a) A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

(b) Except as provided in subsection (c), if the offense level for a career offender from the table in this subsection is greater than the offense level otherwise applicable, the offense level from the table in this subsection shall apply. A career offender's criminal history category in every case under this subsection shall be Category VI.

Offense Statutory Maximum	**Offense Level**
(A) Life	**37**
(B) 25 years or more	**34**
(C) 20 years or more, but less than 25 years	**32**
(D) 15 years or more, but less than 20 years	**29**
(E) 10 years or more, but less than 15 years	**24**
(F) 5 years or more, but less than 10 years	**17**
(G) More than 1 year, but less than 5 years	**12**.

* * *

U.S. Sentencing Guidelines Manual ch. 5, pt. A (2008)

SENTENCING TABLE
(in months of imprisonment)

	Offense Level	Criminal History Category I	II	III	IV	V	VI
	1	0-6	0-6	0-6	0-6	0-6	0-6
	2	0-6	0-6	0-6	0-6	0-6	1-7
	3	0-6	0-6	0-6	0-6	2-8	3-9
	4	0-6	0-6	0-6	2-8	4-10	6-12
	5	0-6	0-6	1-7	4-10	6-12	9-15
Zone A	**6**	0-6	1-7	2-8	6-12	9-15	12-18
	7	0-6	2-8	4-10	8-14	12-18	15-21
	8	0-6	4-10	6-12	10-16	15-21	18-24
	9	4-10	6-12	8-14	12-18	18-24	21-27
Zone B							
	10	6-12	8-14	10-16	15-21	21-27	24-30
	11	8-14	10-16	12-18	18-24	24-30	27-33
Zone C	**12**	10-16	12-18	15-21	21-27	27-33	30-37
				* * *			
	28	78-97	87-108	97-121	110-137	130-162	140-175
	29	87-108	97-121	108-135	121-151	140-175	151-188
	30	97-121	108-135	121-151	135-168	151-188	168-210
	31	108-135	121-151	135-168	151-188	168-210	188-235
	32	121-151	135-168	151-188	168-210	188-235	210-262
	33	135-168	151-188	168-210	188-235	210-262	235-293
	34	151-188	168-210	188-235	210-262	235-293	262-327
Zone D	**35**	168-210	188-235	210-262	235-293	262-327	292-365
	36	188-235	210-262	235-293	262-327	292-365	324-405
	37	210-262	235-293	262-327	292-365	324-405	360-life
	38	235-293	262-327	292-365	324-405	360-life	360-life
	39	262-327	292-365	324-405	360-life	360-life	360-life
	40	292-365	324-405	360-life	360-life	360-life	360-life
	41	324-405	360-life	360-life	360-life	360-life	360-life
	42	360-life	360-life	360-life	360-life	360-life	360-life
	43	life	life	life	life	life	life