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 RESPONDENT

The Elliot L. Richardson Memorial Team

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November 18, 2014 – 7:30 pm
Ames Courtroom
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Oral Argument

QUESTIONS PRESENTED

1. Under the Sixth Amendment, an attorney is obligated to appeal upon request when his client retains the right to appeal as a matter of law. Jaden Duke instructed his attorney to appeal on a ground that he had expressly waived in his plea agreement. Did Duke's attorney render ineffective assistance of counsel by not appealing?

2. Under 28 U.S.C. § 2255, a federal prisoner who claims that his sentencing involved a non-constitutional error may be resentenced only if doing so is necessary to prevent a complete miscarriage of justice. Duke was properly sentenced as a career offender under the advisory United States Sentencing Guidelines, but after an intervening change in law, he would no longer qualify for that designation today. Is he entitled to a new sentence?

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The unreported opinion of the United States Court of Appeals for the Ames Circuit is reproduced at page 2 of the Joint Appendix. The unreported opinion of the United States District Court for the District of Ames is reproduced at page 28 of the Joint Appendix.

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. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (2012).

RELEVANT CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

Pertinent constitutional, statutory, and regulatory provisions are reproduced in the Appendix.

STATEMENT OF THE CASE

This case presents the latest chapter in a series of escalating drug trafficking offenses by Petitioner Jaden Duke. Duke first tangled with the law in 1999, when he was convicted of possession with intent to sell marijuana. J.A. 3. Five years later, he served a ten-month stint in prison and then another two years on probation following a conviction for possession with intent to distribute cocaine. *Id.* Five more years went by, and Duke was at it again, this time toting a loaded 9mm semi-automatic pistol and over 600 grams of crack cocaine. J.A. 10, 26. The government soon indicted him for possession with intent to distribute crack cocaine and possession of a firearm in furtherance of a drug trafficking crime. J.A. 10.

The Guilty Plea and Waiver of Right to Appeal

Adding it all up, Duke faced the prospect of a mandatory life sentence without parole. *See* 21 U.S.C. § 841(b)(1)(A) (2006). But his attorney, Milton Fountain, won him a remarkably favorable offer. J.A. 11–12. In exchange for Duke's plea, the government promised to forego the gun charge, cut the quantity of crack cocaine by a third—to 410 grams—and support a three-level sentencing reduction for acceptance of responsibility. J.A. 11. Perhaps more importantly, the government opted not to seek an enhanced penalty under 21 U.S.C. § 851 (2006). J.A. 3. So the threatened mandatory life sentence gave way to a minimum term of ten years in prison. J.A. 11.

Duke took the deal. As part of the agreement, he explicitly acknowledged the statutory sentencing range, J.A. 11, and that he could be sentenced as a career offender, J.A. 12. He also decided not to appeal unless his sentence exceeded the statutory maximum, and signed a waiver to that effect. *Id.*

Sentencing

Following Duke's plea, the probation office examined his criminal past and concluded, correctly, that he qualified as a "career offender" under Section 4B1.1 of the advisory Sentencing Guidelines. *See* U.S. Sentencing Guidelines Manual § 4B1.1 (2008). That conclusion pushed his base offense level from 34 to 37, and slid his criminal history category across from IV to VI. J.A. 3. The reduction for acceptance of responsibility brought Duke's final offense level down to 34. J.A. 15. Given these figures, the Guidelines suggested a sentence somewhere between 262 and 327 months in prison. *Id.*

On November 1, 2009, Duke stood for sentencing before the Honorable Elise Moore. J.A. 13. Judge Moore made sure that Duke's plea was knowing and voluntary, J.A. 13–14, and then listened as Fountain fought for additional leniency, J.A. 15–17. Duke had faced a tough upbringing, after all, and appeared now to show remorse for his crimes. J.A. 16–17.

Still, there was the large amount of crack cocaine Duke had been caught trying to sell, not to mention his worrisome criminal history. Judge Moore noted the recommendation offered by the advisory Guidelines. J.A. 19. She thought over Duke's individual circumstances and the goals of criminal punishment as

required by 18 U.S.C. § 3553(a) (2006). J.A. 18. Despite misgivings about the career-offender enhancement, she was even more disturbed by Duke's serial recidivism, and the increasingly grave nature of his transgressions. "[T]his is not an isolated incident," she observed. J.A. 19. "This is not a single mistake." *Id.* Ultimately, she settled on a 262-month sentence. *Id.*

Buyer's Remorse

The next day, Fountain decided to check in with Duke to make sure he understood the judgment. J.A. 25. Duke was not happy. His sentence was unfair, he complained, and he had changed his mind: he wanted to appeal. J.A. 22. Surely, some other judge would agree that his sentence was too long. *Id.* But as Fountain pointed out, Duke's waiver squarely forbade him from appealing on that basis. *Id.* Still, Duke was adamant. *Id.* Fountain then explained that Duke's ill-conceived plan would breach his plea agreement and invite the government to "reinstate the gun charge and throw the book at him." J.A. 22, 26. Duke "didn't care"; he was dead set on trying. J.A. 22. Fountain reiterated that an appeal would be immediately dismissed as frivolous. J.A. 26. In the end, Fountain did not file the appeal, and Duke's sentence became final on November 14, 2009. J.A. 4.

A Subsequent Change in Law

Months passed. Then, close to a year after Duke entered federal prison, a change in the law took place. J.A. 4. Back when Duke had been sentenced, the Ames Circuit determined who qualified for the career-offender enhancement by

following the rule of *United States v. Rice*, -- F.3d -- (Ames Cir. 2006). As Duke learned, the career-offender enhancement applies to certain defendants who have previously racked up two qualifying convictions "punishable by imprisonment for a term exceeding one year." U.S.S.G § 4B1.2(b). *Rice* had instructed that a prior conviction met this definition if a hypothetical offender with the worst possible criminal history could have received such punishment. J.A. 4. Both of Duke's previous drug trafficking convictions qualified under the *Rice* methodology. *Id.*

But then this Court handed down *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010), an immigration case that the Ames Circuit decided cast doubt on *Rice*. J.A. 4. In *United States v. Sanchez*, -- F.3d -- (Ames Cir. 2010), a panel reversed *Rice* and held that a defendant's prior conviction is punishable by more than a year in prison only if the defendant himself could have received that punishment. J.A. 4. Under this new rule, Duke's first drug trafficking crime would no longer count against him under the career-offender provision. *Id.* So while Duke's convictions remain valid, if he were resentenced today, he would not qualify as a career offender. *Id.*

Procedural History

Armed with *Sanchez*, Duke filed a habeas petition under 28 U.S.C. § 2255 (2006) raising two issues. First, he alleged that Fountain was ineffective under the Sixth Amendment because he did not appeal. J.A. 4. Second, Duke asked to be resentenced under *Sanchez*. *Id.* After an evidentiary hearing, the District

Court held in favor of the government on both issues. J.A. 29, 31. Duke timely appealed, and the Ames Circuit affirmed. J.A. 9, 32. Both courts reasoned that Fountain was not deficient and Duke suffered no prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984). J.A. 7, 30–31. Additionally, they concluded that there would be no miscarriage of justice in requiring Duke to serve out his sentence. J.A. 9, 31.

This Court granted Duke's petition for certiorari on September 15, 2014. J.A. 1.

SUMMARY OF THE ARGUMENT

I. Jaden Duke cannot continue to bet on a hand he has already folded. He made two decisions in this case: the decision to waive his right to appeal, and the decision to try appealing anyway. The Sixth Amendment protects only the first, and his lawyer was not ineffective for recognizing the game was over.

Strickland v. Washington sets the standard for ineffectiveness. It establishes that a defendant has been deprived of his right to counsel if his attorney performed in a professionally unreasonable manner that caused prejudice. Here, though, Fountain exemplified effective advocacy. By not appealing on waived grounds, he averted a fruitless expedition that would have squandered an incredibly favorable plea agreement. Because "there is no point in a constitutional rule that would yield an exercise in futility," Fountain cannot be deemed ineffective. *Nunez v. United States*, 546 F.3d 450, 456 (7th Cir. 2008).

Although Duke purports to apply *Strickland*, he resists its traditional circumstance-based application. Instead, he urges this Court to install a set of *per se* presumptions. Under his approach, an attorney is both presumptively deficient and presumptively prejudicial if he does not appeal upon request, even when doing so would fly in the face of a waiver.

But these novel presumptions run counter to this Court's Sixth Amendment jurisprudence, and the nearest case on point—*Roe v. Flores-Ortega*, 528 U.S. 327 (1969)—compels the opposite conclusion. Duke grabs at *Flores-Ortega*'s language about *per se* presumptions, but he leaves its reasoning

behind. That mistake makes all the difference because the *Flores-Ortega* Court presumed that defendants retained their right to appeal. Thus, to import its limited *per se* presumptions into the appeal waiver context would be like welcoming a pair of goldfish into the Gobi Desert: they could not survive long in an environment so detached from the critical element that sustains them.

If adopted, Duke's approach would redound to the detriment of criminal defendants everywhere. His presumptions would catapult a bevy of frivolous petitions onto the nation's already beleaguered appellate courts. And this wave of appeals would not benefit criminal defendants—it would cheat them out of an important bargaining chip in plea negotiations and divert judicial resources away from meritorious cases.

In the end, Duke retreats behind an abstract right of autonomy. He marshals extensive evidence that the Sixth Amendment allocates the decision to appeal to the defendant alone. But this case is not about whether the defendant gets to decide if he wants to appeal; it is instead about what happens after he ties his own hands by making that decision. Duke chose not to appeal and sealed his promise with a waiver. By doing so, he exercised the only fundamental decision to appeal that the Constitution grants him.

II. Habeas corpus is an extraordinary remedy that Duke would make routine. This exceptional instrument serves the rule of law by allowing prisoners to challenge the legality of their detention, and to undo their convictions or

sentences if they succeed. Courts issue the writ sparingly and at great cost. But that cost is justified to safeguard the constitutional rights of the accused, and to make sure no person endures a punishment beyond what Congress and the Constitution have authorized.

Duke is a federal prisoner. He bargained his way to a drug trafficking plea, his third such conviction, and received a sentence well within the bounds Congress prescribed. At each step of the way, from his arrest to his incarceration, Duke enjoyed every benefit and protection the law made his.

When Duke entered prison he had no grounds to complain. But then the legal climate changed, and today, the advisory Sentencing Guidelines would no longer call him a career offender. If only he had been caught dealing crack a year later, Duke now laments, he might have gotten a shorter sentence. Of course, he might not, and even if resentenced tomorrow, he could well receive the exact same sentence he has today.

He asks this Court to give him another shot at sentencing anyway, and to expand the scope of habeas corpus in the process. To get what he wants, Duke must demonstrate that if this Court requires him to serve out his original sentence, it would be party to a complete miscarriage of justice.

But stretching the Great Writ on Duke's behalf would run counter to two basic principles that have always guided this Court's habeas jurisprudence: first, that relief must be narrowly confined to protect the law's need for finality, and second, that habeas fulfills its basic purpose so long as lower courts

faithfully apply federal law as it exists at the time a defendant's conviction becomes final.

Unsurprisingly then, Duke's petition finds no support in this Court's precedents. He alleges a mere procedural error that this Court—appropriately—has never found to constitute a miscarriage of justice. Moreover, his claimed error cannot be meaningfully distinguished from a multitude of others that even he agrees are not grave enough to justify the costs of collateral relief.

Vindicating Duke's petition would therefore be deeply unwise. It would obligate the federal courts to do the same in a host of other cases that lie equally beyond the pale of a sensible habeas regime.

This Court should deny Duke's petition.

ARGUMENT

I. GIVEN THE APPEAL WAIVER, DUKE RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.

This Court has often recognized a defendant's power to waive "many of the most fundamental protections afforded by the Constitution." *United States v. Mezzanatto*, 513 U.S. 196, 201 (1995). So when Duke decided to waive his right to appeal, he exercised a fundamental decision that was undoubtedly his to make. But then Duke changed his mind. And while the Constitution protects certain fundamental decisions, going back on one's legally binding word is not among them. Duke cannot now complain that his attorney was ineffective under the Sixth Amendment for not honoring his latest-in-time decision to appeal.

The Sixth Amendment guarantees every criminal defendant the right "to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. This Court has long held that the right to counsel encompasses the right to *effective* assistance of counsel. *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970). As Duke's attorney, Fountain easily cleared the constitutional crossbar under *Strickland*'s seminal test. Undeterred, however, Duke would redefine *Strickland*'s core analysis by plucking a set of *per se* presumptions from *Flores-Ortega*. But *Flores-Ortega* does not apply to a case like Duke's, either by its terms or through its reasoning. And appropriately so, for Duke's attempt to reconfigure *Strickland* to his advantage would harm courts and clients alike. Finally, the autonomy principle that he asserts cannot provide a legal

foundation for a claim that lies well outside the guarantees of the Sixth Amendment.

A. Under *Strickland*, Fountain was not deficient and Duke suffered no prejudice.

Under *Strickland*, a defense attorney is deemed ineffective if (1) his performance "fell below an objective standard of reasonableness," 466 U.S. at 688, and (2) this deficiency "prejudiced the defense," *id.* at 687. Both prongs must be satisfied. *Id.* at 687.

This test is "highly deferential." *Id.* at 689. When evaluating performance, judges must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id. Strickland* also sets a high bar for prejudice: a criminal defendant must show by "a probability sufficient to undermine confidence in the outcome," that "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. Reflecting the need for deference to attorney judgment, *Strickland* eschewed mechanical rules detached from the Sixth Amendment's core concerns and instead endorsed a "circumstance-specific reasonableness inquiry." *Flores-Ortega*, 528 U.S. at 478.

Given this deferential standard, Fountain easily passes both prongs of the traditional *Strickland* test.

1. Fountain acted in a "professionally reasonable" manner.

In this case, Fountain bartered for a favorable plea agreement in his negotiations with the government, even though Duke—already a two-time

convict—had been caught red-handed with a loaded semi-automatic pistol and over six hundred grams of crack cocaine. J.A. 10, 26. After bringing the prosecutor around, Fountain then fought for Duke at sentencing, where he brought key mitigating details to Judge Moore's attention. *See* J.A. 15–17. And finally, though he did not have to, Fountain still visited his client after the hearing because he "wanted to make sure [Duke] understood the judgment." J.A. 25. True, Fountain did not file an appeal. But he knew that Duke had waived that right, and that appealing would imperil the plea agreement. In short, Fountain exemplified a species of zealous advocacy prized in the criminal justice system.

Duke nevertheless faults Fountain for not appealing, charging that he was deficient under *Strickland* because he should have pursued "reasonable alternatives" instead. *See* Pet'r's Br. 21. He tosses out three options: advising Duke not to appeal, filing a frivolous appeal, or withdrawing pursuant to *Anders v. California*, 386 U.S. 738 (1967). But Duke rejected Fountain's advice, J.A. 25–26, and "[i]t is the obligation of any lawyer . . . not to clog the courts with frivolous motions or appeals." *Polk County v. Dodson*, 454 U.S. 312, 323 (1981). Under Duke's logic, then, Fountain and countless attorneys like him have only one choice—*Anders*.

In *Anders*, this Court held that when an attorney finds his client's case to be frivolous, he should request the court's permission to withdraw by submitting a brief that identifies "anything in the record that might arguably support the

appeal." 386 U.S. at 744. Fountain was not deficient, however, simply because he chose not to submit an *Anders* brief that he had no duty to file.

The *Anders* procedure "is not 'an independent constitutional command,' but rather is just 'a prophylactic framework' . . . established to vindicate the constitutional right to appellate counsel." *Smith v. Robbins*, 528 U.S. 259, 273 (2000) (quoting *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987)). Because Duke waived his right to appeal, he necessarily waived any right to appellate counsel, and so forfeited any underlying right upon which to premise an *Anders* requirement.

In any event, prevailing practice does not support the *Anders* requirement Duke seeks. The reality is that attorneys often prefer filing frivolous appeals over complying with the demanding *Anders* procedure, even at the risk of incurring sanctions. *See* Margareth Etienne, *The Ethics of Cause Lawyering: An Empirical Examination of Criminal Defense Lawyers as Cause Lawyers*, 95 J. Crim. L. & Criminology 1195, 1232–34 (2005). In fact, most attorneys complain that preparing an *Anders* brief is actually *more* work than filing an appeal itself. *Id.* at 1232.

In sum, an unprecedented *Anders* requirement would be an exercise in futility that drains the resources of both attorneys and courts. When a defendant seeks to continue his case on waived grounds, counsel should not be held deficient simply because they choose not to file either a frivolous appeal or an *Anders* brief.

2. Fountain did not cause "prejudice" in Duke's case.

Likewise, Fountain did not prejudice Duke under the traditional *Strickland* standard. Duke demanded appealing on a basis—an insufficiently lenient sentence—which fell squarely within the scope of his waiver. J.A. 23. And if Duke had appealed, not only would he have lost quickly, but he also would have triggered a reinstated firearm charge, adding years to his sentence. J.A. 26. In effect, appealing was a no-win proposition, and Duke cannot show with reasonable confidence that but for Fountain's allegedly "unprofessional errors, the result of [that] proceeding would have been different." *Strickland*, 466 U.S. at 694. Only a warped interpretation of the Sixth Amendment could see prejudice in a lawyer's failure to file a petition dead on arrival.

B. *Flores-Ortega*'s *per se* presumptions do not apply to cases involving appeal waivers.

Although he claims to abide by the traditional *Strickland* standard, Duke effectively spurns it. According to him, it is *always* both presumptively unreasonable and presumptively prejudicial to disregard an instruction to appeal. Pet'r's Br. 18, 23. In support, Duke cites one of this Court's cases, *Flores-Ortega*, and asserts that it has already established the set of *per se* presumptions he needs. *See* Pet'r's Br. 17–19, 23–28.

But *Flores-Ortega* does not support Duke's *Strickland* analysis on its face or through its reasoning. And because Duke cannot surmount the high bar set for new *per se* presumptions, this Court should decline his invitation to march into uncharted doctrinal territory under the banner of *Flores-Ortega*.

1. *Flores-Ortega*'s text stands in the way of Duke's attempt to import its presumptions into his *Strickland* analysis.

Flores-Ortega does not help Duke because it did not involve a waiver of the right to appeal. The majority's holding was clear. Applying *Strickland*'s first prong, the majority merely outlined the circumstances where an attorney is deficient for failing to consult his client about the possibility of appeal. *Flores-Ortega*, 528 U.S. at 480. Turning to the second prong, the Court held that a defendant is prejudiced only if he likely would have appealed had his attorney consulted him. *Id.* at 484.

To be sure, as Duke points out, the Court stated broadly that an attorney is *per se* ineffective for refusing to appeal on demand. *See id.* at 477; Pet'r's Br. 17, 23. But the *Flores-Ortega* majority never stated that this language extended to cases involving appeal waivers.

In fact, to the extent that the Court contemplated appeal waivers at all, it recognized that they fell outside the scope of the case before it. While Justice Souter advocated for a more sweeping *per se* presumption requiring attorneys "almost always" to consult with their clients, he still exempted appeal waivers—recognizing that such cases would lie "beyond the margin." *Flores-Ortega*, 528 U.S. at 488 & n.1 (Souter, J., concurring in part and dissenting in part). The majority rejected Justice Souter's rule for going too far, *see id.* at 481, but even *his* far-reaching rule would have excluded cases involving appeal waivers. Duke relies on *Flores-Ortega*, but never acknowledges that, on its face, it does not apply here.

2. *Flores-Ortega*'s reasoning also stymies Duke's attempt to usher its presumptions into the waiver context.

It is unsurprising that *Flores-Ortega*'s text does not reach cases involving appeal waivers because the Court assumed its holding would apply only to criminal defendants who had retained their right to appeal. This basic premise underlies *Flores-Ortega*'s discussion of both *Strickland*'s deficiency prong and its prejudice prong.

a. The Court presumed that defendants retained their right to appeal in its discussion of attorney deficiency.

Under *Flores-Ortega*, an attorney generally does not need to meet with his client to discuss the possibility of appealing if his client has waived that right. After all, *Flores-Ortega* required lawyers to consult with their clients if it would be rational for them to appeal. *See* 528 U.S. at 480. An appeal waiver is "highly relevant" to this inquiry because, barring the anomalous case, no rational defendant would want to engage in a dangerous exercise in futility by appealing on frivolous grounds. *Id.*; *see also id.* at 488 & n.1 (Souter, J., concurring in part and dissenting in part) (excepting waiver cases from the duty to consult). Accordingly, an attorney would have no further duty to consult his client after a waiver, absent some other rational basis for appealing.

On its own, this holding poses a serious puzzle for Duke's argument: if the Court meant to enable defendants to appeal even when they had waived that right, then why would it have absolved attorneys of their obligation to meet with these clients? Rejecting Duke's approach resolves this mystery. The *Flores-Ortega* Court excepted defendants with appeal waivers precisely because the

Sixth Amendment does not protect their autonomy when they would abuse it to file a frivolous appeal.

But Duke's approach would have consequences beyond the casebooks. Not only would it muddle this Court's Sixth Amendment jurisprudence, it would also do real damage to criminal defendants. If this Court holds that the Sixth Amendment requires counsel to heed irrational appeal requests, it will incentivize attorneys to shirk post-sentencing meetings to avoid being saddled with a choice between a frivolous appeal and a charge of ineffectiveness. Duke's approach leads directly to this pernicious result. It seems unlikely, however, that the *Flores-Ortega* Court meant to penalize conscientious counsel, so it must have limited its *per se* presumptions to defendants who could still appeal as a matter of right.

b. The Court also assumed that defendants retained their right to appeal in its discussion of prejudice.

The Sixth Amendment right to counsel is meant to ensure fair and reliable judicial proceedings. *See Strickland*, 466 U.S. at 691–92. An attorney undermines that purpose if he forfeits the entire proceeding by failing to vindicate his client's preserved right to appeal. *See Flores-Ortega*, 528 U.S. at 483. As Duke notes, "prejudice must be presumed" in this situation. Pet'r's Br. 23.

Flores-Ortega recognized, however, that this logic goes only so far when the defendant has waived away his right to appeal. In these cases, an attorney does not deprive his client of access to an appellate proceeding because his client

has already voluntarily deprived *himself* of that right. Counsel cannot take away a right that the client no longer has. *Flores-Ortega* made this point explicitly: it installed a "presumption of prejudice" only when an attorney robs his client of a "judicial proceeding . . . *to which he had a right*." *Id.* (emphasis added). Here, Duke has no right to further review of the issues he wishes to appeal, J.A. 12, 23–24, and therefore Fountain did not cause any prejudice.

Duke responds that this logic is oversimplified for two reasons. First, in Duke's view, a waiver "simply decreases the likelihood the appeal will succeed on the merits"; it "does not extinguish a defendant's right to appeal." Pet'r's Br. 25; *see id.* at 27. But this Court has said just the opposite: "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *see also* Black's Law Dictionary (9th ed. 2009) (defining a "waiver" as "the voluntary relinquishment or abandonment—express or implied—of a legal right"). And although Duke pins his hopes on the chance that the government might elect not to enforce the waiver on appeal, J.A. 9, prejudice does "not depend on the idiosyncrasies of the particular decisionmaker, such as unusual propensities toward harshness or leniency," *Strickland*, 466 U.S. at 695.

Second, Duke points out that even after an appeal waiver, criminal defendants retain a basis for appealing in certain rare cases. *See* Pet'r's Br. 27–28. These defendants, he observes, could still conceivably be prejudiced. But this argument proves too much. Under Duke's logic, *Flores-Ortega* created a set of

per se presumptions for any situation where the mere possibility of prejudice, however remote, still exists. Here, though, Duke demanded appealing on a basis—an insufficiently lenient sentence—that he expressly waived. J.A. 12, 23–24. In other words, he could not possibly have been prejudiced by Fountain's failure to appeal. So even if he retained his right to appeal on *other* grounds, he cannot argue that his attorney was ineffective because he failed to appeal on a *waived* ground. This point is crucial: even if Duke's theory could help other defendants, at the very minimum, he loses under his own logic.

3. Duke cannot overcome the high threshold set by *Strickland* for the creation of new *per se* presumptions.

Duke's argument collapses under the combined weight of *Flores-Ortega*'s text and reasoning. But there is an additional reason for this Court to decline Duke's offer to chalk a prophylactic bright-line rule: doing so would contravene *Strickland*'s commitment to flexible and deferential standards in lieu of rigid judicial decrees.

To be sure, this Court has occasionally been willing to establish *per se* presumptions where deficiency or prejudice is "*so likely* that case-by-case inquiry . . . is not worth the cost." *Strickland*, 466 U.S. at 692 (emphasis added). But Duke fixates instead on the "rare" instance where an attorney fails to recognize a meritorious ground for appeal, Pet'r's Br. 28, even though the sweeping pair of presumptions he advances would drown those special cases in a sea of frivolous petitions like his own. This Court has never rooted *per se* presumptions in picayune possibilities, and it should not start now.

C. Forcing attorneys like Fountain to file frivolous appeals would harm courts and clients alike.

Since the Federal Courts Study Committee first declared an "appellate caseload crisis," total appeals terminated on the merits in federal courts have risen from 21,006 in 1990 to 35,772 last year. *Compare* Admin. Office of U.S. Courts, *Judicial Facts and Figures* tbl.2-2 (2010), *with* Admin. Office of U.S. Courts, *Judicial Business of the U.S. Courts 2013, Statistical Tables June 2013* tbl.B-5 (2013). Of those appeals, ninety-four percent—33,523—lacked merit. *Id.*; *see also* Honorable Roger J. Miner, *"Dealing with the Appellate Caseload Crisis": The Report of the Federal Courts Study Committee Revisited*, 57 N.Y.L. Sch. L. Rev. 517, 519–20 (2012) (describing methodology).

Against the backdrop of this already overburdened court system, Duke's rule would forge a constitutional duty that forces attorneys to file requested appeals that even he admits would almost always be frivolous. *See* Pet'r's Br. 28. In contrast, the traditional *Strickland* standard strikes a sensible balance between protecting courts from frivolous litigation and ensuring that meritorious cases are heard. Departing from this traditional approach would thus harm courts and criminal defendants alike.

1. A new set of *per se* presumptions would burden the already beleaguered court system.

The criminal justice system relies on plea bargaining and appeal waivers. Plea bargains are necessary because they lead to prompt dispositions without which the government "would need to multiply by many times the number of judges and court facilities." *Santobello v. New York*, 404 U.S. 257, 260 (1971).

Waivers of appeal serve the same function, ensuring that a final judgment accepted by both parties will not disintegrate and trigger endless re-litigation simply because one side has had a change of heart and reneged on his promise.

But waivers lose their force if defendants can still compel their attorneys to appeal. Although the cost of appealing in the teeth of a waiver might discourage some defendants, *see* Pet'r's Br. 29, not everyone will be deterred. *See Campbell v. United States*, 686 F.3d 353, 359 (6th Cir. 2012) (listing examples). Like Duke, many defendants will want to appeal—despite impossible odds—simply because they feel that their sentence is "unfair." J.A. 24.

More worrisome than the sheer number of petitions, however, is the prospect of chiseling an utterly hollow procedure into the effective assistance standard. Because the traditional *Strickland* analysis would ultimately catch the rare meritorious case, Duke's approach can only add to the already unacceptable number of meritless appeals. These clunkers—ostensibly quick and painless to throw out—are in fact always and immediately taxing upon the circuit courts. *See* Etienne, *supra*, at 1236. Duke's *per se* presumptions would therefore burden the courts in vain.

In response to these concerns, some circuits have suggested that these presumptions would be no more onerous than applying traditional *Strickland* because both approaches still allow for collateral review. *See, e.g.*, *United States v. Poindexter*, 492 F.3d 263, 272 (4th Cir. 2007); *Campusano v. United States*, 442 F.3d 770, 776 (2d Cir. 2006). But this misses two points. First, Duke's rule

would require courts to consider a bevy of meritless *direct* appeals—both immediately after sentencing and after a successful collateral attack. Second, although collateral review remains available under either approach, Duke's unleashes far *more* collateral appeals. Convicts will be incentivized to stretch the truth in an evidentiary hearing that pits their word against their attorney's over whether there was an instruction to appeal. *See, e.g.*, *id.* at 267; *Nunez*, 546 F.3d at 453; *United States v. Garrett*, 402 F.3d 1262, 1264 (10th Cir. 2005). Given the odds, convicts hoping to find a more lenient judge will be eager to try their luck.

2. A new set of *per se* presumptions would sacrifice the best interests of criminal defendants in vain.

Duke portrays this case as a battle between a defendant's autonomy and an attorney's "usurpation" of it. Pet'r's Br. 16. But this framework ignores how his proposed rule is most dangerous for criminal defendants themselves. In fact, it would harm defendants everywhere in exchange for illusory benefits to a select few.

A new set of *per se* presumptions would impose two large costs on criminal defendants. First, Duke's rule would cheapen the value of every defendant's bargaining chips while stacking the deck against criminal defendants in the future. When prosecutors include appeal waivers in plea agreements, they expect defendants to hold up their side of the bargain, and as a result, are willing to offer greater concessions. *See* Nancy J. King & Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 Duke L.J. 209, 230–38 (2005).

But "prosecutors cannot be fooled in the long run"—a rule that makes it easier for defendants to welsh on their promises will reduce the value of appeal waivers to prosecutors, and thereby rob defendants of valuable leverage. *United States v. Wenger*, 58 F.3d 280, 282 (7th Cir. 1995). True, prosecutors may still use waivers to narrow the scope of direct appeals, but Duke would nevertheless require them to expend scarce resources filing responsive briefs and determining which dropped charges to reinstate.

Second, Duke's rule directs resources away from meritorious cases and toward frivolous appeals, stretching the blanket of appellate review further and further and leaving worthier defendants out in the cold. Worse, Duke's rule could generate an unfortunate but utterly predictable fatigue among reviewing courts. When judges must search a haystack for a needle, they are "likely to end up with the attitude that the needle is not worth the search." *Brown v. Allen*, 344 U.S. 443, 537 (1953) (Jackson, J., concurring in the judgment). This lesson is especially relevant in the context of the he-said-she-said evidentiary hearings proposed by Duke. And when dockets swell, judges may be tempted to substitute speed for care. *Argersinger v. Hamlin*, 407 U.S. 25, 35 (1972).

On the benefits side of the ledger, Duke largely draws a blank. He has given this Court no reason to believe that he might win a reduced sentence on appeal. Even the circuits that have upheld his preferred rule recognize that defendants like Duke are "probably lucky to have a lawyer who exercised such wise judgment" and refused the instruction to appeal. *United States v. Sandoval-*

Lopez, 409 F.3d 1193, 1197 (9th Cir. 2005). Had Fountain complied with Duke's demand, Duke would now face a reinstated firearm charge and a potentially much longer sentence. J.A. 26. Under these conditions, demanding that one's lawyer appeal is like demanding that one's doctor transplant an appendix—high risk, no reward, almost certain harm, and inevitably futile. *Cf. Sandoval-Lopez*, 409 F.3d at 1197.

D. Duke cannot fall back on a principle of autonomy to guide his *Strickland* analysis.

From the start, Duke takes a fundamentally different view of the Sixth Amendment, one that rests on a single theme: the "right to exercise his personal autonomy in making certain fundamental decisions." Pet'r's Br. 14; *see also id. passim*. This thematic simplicity is undeniably seductive. But under scrutiny, his theory of the case falls apart. In the first place, Duke never clarifies whether he imagines an absolute right of autonomy or a more limited conception. More problematically, though, under either reading, Duke glosses over the fundamental questions of this case: whether and how a valid waiver alters the nature of his right to appeal.

1. The Sixth Amendment does not protect an absolute right of autonomy.

At first, Duke appears to suggest that an absolute "right of personal autonomy" stands apart from any right to counsel. The right to counsel, he asserts, only "complements—rather than supplants—the defendant's right to exercise his personal autonomy." Pet'r's Br. 14.

But if Duke means to endorse an absolute right of autonomy, then he has not explained why this Court should buck decades of contrary precedent. This Court has flatly rejected the argument that "the function of counsel under the Sixth Amendment is to protect the dignity and autonomy of a person on trial by *assisting* him in making choices that are his to make." *Jones v. Barnes*, 463 U.S. 745, 759 (1983) (Brennan, J., dissenting). Instead, it has repeatedly affirmed that any right of autonomy protected by the right to counsel is not absolute, and exists only to serve the larger purposes of the Sixth Amendment. *See, e.g.*, *Indiana v. Edwards*, 554 U.S. 164, 171 (2008); *Martinez v. Court of Appeals of Cal.*, 528 U.S. 152, 161 (2000); *McKaskle v. Wiggins*, 465 U.S. 168, 182 (1984).

Ignoring this line of precedent, Duke rustles up language from *Faretta v. California*, 422 U.S. 806 (1975). But *Faretta* is inapposite. It upheld the right of self-representation based on structural and historical arguments not applicable to this case. *Id.* at 821–32; *see also Martinez*, 528 U.S. at 156. Moreover, this Court has never extended *Faretta* beyond self-representation at trial despite numerous opportunities to do so. *See, e.g.*, *Martinez*, 528 U.S. at 154.

An absolute right of autonomy also runs headlong into the American Bar Association's Standards, which similarly recognize limits on a lawyer's duty to follow any and all client directives. Rather than assuming that defendants can control their entire case, these standards hand only certain fundamental decisions to clients—decisions like entering into a plea agreement or waiving rights. *See* Model Rules of Prof'l Conduct R. 1.2 (2011). They also expressly

direct counsel "not [to] bring or defend a proceeding . . . unless there is a basis in law and fact for doing so that is not frivolous." *Id.* R. 3.1; *see also McCoy v. Court of Appeals of Wis.*, 486 U.S. 429, 436 (1988). Once again, the autonomy principle is not absolute. Client autonomy is not protected simply for client autonomy's sake.

2. Alternatively, Duke's limited conception of autonomy is conclusory.

Then again, Duke also appears to argue for a more limited right of autonomy over fundamental decisions. Pet'r's Br. 14. But here too he has skipped over the most crucial step in his argument: explaining where this right ends, and why this case implicates a fundamental decision despite the waiver.

At most, Duke assumes what he sets out to prove. He marshals extensive evidence that the "choice to appeal belongs solely to the defendant." Pet'r's Br. 15. But this point is not contested; indeed, this Court has unequivocally said so. *See Barnes*, 463 U.S. at 751. Instead, the question is whether the right to counsel protects not only a defendant's decision to sign a binding waiver, but also his later decision to breach it.

Duke cannot answer this question without first determining where the right of autonomy ends. And to guide that inquiry, this Court has repeatedly held that "'the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial' or a fair appeal." *Flores-Ortega*, 528 U.S. at 482 (quoting *United States v. Cronic*, 466 U.S. 648, 658 (1984)). It follows that courts can

"illuminate[]" the substantive scope of the right to counsel only "by reference to [that] underlying purpose." *Cronic*, 466 U.S. at 655. Thus, the Sixth Amendment protects client autonomy—like any other abstract principle—only to the extent necessary to ensure that a defendant receives what he is due. *See Strickland*, 466 U.S. at 691–92.

When a defendant validly waives his right to an appellate proceeding, he necessarily surrenders with it any interest in the reliability and fairness of that abandoned appeal. *Cf. Flores-Ortega*, 528 U.S. at 489 (Souter, J., concurring in part and dissenting in part). In this case, Duke forfeited his right to appeal as a matter of law, and he cannot now rely on a principle of autonomy to resurrect that right.

Duke never grapples with these issues. In his eyes, defendant autonomy is always paramount, "waiver be damned." Pet'r's Br. 19. But "the right to appeal that has been waived stands on a different footing from a preserved right to appeal, both conceptually and in relation to counsel's duty to his client." *United States v. Mabry*, 536 F.3d 231, 242 (3d Cir. 2008). Duke fixates on his conceded power over the initial decision to appeal, but blunders in equating it with his later change of heart. Waivers are not mere parchment barriers; once signed, they constitute a "fundamental decision" that cannot be overturned. For that reason, this Court should hold that Duke received effective assistance of counsel.

II. DUKE IS NOT ENTITLED TO HABEAS RELIEF BECAUSE THERE WOULD BE NO MISCARRIAGE OF JUSTICE IF HE IS REQUIRED TO SERVE OUT HIS SENTENCE.

Duke would have this Court vacate his sentence because Judge Moore labeled him a career offender and sentenced him with that designation in mind. Not that she did anything wrong: to the contrary, she faithfully and correctly applied clear federal law as it existed in 2009, when Duke stood in her courtroom as a thrice-convicted drug trafficker awaiting sentencing. But then the law changed, and under *Sanchez*, Duke would escape the career-offender label today. In turn, his advisory Guidelines range would go down. Nothing else would change: not the criminality of his underlying conduct, not the range of punishment the law carves out for him, and not the validity of his two prior convictions.

Despite all this, Duke urges this Court to throw out his sentence on habeas review. To get what he wants, Duke must demonstrate that he will suffer a complete miscarriage of justice unless he is resentenced under *Sanchez.* But a prisoner like Duke is not entitled to habeas relief simply because an intervening change in law would peel off a career-offender label under the advisory Sentencing Guidelines, especially when removing the enhancement would have no effect on his mandatory minimum or statutory maximum punishment.

Accordingly, this Court should refuse to vacate Duke's sentence for three reasons. First, granting relief here would be deeply inconsistent with the core principles of federal habeas review. Second, and for that very reason, Duke's claim cannot be reconciled with this Court's precedents or distinguished from a

host of other sentencing errors that all agree should not afford post-conviction relief. Finally, holding for Duke would unleash a wave of collateral litigation on the federal courts.

A. The fundamental principles of habeas review make clear that Duke's petition should be denied.

This Court is being asked to create a new ground for collateral relief. Granting Duke's petition would give prisoners who are properly sentenced under the advisory Guidelines the power to demand resentencing any time the law changes—perhaps years after their convictions become final—provided only that they might receive a lighter punishment under the new regime. Duke is not the first to ask this Court to broaden the scope of habeas corpus. But every time this Court has considered doing so, it has always proceeded with two foundational principles in mind. First, habeas must respect the finality of criminal convictions. Second, the fundamental purpose of habeas review is to ensure that each defendant's case complied with prevailing law.

Time and again this Court has instructed that finality is "[o]ne of the law's very objects," *McCleskey v. Zant*, 499 U.S. 467, 491 (1991), indeed, "essential to the operation of our criminal justice system," *Teague v. Lane*, 489 U.S. 288, 309 (1989). Finality resonates throughout this Court's jurisprudence because it sustains a host of values that justice holds dear: the courts' ability to resolve primary disputes, *McCleskey*, 499 U.S. at 491; the time and resources of prosecutors and defense counsel, *Whiteside v. United States*, 748 F.3d 541, 568 (4th Cir. 2014), *vacated pending reh'g en banc* (4th Cir. 2014) (Wilkinson, J.,

dissenting); closure for victims, *id.*; public confidence in the justice system, *United States v. Addonizio*, 442 U.S. 178, 184 n.11 (1979); and the law's deterrent effect, *Teague*, 489 U.S. at 309. Each depends on society's healthy ability to move on after the opportunity for trial and appeal—with their robust array of substantive and procedural safeguards—has come to a close.

Alongside finality, this Court has long stressed that the Great Writ exists to make sure trial courts faithfully apply governing federal law. *Sawyer v. Smith*, 497 U.S. 227, 234 (1990); *Desist v. United States*, 394 U.S. 244, 262–63 (1969) (Harlan, J., dissenting). By providing yet another opportunity for prisoners to attack their convictions and sentences, habeas secures obedience to constitutional and statutory commands prevailing at the time their cases become final. *Saffle v. Parks*, 494 U.S. 484, 488 (1990). This objective ranks "[f]oremost" among "the underlying purposes of the habeas writ." *Id.*; *United States v. Martinez*, 139 F.3d 412, 415–16 (4th Cir. 1998).

Duke's requested expansion would undermine both principles. Emphatically, habeas does not exist to redo procedures that only appear deficient in the light of subsequent changes. *Sawyer*, 497 U.S. at 234; *Sunal v. Large*, 332 U.S. 174, 182–83 (1947). For that very reason, this Court has largely blocked prisoners like Duke from seizing on intervening changes in law "to upset the finality of . . . convictions valid when entered." *Sawyer*, 497 U.S. at 234.

To be sure, the scope of habeas reflects a delicate balance. It sets off the pressing need for finality against the risk of imprisoning the innocent or

imposing sentences not authorized by law. Duke asks this Court to recalibrate that balance, though his proposal would strike a blow to finality without freeing a single innocent man, lifting one unlawful sentence, or rectifying any misstep actually committed at trial or sentencing. Duke's request finds no home among the core principles of habeas.

B. Duke is not entitled to a new sentence simply because current law would no longer label him a career offender.

Duke grabs hold of the *Sanchez* decision and would use it to discredit his initial sentencing. He alleges an error that is neither jurisdictional nor constitutional. Even if Duke is in fact the victim of a sentencing error, he would be entitled to habeas relief only if he can make an extraordinary showing: that mistakenly applying an advisory career-offender enhancement constitutes "a fundamental defect which inherently results in a complete miscarriage of justice." *Davis v. United States*, 417 U.S. 333, 346 (1974) (quoting *Hill v. United States*, 368 U.S. 424, 428 (1962)).

By any measure, Duke fails this test. First, his request clashes with this Court's precedents—an unsurprising fact given that his petition is at odds with the underlying principles of habeas corpus. And second, Duke's alleged injustice is not meaningfully different from a host of Guidelines errors that even he agrees are not redressable on collateral review.

1. This Court's precedents foreclose Duke's claim.

When considering habeas petitions alleging non-constitutional errors, this Court has established a fundamental divide between substantive and

procedural errors. Substantive errors occur when a change in the law reveals that someone sits in prison for an act the law no longer makes criminal, or endures a punishment the law could no longer impose. *See Davis*, 417 U.S. at 346; *Saffle*, 494 U.S. at 494–95. Procedural errors infect only the methods used to determine a defendant's culpability or to select his appropriate punishment. *See Schriro v. Summerlin*, 542 U.S. 348, 353 (2004).

This Court has never classified a non-constitutional procedural error as a miscarriage of justice. It has considered this question five times. And every time, this Court has held the inmate's claim non-cognizable.[1] This lackluster record should surprise no one. Procedural errors bear only an attenuated relationship to guilt or innocence, so they are not worth the high costs of reopening a case that is already final—especially when the error is non-constitutional.

By contrast, a change in substantive law can indeed reveal that a person's continued imprisonment would constitute a miscarriage of justice. This Court's decision in *Davis* supplies the paradigmatic example. In *Davis*, the new law decriminalized the conduct that landed the petitioner in prison. Denying him the benefit of the intervening law would have been to punish him "for an act that the law does not make criminal." *Davis*, 417 U.S. at 346. As a result, the intervening change yielded a substantive error worthy of collateral relief. *Id.* at 334.

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[1] *See Peguero v. United States*, 526 U.S. 23, 24 (1999); *Reed v. Farley*, 512 U.S. 339, 342 (1994); *Addonizio*, 442 U.S. at 179; *United States v. Timmreck*, 441 U.S. 780, 783–84 (1979); *Hill*, 368 U.S. at 426.

But the change in law Duke invokes falls squarely within the procedural camp, and his alleged error is therefore non-cognizable under this Court's precedents. It is not hard to see why: *Sanchez* has no effect on the legality of Duke's admitted conduct (selling crack cocaine is still very much criminal). And resentencing Duke in accordance with *Sanchez* would have no effect on the range of punishment the law may visit upon that conduct (Duke would face ten years to life with or without the career-offender tag). Therefore, *Sanchez* cannot be a substantive rule.

Instead, *Sanchez* is procedural. Giving Duke the benefit of its rule would change only the method by which a court calculates his advisory Guidelines range en route to selecting an appropriate sentence. Specifically, before *Sanchez*, Duke qualified as a career offender under one methodology—the "hypothetical offender" approach—whereas after *Sanchez*, a court would look instead to his actual prior convictions. The advisory range this new method spits out will be different, but Duke's substantive liabilities are unchanged.

Undaunted, Duke offers a different reading. He accepts that this Court's habeas jurisprudence establishes a divide between substantive and procedural errors. *See* Pet'r's Br. 35–37. But he contends that his error is akin to the substantive defect in *Davis* and other cases. Pet'r's Br. 35. Further, he maintains that his error "stands a world apart" from the innocuous procedural slip-ups in cases like *Timmreck* and *Hill*, which denied relief for violations of the Federal

Rules of Criminal Procedure. Pet'r's Br. 36 (citing *Timmreck*, 441 U.S. at 785; *Hill*, 368 U.S. at 429).

Duke is half wrong and half right, but comes up short regardless. First, he is wrong to suppose that his petition alleges a substantive error at all analogous to *Davis* and the other authorities he cites. And while he may be right that the alleged error in his case was more influential than the bland procedural violations in *Timmreck* and *Hill*, that alone will not afford him relief.

Turning away from the cases empty-handed, Duke contends that the text of Section 2255 mandates relief to at least some prisoners who were sentenced below their statutory maximums. The government can prevail here even if Duke is right. That being said, he plainly misreads the statute.

a. Duke derives no support from the authorities he invokes.

Appropriating *Davis*'s vocabulary, Duke tries to shoehorn his alleged error into the substantive category by insisting that he "was punished for an act that the law no longer deems punishable under § 4B1.1." Pet'r's Br. 35. This argument sounds plausible but is ultimately confused: the career-offender provision does not deem a single act unlawful. It is not a statute of conviction; it imposes no substantive liability. It could be repealed tomorrow and the scope of the criminal law would not contract an inch. True, when *Sanchez* altered its meaning, Duke's status under the advisory Guidelines changed. But floor to ceiling, Duke's exposure to punishment is undisturbed.

Unsurprisingly then, Duke derives no support from the authorities he invokes. *Johnson v. United States*, 544 U.S. 295 (2005), and *Narvaez v. United*

States, 674 F.3d 621 (7th Cir. 2011), offer no help because each involved a sentencing error perpetrated when the Guidelines were mandatory. But the Guidelines no longer *are* mandatory—something Duke nowhere acknowledges—and this simple fact dooms his analogy.

First, the victim of an erroneous *mandatory* enhancement can plausibly argue that he has experienced a substantive error, precisely because revising his range would alter the amount of punishment a judge has authority to bestow. *Narvaez*, 674 F.3d at 627 n.11. Indeed, such a petitioner can persuasively maintain that his erroneously enhanced sentence "exceeded the maximum authorized by 'law.'" *Hawkins v. United States*, 706 F.3d 820, 822 (7th Cir. 2013), *opinion supplemented on denial of reh'g*, 724 F.3d 915 (7th Cir. 2013), *and cert. denied*, 134 S. Ct. 1280 (2014). The opposite is true now that the Guidelines are advisory.

Moreover, today, sentencing judges cannot even *presume* that the Guidelines are reasonable. *Gall v. United States*, 552 U.S. 38, 50 (2007). Indeed, at all times relevant to Duke, district courts have enjoyed broad authority to reject advisory Guidelines recommendations based on policy disagreements. *Spears v. United States*, 555 U.S. 261, 266 (2009). This freedom is only heightened by every judge's obligation to consider each defendant's individualized circumstances and to craft a sentence consistent with the purposes of criminal punishment. 18 U.S.C. § 3553(a) (2012); *Gall*, 552 U.S. at 50.

The Guidelines' advisory nature is not merely theoretical: in career-offender cases, judges sentence below the advisory Guidelines range 70 percent of the time. *See* U.S. Sentencing Comm'n, *Quick Facts: Career Offenders* (2014) [hereinafter U.S.S.C. *Quick Facts*]. Given that reality, "[a]n error in the interpretation of a merely advisory guideline is less serious," and therefore "it is not a proper basis for voiding a punishment lawful when imposed." *Hawkins*, 706 F.3d at 824.

Finally, Duke cannot reasonably compare himself to the petitioner in *Johnson*. Johnson had been sentenced as a career offender, but this Court said (in dicta) that he might deserve a new sentence after one of his prior convictions was invalidated. He and Duke have little in common. Not only was Johnson sentenced under the mandatory Guidelines, but his vacated convictions were obtained in violation of his right to counsel. *Johnson*, 544 U.S. at 300–01. Habeas petitions like Johnson's are therefore "of constitutional dimension." *Mateo v. United States*, 398 F.3d 126, 136 (1st Cir. 2005). Similarly, Johnson's petition raised due process concerns because, after his prior conviction was vacated, his sentence enhancement lacked a valid *factual* basis. *See, e.g.*, *Goldman v. Winn*, 565 F. Supp. 2d. 200, 210 (D. Mass. 2008). Either or both of these constitutional issues might explain why the *Johnson* Court never even mentioned the *Davis* "miscarriage of justice" test, which after all applies only to non-constitutional errors.

Duke relies on new law rather than a new fact, though, and his petition does not implicate the Constitution in any way. Pet'r's Br. 10. Unlike Johnson, if Duke is resentenced his sentencing judge "could, would, and should" consider his prior convictions. *Whiteside*, 748 F.3d at 563 (Wilkinson, J., dissenting). Duke's case presents none of the circumstances that might justify relief for a prisoner whose predicate convictions are later invalidated.

b. Prejudice alone is not sufficient to warrant collateral relief.

Duke has conflated his case with those alleging cognizable substantive errors. But he also insists that his petition asserts a more serious error than those involved in procedural cases where relief was denied. Pet'r's Br. 36. Specifically, Duke suggests that unlike the defendants in *Timmreck* and *Hill*, he is likely to receive a shorter sentence if given the chance. Maybe. But no matter how plausible those speculations, this Court's precedents make clear that Duke offers a distinction without a difference.

In fact, this Court rejected a strikingly comparable theory in *Addonizio*, where the defendant wanted relief because his judge imposed a sentence that seemed unjust after an intervening change in the Parole Commission's procedures. And although in Addonizio's case there was no doubt that his error was deeply harmful—he had already been resentenced and set free—this Court had no difficulty sending him back to prison. *Addonizio*, 442 U.S. at 183. Even undisputed prejudice will not necessarily warrant relief.

The Fourth Circuit reached the same conclusion in *United States v. Mikalajunas*, 186 F.3d 490 (4th Cir. 1999), an outcome Duke fully endorses.

Pet'r's Br. 43–44. Like Duke, Mikalajunas used an intervening change in law to complain that he had received an erroneous sentencing enhancement; like Addonizio, Mikalajunas won a reduced sentence, specifically by 52 months. *Id.* at 492. But the Fourth Circuit reversed, reinstating the original sentence despite the obvious harm inflicted by his Guidelines error. *Id.* at 496.

In short, Duke cannot win relief simply by showing that he is likely to get a shorter sentence if this Court grants his petition. The Great Writ is not meant to correct any and all sentencing errors, even demonstrably harmful ones.

c. Duke misreads the text of Section 2255.

Finally, Duke looks at the text of Section 2255(a) and concludes that relief *must* be available to at least some prisoners who, like him, suffered non-constitutional errors but still received sentences below their statutory maximum. Pet'r's Br. 40. The government can prevail here even if Duke is right, because his reading of the statute would not necessarily place himself among the class of offenders he asserts is entitled to relief. Nevertheless, Duke misreads the statute.

Section 2255(a) merely says that a prisoner has the right to *petition* for a new sentence if he suffered a non-constitutional error. It does not guarantee him the right to *relief* as a remedy for such an error. And Section 2255(b) makes clear that a petitioner is guaranteed relief *only* if his "judgment was rendered without jurisdiction" or if "the sentence imposed [on him] was not authorized by law." 28 U.S.C. § 2255(b). Neither condition applies to Duke, who concedes that he received a "punishment the law permits." Pet'r's Br. 35. And in every other

case—especially cases like Duke's—Section 2255(b) grants courts discretion to expand or contract the scope of relief in accordance with the principles of habeas. *Cf. Withrow v. Williams*, 507 U.S. 680, 715–16 (1993) (Scalia, J., concurring in part and dissenting in part).

Thus, it would be perfectly consistent with the text of Section 2255 to hold that a prisoner claiming a non-constitutional error may win relief only if he received a sentence that exceeded the statutory maximum, or which the law otherwise had no authority to impose. The statute may not require this rule, but contrary to Duke's reading, neither does the statute forbid it.

2. Misapplication of the career-offender enhancement cannot be distinguished from a host of other non-cognizable sentencing errors.

Given the high costs of habeas relief, Duke concedes that so-called "ordinary" sentencing errors—including the 52-month error in *Mikalajunas*—cannot be redressed on collateral review. Pet'r's Br. 43–44. The courts of appeals agree. *See, e.g.*, *Mikalajunas*, 186 F.3d at 496 (collecting cases). In other words, Duke has no problem allowing those inmates to sit out their sentences. Nevertheless, he insists that refusing to correct a career-offender error inherently works a complete miscarriage of justice.

He gives two basic reasons to draw the line at career-offender mistakes. One equates Section 4B1.1 with a branding iron, and claims that the career-offender label categorically imposes a greater stigma than other Guidelines enhancements. *E.g.*, Pet'r's Br. 37. The other zeroes in on the number of months the enhancement adds to a typical sentence. *E.g.*, Pet'r's Br. 37. Neither

distinction stands up under scrutiny. Simply put, Duke's error is not so different from ordinary Guidelines errors to justify the extraordinary remedy he seeks.

a. The career-offender "brand" is not more damaging than other Guidelines designations.

To start, the evidence discredits Duke's theory that the career-offender "brand" generally imposes a greater stigma than other Guidelines designations. If Duke were right, one would expect judges to afford greater deference to the Guidelines when they sentence career offenders. But the opposite is true. In 2012, judges sentenced below the career offender–enhanced Guidelines recommendation 70 percent of the time, *see* U.S.S.C. *Quick Facts*, compared to only 46 percent of the time in all other cases, *see* U.S. Sentencing Comm'n, *2012 Sourcebook of Federal Sentencing Statistics* tbl.N [hereinafter *2012 Sourcebook*].

Moreover, the variations are substantial: when the sentencing judge in a career-offender case departs on his own initiative, the average sentence falls 68 months below the recommended range. U.S.S.C. *Quick Facts*. When the government suggests lenience, average sentences fall upwards of 80 months. *Id.* Given these statistics, it is untenable to say that the career-offender label is somehow harder to shake than other sentencing designations, or that it drops an "anchor" heavier than any other.

b. The career-offender enhancement does not impact sentences in an extraordinary way.

Moving beyond the career-offender enhancement's supposed brand power, Duke contends that it stands apart from the rest because it exerts a uniquely

severe impact on defendants' sentences. Pet'r's Br. 37–40. But "ordinary" errors can impact a sentence in much the same way that the career-offender enhancement typically does.

Consider first the average impact of the career-offender enhancement. In 2012, 75 percent of career offenders were sentenced for a drug trafficking conviction, and the most common criminal history category before the enhancement was VI. *See* U.S.S.C. *Quick Facts*. Of defendants with these characteristics, those tagged as career offenders received sentences 39 months longer, on average, than the unenhanced members of the same group. *See 2012 Sourcebook* tbl.14. Drug traffickers with pre-enhancement criminal history category V saw a 53-month boost; drug traffickers with criminal history category IV (Duke's category) saw a 63-month boost. *Id.*

A so-called "ordinary" enhancement could easily work a comparable or even bigger boost. As mentioned above, the petitioner in *Mikalajunas* mistakenly received an "ordinary" two-level enhancement that lengthened his actual sentence by 52 months. *See* 186 F.3d at 492. The Fourth Circuit had no trouble saying this error did not effect a miscarriage of justice, and Duke agrees. Pet'r's Br. 43–44.

Similar scenarios spring readily to mind. Imagine that instead of the career-offender enhancement, Duke had mistakenly received an "ordinary," two-level boost for recklessly endangering another person during flight from a police officer. *See* U.S.S.G. § 3C1.2. That "ordinary" error would have added 52 months

to the lower bound of his advisory Guidelines range. That is smack in the middle of the average career-offender boosts (calculated two paragraphs ago) for drug traffickers with criminal history categories IV, V, and VI. And depending on the amount of crack cocaine involved, an improper two-level enhancement could add up to 68 months to the lower bound of a Guidelines range; it could also endorse a *life* sentence. *See* U.S.S.G. ch. 5, pt. A. In short, "ordinary" enhancements can boost a defendant's Guidelines range by an amount on par with the typical sentence increase actually attributable to the career-offender enhancement.

For his part, Duke tries to establish the extraordinary status of the career-offender enhancement by proposing three different comparisons. But each one exaggerates the force of the provision, undermining his "miscarriage of justice" theory.

First, he reports that career offenders faced median sentences 91 months longer than non–career offenders who have criminal history category VI. Pet'r's Br. 32. But Duke's career-offender group includes only those convicted of serious drug and violent crimes, whereas the non–career offender group includes every category of crime, even low-level crimes that could never trigger the enhancement. The non–career offender group's median sentence thus appears lower than it would if the two groups were truly comparable, so it overstates the impact of the enhancement.

Second, Duke looks at defendants who began with a criminal history category below VI, and contends that the career-offender enhancement elevated

their median Guidelines range from 92–115 months to 262–327 months. Pet'r's Br. 37. But those numbers are wrong: they leave out the 14 percent of non–category VI defendants whose crimes are so heinous—murderers, for example—that the enhancement had no impact on their base offense level. *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). Duke's 92–115 figure would have shot up if those offenders had been included. And even though the 262–327 number might have gone up as well, the *gap* between the two ranges would be considerably narrower. Thus, Duke's comparison once again exaggerates the impact of the enhancement.

Third, Duke points out that career offenders receive mean sentences three times longer than non–career offenders. Pet'r's Br. 37. This figure is practically meaningless. By definition, career offenders are sentenced only for serious drug and violent crimes, so it is unhelpful to compare them to the whole universe of lawbreakers.

In sum, Duke has drawn up a short list of cognizable Guidelines errors, but his list lacks a compelling rationale. It fails to show why career-offender errors are categorically different from "ordinary" errors, and why Duke has suffered a miscarriage of justice whereas other petitioners have not.

C. Granting Duke relief would unleash a wave of petitions on the federal courts.

Duke asks this Court to expand habeas relief just far enough to let him slip through. But because there is no non-arbitrary line separating career-

offender errors from a multitude of other Guidelines errors, it would be myopic to think that this Court can help Duke without laying fertile ground for a crop of similar petitions and resentencings in the future.

This is so for two reasons. First, courts routinely hand down *Sanchez*-like decisions that redraw the borders of Guidelines enhancements. Granting relief here will invite prisoners to arm themselves with each of those decisions and fire off habeas petitions that read identical to Duke's. Second, if Duke wins, federal courts will have to apply *Sanchez* and decisions like it retroactively, disrupting sentences for many prisoners whose convictions are long since final.

1. Decisions like *Sanchez* are common, and a victory for Duke will make each one a seedbed of new petitions.

At bedrock, Duke filed this petition because *Sanchez* reinterpreted a legal phrase—"punishable by imprisonment for a term exceeding one year"—that appears in the Sentencing Guidelines. U.S.S.G § 4B1.2(b). Granting Duke's petition today would guarantee that scores of prisoners follow Duke's example every time a future decision redefines the scope of a phrase in the Guidelines.

Decisions like these "come pouring out of the federal courts of appeals and the Supreme Court." *Hawkins*, 706 F.3d at 824. The Guidelines directly reference over a thousand statutes of conviction, whose language they draw on to articulate hundreds and hundreds of sentencing enhancements. *See* U.S.S.G. app. A (2013). Each one is open to interpretation. Indeed, "the case law about what various and sundry guidelines mean and whether they apply in different factual situations is in a constant state of flux." *Gilbert v. United States*, 640

F.3d 1293, 1309 (11th Cir. 2011) (en banc). For example, suppose a circuit court or this Court reinterprets "means of transportation," U.S.S.G. § 2A1.4(a)(2)(B), or "organizer or leader," *id.* § 3B1.1(a). Any prisoner who would be able to shed a Guidelines enhancement as a result could file a habeas petition just as compelling as Duke's. Vindicating Duke's claim would encourage just that.

Duke's assurance that Guidelines errors almost never occur rings hollow in light of the above. Pet'r's Br. 43. As his own case illustrates, many "errors" cannot be seen until a change in the legal climate illuminates them. Because the legal climate changes frequently, a rising tide of errors and petitions would be all but assured.

2. Holding for Duke would make *Sanchez* and decisions like it retroactively applicable on habeas review.

Duke contends that *Sanchez* must be applied here in order to avert a complete miscarriage of justice. He insists that because *Sanchez* altered the scope of the career-offender enhancement, it announced a substantive rule no different from the intervening change in law in *Davis*. Pet'r's Br. 33–35. His theory, if accepted, will obligate federal courts to make *Sanchez* available retroactively for the benefit of any prisoner. And *Sanchez* will not be the end of it: federal courts will have to give retroactive effect to many decisions that, like *Sanchez*, redraw the boundaries of sentencing enhancements comparable to Section 4B1.1.

The above proposition—that if a rule meets the *Davis* "miscarriage of justice" test, then it has full retroactive application to cases on collateral

review—follows directly from decisions by this Court and the courts of appeals. First, *Schriro v. Summerlin* and *Bousley v. United States* directly imply that if an intervening change in law meets the *Davis* test, it automatically qualifies for full retroactive effect. *See Summerlin*, 542 U.S. at 352 & n.4; *Bousley v. United States*, 523 U.S. 614, 620 (1998). This proposition makes perfect sense. As those decisions recognize, the *Davis* test—used to determine whether an intervening change in non-constitutional law will afford relief under Section 2255—is identical in scope to the first "exception" to *Teague*'s non-retroactivity principle. The courts of appeals entirely agree.[2] So if Duke is right that *Sanchez* announced a substantive rule and withholding it would create a miscarriage of justice under *Davis*, then *Sanchez* must apply retroactively to any case on collateral review. And by the same logic, so too must *Sanchez*-like decisions that alter the technical definition of comparable Guidelines provisions.

The upshot is that if this Court says Duke must be resentenced to avert a miscarriage of justice, it will not end with him. Federal courts will almost certainly have to resentence a great many prisoners who will also be able to slip out of a sentencing provision anytime the legal ground shifts under their feet, thanks to future changes in the meaning of the Guidelines.

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[2] *See, e.g.*, *United States v. Cuch*, 79 F.3d 987, 994 (10th Cir. 1996) (holding that changes in law that meet the *Davis* test are "afforded complete retroactivity"); *United States v. Woods*, 986 F.2d 669, 671 (3d Cir. 1993) (If failing to apply a rule "would result in a serious miscarriage of justice" under *Davis*, then the rule "should apply . . . retroactively" under *Teague*.); *see also Fiore v. White*, 149 F.3d 221, 226 n.4 (3d Cir. 1998), *rev'd on other grounds*, 531 U.S. 225 (2001) (Alito, J.) (describing "the *Davis* retroactivity rule").

Duke answers that even if he wins, many of the follow-on petitions he inspires will stumble over procedural obstacles. Pet'r's Br. 44. Of course, Duke is right that some prisoners demanding to be resentenced under *Sanchez* (or a similar decision) will be unable to file their motions within an applicable statute of limitations. *Id.* But first, courts will still need to take the time to wade through the tide of untimely petitions. And more significantly, it is unrealistic to think that such hurdles will spare courts the burden of actually resentencing many of these offenders. Strikingly, the Fourth Circuit panel in *Whiteside* did not hesitate to equitably toll the statute of limitations for a petitioner in this exact situation. 748 F.3d at 546–48. Other courts will surely do the same—especially if this Court decrees that enduring an erroneous career-offender enhancement works a miscarriage of justice as egregious as Duke makes it seem.

In short, holding for Duke would entice an influx of collateral attacks by prisoners whose convictions are long since final. And many of those attacks will succeed, precisely because the logic Duke presses here cannot be confined to his case alone.

Still, one might imagine a world where judges employ habeas corpus routinely and without cost, wielding the Great Writ as Duke would have them—as a means of continually updating every prisoner's punishment, bringing each into line with the mercurial standards of the moment. *See* Pet'r's Br. 46. But this is not that world. Habeas corpus remains an extraordinary power, and Duke's complaint lies far afield of the exceptional cases it was meant to remedy.

CONCLUSION

This case poses no dilemma between what is finished and what is right. Jaden Duke now wants to file an appeal, even though he already signed a plea agreement, extinguished that right, and shaved years off his punishment. He wants his sentence thrown aside, even though he already received all the process he was due under law and a punishment well within the range Congress authorized—and continues to authorize—for offenders like him. At each turn, Duke's requests for relief would take this Court far from the underlying principles that have always guided its Sixth Amendment and habeas corpus jurisprudence. Granting Duke's petition would do justice neither in this case, nor in the scores affected by it. The judgment of the United States Court of Appeals for the Ames Circuit should be affirmed.

October 24, 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.

* * *

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
Zone A	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
Zone C	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
Zone D	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

Model Rules of Professional Conduct Rule 1.2

Scope of Representation and Allocation of Authority between Client and Lawyer

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

Model Rules of Professional Conduct Rule 3.1

Meritorious Claims and Contentions

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.