APPENDIX 001a

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 18a0249p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JEREMY SNIDER,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

No. 16-6607

Appeal from the United States District Court
for the Western District of Tennessee at Jackson.
Nos. 1:06-cr-10005-1; 1:11-cv-01174—James D. Todd, District Judge.

Decided and Filed: November 9, 2018

Before: SUHRHEINRICH, MOORE, and BUSH, Circuit Judges.

COUNSEL

ON BRIEF: Dennis G. Terez, Beachwood, Ohio, for Appellant. Jerry Kitchen, UNITED STATES ATTORNEY'S OFFICE, Memphis, Tennessee, for Appellee.

SUHRHEINRICH, J., delivered the opinion of the court in which BUSH, J., joined. MOORE, J. (pp. 13–23), delivered a separate dissenting opinion.

OPINION

SUHRHEINRICH, Circuit Judge. Petitioner Jeremy Snider ("Snider") appeals the district court's denial of his petition for collateral relief under 28 U.S.C. § 2255. Snider contends that this court's en banc ruling in *United States v. Stitt*, 860 F.3d 854 (6th Cir. 2017) (en banc), *cert. granted*, 138 S. Ct. 1592 (Apr. 23, 2018)—holding that a conviction for Tennessee

aggravated burglary under TENN. CODE ANN § 39-14-403, is not a "violent felony" for purposes of the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e)—requires us to vacate his sentence as a career offender under advisory sentencing guidelines range, U.S.S.G. § 4B1.1(a), because it is also not a "crime of violence." For the following reasons, we affirm the denial of Snider's motion to vacate his sentence.

I.

A.

Between 1992 and 2006, Snider committed assorted crimes, including four convictions under Tennessee's aggravated burglary statute, TENN. CODE ANN. § 39-14-403. As the district court put it at sentencing, "[y]ou basically, Mr. Snider, have been a one-man crime wave." On November 2, 2006, he was charged with conspiracy to manufacture methamphetamine, in violation of 21 U.S.C. § 846; manufacturing and attempting to manufacture over 50 grams of methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1) and 846; possessing equipment, chemicals, products, and materials that may be used to manufacture methamphetamine, in violation of 21 U.S.C. § 843(a)(6); possessing a firearm after being convicted of a felony, in violation of 18 U.S.C.§ 922(g); possessing a stolen firearm, in violation of 18 U.S.C. § 922(j); and possessing a firearm during and in relation to a drug-trafficking crime, in violation of 18 U.S.C. § 924(c). On July 6, 2007, a jury convicted him on all counts.

Snider's presentence report recommended an adjusted offense level of 34 under the U.S. Sentencing Guidelines Manual § 4B1.1(b)(B), because Snider qualified as a career criminal offender based on three Tennessee aggravated burglary convictions deemed crimes of violence. The guidelines define a career offender as having at least two prior felony convictions for crimes of violence or controlled substance offenses. U.S.S.G. § 4B1.1(a). At the time of Snider's sentencing, "crime of violence" was defined to include "burglary of a dwelling." U.S.S.G. § 4B1.2(a) (Nov. 1, 2007).[1]

[1]The full definition included any felony that "(1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or (2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." U.S.S.G. § 4B1.2(a) (Nov.1, 2007). The Sentencing Commission has since removed "burglary of a dwelling" from

The presentence report relied (erroneously it turns out) on three burglaries committed in 1995. In March 1995, Snider broke into three different residences on three different dates, March 19, 20, and 21. He was arrested for all three burglaries on the same day, April 19, 1995, and pleaded guilty to all three crimes on the same day, May 22, 1995. *Id.* Although the presentence report did not rely upon it in its calculation of the career offender designation, it also listed an additional qualifying Tennessee aggravated burglary conviction.

With the career offender designation, Snider's guidelines range was 360 months to life. (citing U.S.S.G. § 4B1.1(c)(3)). The presentence report noted that Snider's adjusted offense level after application of the various sentencing enhancements would have been the same in any event. However, without the career offender designation, based on Snider's criminal history score of 17, which established a criminal history category of VI, Snider's resulting advisory guidelines range was 262 to 327 months, plus 60 months consecutive.

Snider did not object to the classification of his prior convictions as crimes of violence in his sentencing memorandum or at the sentencing hearing. Snider asked for a sentence above the statutorily-mandated ten-year minimum, but "substantially less" than the 360 months suggested by the guidelines.

In considering the 18 U.S.C. § 3553 sentencing factors, the district court described the instant crime as "very serious" and "involving the manufacture of a poison, along with firearms, fleeing from police, putting police officers at risk during the flight." The court noted that Snider's life of crime began at age 15 (he was 30 at the time of sentencing), that he had twenty-four convictions listed in his presentence report, and that these included "serious burglary and theft convictions" as well as "drug convictions." The district court rejected Snider's request for a below-guidelines sentence, but sentenced him to the low end of the advisory guidelines range, with a total sentence of 300 months on the first five counts and the required 60-month consecutive sentence on count six.

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the list of enumerated crimes of violence in § 4B1.2(a)(2). *See* U.S.S.G. Supp. to App. C., Amdt. 798 (eff. date Aug. 1, 2016).

On direct appeal, Snider raised one issue—he successfully argued that count six of the indictment mixed elements of two distinct offenses created by 18 U.S.C. § 924(c)(1)(A), and the jury instructions did not cure this flaw. *See United States v. Snider*, 379 F. App'x 430 (6th Cir. 2010). On remand, the district court dismissed the § 924(c) charge, and reimposed the original sentence on counts one through five, for a total sentence of 300 months.

B.

On June 16, 2011, Snider filed a timely *pro se* motion under 28 U.S.C. § 2255, raising four issues. On February 2, 2012, the district court directed the government to reply to Snider's first claim—that he received ineffective assistance of counsel at sentencing because counsel failed to object to his designation as a career criminal "on the ground that his three convictions for aggravated robbery were not committed 'on occasions different from one another'"—and denied relief on the three remaining claims.[2] In response, the government argued that even if Snider's three prior aggravated burglary convictions should only collectively count as one crime of violence, Snider still qualified as a career offender because he had an additional qualifying conviction listed in the presentence report; that the ineffective assistance of counsel issue was not fairly raised in Snider's motion; and that there was no evidence of ineffective assistance of counsel because Snider did not suffer any prejudice as a result of his attorney's failure to object to sentencing based on U.S.S.G. § 4A1.1(a)(2).

On September 23, 2013, Snider filed a *pro se* motion to supplement his § 2255 motion based on *Alleyne v. United States*, 570 U.S. 99, 108 (2013) (holding that any fact that increases the mandatory minimum sentence for a crime is an "element" rather than a sentencing factor and must be submitted to a jury) and *Descamps v. United States*, 570 U.S. 254, 260 (2013) (holding that the modified categorical approach cannot be used to determine the nature of a prior conviction under the ACCA when the crime of conviction has indivisible elements). On November 14, 2013, the district court granted the motion to supplement and denied relief on the

[2]The district court noted that, although the presentence report used the 2006 version of the Sentencing Guidelines, U.S.S.G. § 4A1.1 was amended by Amendment 709 to clarify that "[i]f there is no intervening arrest, prior sentences are counted separately unless . . . the sentences were imposed on the same day." U.S.S.G. App C Amend. 709 took effect on November 1, 2007, prior to Snider's April 18, 2008 sentencing.

first and supplemental claims. The court agreed with the government that although the three aggravated burglaries should have been counted as only a single predicate, Snider was properly classified as a career offender based on the additional aggravated burglary conviction listed in the presentence report but not specifically designated as a predicate offense. The court failed to see the relevance of *Alleyne* and *Descamps* and concluded that Snider was not entitled to relief on the supplemental issue presented. Moreover, it stated that "this Court is bound by the Sixth Circuit's holding in *Nance* that 'Tennessee aggravated burglary represents a generic burglary[.]" Thus, the district court determined that none of the issues raised in Snider's § 2255 motion had merit and further declined to issue a certificate of appealability.

On December 16, 2013, Snider filed a *pro se* motion for reconsideration under Fed. R. Civ. P. 59(e), arguing in part that the district court erred in denying relief under *Descamps*.[3] On September 9, 2016, the district court denied the motion:

> Snider . . . reiterates his argument, based on the decision in *Descamps*, that he was not properly sentenced as a career offender. He contends that the offense of aggravated burglary under Tennessee law is not categorically a crime of violence under the Career Offender guideline, U.S.S.G. § 4B1.1(a) because it is not a "generic" burglary. That argument is without merit. As the Court noted in the order denying the § 2255 motion, the Sixth Circuit held, in *United States v. Nance*, 481 F.3d 882, 887-88 (6th Cir. 2007), that "Tennessee aggravated burglary represents a generic burglary capable of constituting a violent felony for ACCA purposes." . . . Even after the decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015) [holding that an increased sentence under the residual clause of the ACCA violated the constitutional due process], the Sixth Circuit reaffirmed the holding in *Nance*. *See United States v. Priddy*, 808 F.3d 676, 684 (6th Cir. 2015).

On May 16, 2017, this court granted a certificate of appealability, stating that "reasonable jurists would find it debatable whether the district court erred in denying Snider's claims that he was incorrectly classified as a career offender and that he received ineffective assistance of counsel." We also appointed counsel.

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[3]Snider also filed *pro se* several motions to supplement the motion for reconsideration. In the final one, filed on July 11, 2016, Snider argued for reconsideration in light of *Mathis v. United States*, 136 S. Ct. 2243 (2016), as well as "in light of new developments regarding the Sixth Circuit Court of Appeals granting en banc for *United States v. Stitt* . . . to determine Tennesse(s) [sic] aggravated burglary statute which is overbroad." He also requested that counsel be appointed.

II.

Legal conclusions in a habeas corpus petition are reviewed de novo. *Cradler v. United States*, 891 F.3d 659, 664 (6th Cir. 2018).

Snider argues that we should vacate the district court's order denying his § 2255 motion because the district court relied on law that has since been overruled in our en banc decision in *Stitt*. Relatedly, he argues that because of ineffective assistance of counsel, he was incorrectly assessed as a career offender under the Sentencing Guidelines. The government has several responses: First, that Snider's reliance on *Stitt* is misplaced because *Stitt* dealt with the definition of generic burglary in the ACCA, and Snider's sentence is based on the advisory sentencing guidelines. So, Snider has forfeited his argument on appeal. Second, that Snider cannot challenge an advisory guidelines calculation on collateral review. Third, that Snider procedurally defaulted his claim by failing to raise it during sentencing, and he cannot show cause and prejudice to excuse his default. Fourth, that Snider received effective assistance from his sentencing counsel and suffered no prejudice.

A.

In *Stitt*, the en banc court held that because Tennessee's aggravated burglary statute is both broader than the generic form of burglary and indivisible, such a conviction does not categorically qualify as "violent felony" under the ACCA, 18 U.S.C. § 924(e). *Stitt*, 860 F.3d at 857. In the process, *Stitt* overruled *United States v. Nance*, 481 F.3d 882 (6th Cir. 2007), which held that Tennessee's aggravated-burglary statute matched the ACCA's definition of generic burglary, and abrogated *United States v. Priddy*, 808 F.3d 676 (6th Cir. 2015) (applying *Nance*). *Stitt*, 860 F.3d at 861.

Snider claims that we must vacate the district court's order because the lower court relied on *Nance* when it denied his § 2255 motion and *Stitt* has overruled *Nance.* The government responds that because Snider's sentence was based on U.S.S.G. § 4B1.1, not the ACCA, *Stitt* is not *directly* on point, and Snider's guidelines calculation challenge is somehow forfeited. *See Radvansky v. City of Olmsted Falls*, 395 F.3d 291, 311 (6th Cir. 2005) (failing to raise an argument on appeal constitutes a forfeiture of the argument on appeal); *see also United States v.*

Blair-Torbett, 230 F. App'x 483, 490 (6th Cir. 2007) (stating that an objection made on appeal that differs from the one made at sentencing is reviewed for plain error).

We agree with the government's assertion that Snider would have come somewhat closer to the mark had he cited *Mathis v. United States*, 136 S. Ct. 2243 (2016), and *United States v. Ozier*, 796 F.3d 597 (6th Cir. 2015), both of which were decided by the time of this appeal. *Ozier* held that the Tennessee aggravated burglary statute is broader than "burglary of a dwelling," under U.S.S.G. § 4B1.2(a)(2), *Ozier*, 796 F.3d at 600-02, and *Mathis* clarified that the statute is not divisible, *Mathis*, 136 S. Ct. at 2251 n.1 (abrogating *Ozier's* conclusion to the contrary). Thus, after *Mathis*, the Tennessee aggravated burglary statute is indivisible and, per *Ozier*, broader than the guidelines definition of "burglary of a dwelling."

To be fair, it must be acknowledged that this court has repeatedly equated the definition of "violent felony" under the ACCA "to the parallel determination of whether a prior conviction constitutes a 'crime of violence' under USSG § 4B1.2(a)," *United States v. Bartee*, 529 F.3d 357, 359 (6th Cir. 2008) (citing *inter alia*, *United States v. Arnold*, 58 F.3d 1117, 1121 (6th Cir. 1995)); *United States v. Denson*, 728 F.3d 603, 607 (6th Cir. 2013) ("we analyze a crime of violence under the career-offender guideline just as we do a 'violent felony' under the [ACCA]"); *United States v. Johnson*, 707 F.3d 655, 659 n.2 (6th Cir. 2013) ("A 'crime of violence' under the career-offender provision is interpreted identically to a 'violent felony' under ACCA.") (citation omitted), and, one year prior to Snider's sentencing in April 2008, we held that "Tennessee aggravated burglary represents a generic burglary capable of constituting a violent felony for ACCA purposes." *Nance*, 481 F.3d at 888. Moreover, in granting the certificate of appealability, we relied on ACCA authority, including *Stitt*:

> At the time Snider was sentenced, a crime of violence was defined, among other things, as any offense punishable by imprisonment of more than one year that is arson, burglary of a dwelling, extortion, or involves the use of explosives. USSG § 4B1.2(a)(2) (2010). While we have held that Tennessee's aggravated burglary statute constitutes a crime of violence under the enumerated-offenses clause, *United States v. Priddy*, 808 F.3d 676, 684 (6th Cir. 2015), we recently granted en banc review in another case to reconsider whether Tennessee's aggravated-burglary statute qualifies as generic burglary. . . . Because it is unclear whether Snider's aggravated-burglary convictions constitute crimes of violence, reasonable jurists could debate the district court's resolution of these claims.

ECF 8-2, p.2-3. Because we have consistently intermingled our own precedent regarding the wo provisions, and we are free to affirm the district court for any reason supported by the record, *see Clark v. United States*, 764 F.3d 653, 660-61 (6th Cir. 2014), we decline to dismiss Snider's first claim on this basis.

B.

Snider's non-constitutional challenge to his advisory guidelines range suffers from a greater defect: it is not cognizable under § 2255. The statute authorizes postconviction relief only when a sentence "was imposed in violation of the Constitution or laws of the United States, or . . . the court was without jurisdiction to impose such sentence, or . . . the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack . . . ." 28 U.S.C. § 2255(a). Thus, § 2255 claims that do not assert a constitutional or jurisdictional error are generally cognizable only if they involved "a fundamental defect which inherently results in a complete miscarriage of justice." *Davis v. United States*, 417 U.S. 333, 346 (1974) (internal quotation marks and citation omitted). This standard is met only by "exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent." *Hill v. United States*, 368 U.S. 424, 428 (1962) (internal quotation marks and citation omitted). In other words, not "every asserted error of law can be raised on a § 2255 motion." *Davis*, 417 U.S. at 346; *see United States v. Addonizio*, 442 U.S. 178, 185 (1979); *see also United States v. Peterman*, 249 F.3d 458, 462 (6th Cir. 2001) ("Courts have generally declined to collaterally review sentences that fall within the statutory maximum."). The statutory maximum for a violation of 21 U.S.C. § 846 is forty years. *See* 21 U.S.C. § 841(b)(1)(B)(viii).

Although the Supreme Court has not addressed whether an advisory, non-constitutional Sentencing Guidelines case could reach such exceptional levels, *see Hawkins v. United States*, 706 F.3d 820, 829 (7th Cir. 2013) (Rovner, J. dissenting), *opinion supplemented on denial of reh'g*, 724 F.3d 915, it has provided certain guideposts. At one end is *Davis*, which held that § 2255 relief is available for someone whose conviction is based on conduct that is later determined to be non-criminal. *Davis*, 417 U.S. at 346-47. In this situation, "[t]here can be no room for doubt that such a circumstance inherently results in a complete miscarriage of justice and presents exceptional circumstances that justify collateral relief under § 2255." *Id.* (internal

quotation marks and alteration omitted). At the other end of the spectrum, the Supreme Court has held on several occasions that a district court's failure to follow procedural rules is not tantamount to a complete miscarriage of justice absent prejudice to the defendant. *See, e.g.*, *Peguero v. United States*, 526 U.S. 23, 24 (1999) (district court's failure to inform the defendant of the right to appeal was not cognizable under § 2255 where the defendant knew about the right); *United States v. Timmreck*, 441 U.S. 780, 784-85 (1979) (collateral relief not available for failure to mention special parole term at Rule 11 hearing); *Hill v. United States*, 368 U.S. 424, 429 (1962) (sentencing judge's failure to ask the defendant if he wanted to speak at his sentencing hearing was not an error of constitutional magnitude cognizable under § 2255).

"Between these limits—punishment for conduct later rendered non-criminal on one end and non-prejudicial procedural errors on the other—" lies *Addonizio*. *United States v. Foote*, 784 F.3d 931, 937 (4th Cir. 2015). *Addonizio* held that post-sentencing changes in Parole Commission policies that extended the federal prisoner's sentence beyond the sentencing judge's expectation did not create a cognizable § 2255 claim because the sentence imposed by the district court was "within the statutory limits; and the proceeding was not infected with any error of fact or law of the 'fundamental' character that renders the entire proceeding irregular and invalid." *Addonizio*, 442 U.S. at 186. Unlike the decision in *Davis*, which involved "a change in the substantive law that established the conduct for which petitioner had been convicted and sentenced was lawful," the petitioner's challenge in *Addonizio* "did not affect the lawfulness of the judgment itself—then or now." *Id.* at 186-87.

In *Foote*, a case very similar to our own, the Fourth Circuit relied on *Addonizio* in concluding that the defendant-appellant did not have a cognizable § 2255 claim based on a misapplication of a subsequently-nullified career offender designation. *Foote*, 784 F.3d at 943. The *Foote* defendant was convicted of distributing crack cocaine and classified as a career offender based on two prior North Carolina convictions for possession with intent to sell cocaine. *Id.* at 932-33. After an intervening change in law, one of his prior drug offenses no longer qualified as a predicate "controlled substance offense" under the career offender guideline, so the defendant sought resentencing via a § 2255 motion. *Id.* at 934-35. The Fourth Circuit held that "sentencing a defendant pursuant to advisory Guidelines based on a career offender status that is

later invalidated does not meet" the "remarkably high bar" for § 2255 relief. *Id.* at 936.[4] The *Foote* court observed that the Supreme Court has found a "miscarriage of justice" only if it appears that the petitioner is "actually innocent" of the underlying crime. *Id.* at 940-41. Furthermore, under the advisory guidelines scheme, a career offender designation is, unlike a statute, only "one part of a series of guidelines meant to *guide* the district court to the proper sentence," from which district courts are free to vary. *Id.* at 941 (emphasis in original). The *Foote* court therefore concluded that a mistaken career offender designation is not a "fundamental defect that inherently results in a complete miscarriage of justice." *Id*. at 940, 942-43.

Like the petitioner in *Foote*, Snider alleges that an intervening change in the law rendered his career offender designation erroneous. Snider does not allege that he is innocent of the charged offense or the underlying predicate offenses. He does not rely on any constitutionally prohibited factors. Snider was sentenced under an advisory guidelines scheme, and the district court applied the 18 U.S.C. § 3553(a) factors at sentencing. Although the career designation may have affected the ultimate sentence imposed, "it did not affect the lawfulness of the [sentence] itself—then or now." *Addonizio*, 442 U.S. at 187; *see also Gibbs v. United States*, 655 F.3d 473, 479 (6th Cir. 2011) ("A challenge to the sentencing court's guidelines calculation . . . only challenges the legal process used to sentence a defendant and does not raise an argument that the defendant is ineligible for the sentence she received."). Therefore, like the petitioner in *Foote*, Snider is not entitled to § 2255 relief.

In short, no "exceptional circumstances" justify issuance of the writ in this case, especially because, without the career offender designation, Snider's adjusted offense level after the application of various sentencing enhancements was also 34, resulting in an advisory guidelines range of 262 to 327 months. *See Peugh v. United States*, 569 U.S. 530, 536 (2013)

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[4]Also like the defendant in *Foote*, Snider has 17 criminal history points without the career offender provision. *See Foote*, 784 F.3d at 933 n.1 Unlike the *Foote* defendant, whose advisory guidelines range jumped from 151-188 months to 262-327 months with the career offender designation, *id.* at 933, the sentence Snider received was within the sentencing advisory guidelines range unenhanced by the career offender status. *Cf. Sun Bear v. United States*, 644 F.3d 700, 705 (8th Cir. 2011) (en banc) (holding that the defendant's 360-month sentence imposed under a career offender designation was not imposed in excess of statutory authority; noting that the petitioner's sentence was within the sentencing range had the career offender status not been applied).

(noting that the Sentencing Guidelines "should be the starting point and the initial benchmark"; holding that a retrospective increase in an applicable guidelines range created a *constitutional* ex post facto violation). Snider's 300-month sentence is within the middle of that range, which cannot be plausibly characterized as a "fundamental defect which inherently results in a complete miscarriage of justice." *Davis*, 417 U.S. at 346 (internal quotation marks and citation omitted). Snider's misapplication-of-an-advisory-guidelines-range claim is therefore not cognizable under § 2255.

We note that, although not without dissent, every other court of appeals to have looked at the issue has agreed that a defendant cannot use a § 2255 motion to vindicate non-constitutional challenges to advisory guideline calculations. *See Foote*, 784 F.3d at 939 ("[T]here is no decision left standing in any circuit whereby a challenge to one's change in career offender status, originally determined correctly under the advisory Guidelines, is cognizable on collateral review. However, we cannot ignore that these decisions are extremely close and deeply divided."); *Spencer v. United States*, 773 F.3d 1132, 1144 (11th Cir. 2014) (en banc); *Hawkins*, 706 F.3d at 824-25.[5]

C.

Snider also has a free-standing ineffective assistance of counsel claim, which is cognizable under § 2255. *See Massaro v. United States*, 538 U.S. 500, 508-09 (2003). But to prevail, Snider must demonstrate (1) that counsel's representation at sentencing fell below an objective standard of reasonableness and (2) that a reasonable probability exists that, but for his

[5]As the government notes in its brief, courts disagree whether errors in calculating a *mandatory* guidelines range (i.e. where a defendant was sentenced before *Booker*) are cognizable under § 2255. *Compare Sun Bear v. United States*, 644 F.3d 700, 704 (8th Cir. 2011) (en banc) (not cognizable), *with United States v. Doe*, 810 F.3d 132, 159 (3d Cir. 2015) (is cognizable), *and Narvaez v. United States*, 674 F.3d 621, 627-29 (7th Cir. 2011) (same). The same is true regarding whether a defendant can use the savings clause of § 2255(e) and 28 U.S.C. § 2241 to challenge a *mandatory* guidelines enhancement when the defendant is foreclosed from bringing a successive § 2255 petition. *Compare Gilbert v. United States*, 640 F.3d 1293, 1307-12 (11th Cir. 2011) (en banc) (holding that mandatory career offender error is not redressable under § 2241); *and In re Bradford*, 660 F.3d 226, 230 (5th Cir. 2011) (same); *with Hill v. Masters*, 836 F.3d 591, 599-600 (6th Cir. 2016) (holding that it is redressable); *and Brown v. Caraway*, 719 F.3d 583, 587 (7th Cir. 2013) (same). Also, some courts have found guidelines claims cognizable where the predicate conviction supporting the guidelines enhancement was later vacated. *See, e.g.*, *Cuevas v. United States*, 778 F.3d 267, 271-72 (1st Cir. 2015); *see also Johnson v. United States*, 544 U.S. 295, 303 (2005). But none of those scenarios are before us.

attorney's unprofessional representation, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). We assess counsel's performance based on "counsel's perspective at the time," *id.* at 689, "considering all the circumstances," *id.* at 688, rather than "in the harsh light of hindsight," *Bell v. Cone*, 535 U.S. 685, 702 (2002); *Strickland*, 466 U.S. at 689 ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time."). We have repeatedly held that counsel is not ineffective for failing to predict developments in the law, unless they were clearly foreshadowed by existing decisions. *Thompson v. Warden, Belmont Corr. Inst.* 598 F.3d 281, 288 (6th Cir. 2010) (collecting cases); *United States v. Freeman*, 679 F. App'x 450, 453 (6th Cir. 2017). As explained above, given the holdings in *Nance*, 481 F.3d at 888 (Tennessee aggravated burglary constituted a violent felony under the ACCA), and *Arnold*, 58 F.3d at 1121 (a crime of violence under the career offender provision is interpreted identically to a violent felony under the ACCA), trial counsel was not ineffective for failing to foresee that this court would subsequently shift gears years later and eventually decide that (1) the Tennessee aggravated burglary statute is not generic and (2) does not state a crime of violence under the ACCA, let alone the career offender provision (which it still hasn't explicitly done). Stated differently, counsel could have reasonably concluded in 2008 that such a challenge would be unsuccessful. Thus, counsel did not provide constitutionally deficient performance because she failed to assert in 2008 that Snider's Tennessee aggravated burglary convictions are not crimes of violence under U.S.S.G. § 4B.1.

Absent cause, we need not consider prejudice.

D.

Finally, because both of Snider's claims on the merits fail, we need not address the government's procedural default argument.

III.

For these reasons, the judgment of the district court denying Snider's § 2255 motion is **AFFIRMED**.

DISSENT

KAREN NELSON MOORE, Circuit Judge, dissenting. The majority holds today that Snider's advisory guideline claim is not cognizable under § 2255 because he was "sentenced under an advisory guidelines scheme," his career offender designation did not affect the "lawfulness" of his sentence, and his guideline range would have been the same absent the career offender designation. Op. at 10–11. Because I believe there are instances in which, despite being sentenced under the advisory guidelines, a defendant who has been incorrectly designated as a career offender may still bring a claim under § 2255, I respectfully dissent.

I. LEGAL FRAMEWORK

Under 28 U.S.C. § 2255, a prisoner may collaterally attack his sentence on four grounds: (1) "the sentence was imposed in violation of the Constitution or laws of the United States"; (2) "the court was without jurisdiction to impose such sentence"; (3) "the sentence was in excess of the maximum authorized by law"; or (4) the sentence "is otherwise subject to collateral attack." 28 U.S.C. § 2255(a); *see also Hill v. United States*, 368 U.S. 424, 426–27 (1962).

Although the language of § 2255 provides for collateral relief when a sentence generally "is otherwise subject to collateral attack," in a number of opinions (primarily from the 1960s and 1970s), the Supreme Court has circumscribed the scope of these motions. Specifically, when a § 2255 claim does not assert a constitutional or jurisdictional error, the Court has stated that the claim is generally not cognizable unless the error involves "a fundamental defect which inherently results in a complete miscarriage of justice." *Davis v. United States*, 417 U.S. 333, 346 (1974) (internal quotation marks omitted). In *Davis*, the Supreme Court determined that when a defendant's conviction no longer constituted a crime, he *was* entitled to collateral relief under § 2255. *Id.* at 346–47. Additionally, the Court has found that non-prejudicial "procedural" errors are not the type of "exceptional circumstances," *Hill*, 368 U.S. at 428, warranting relief under § 2255. *See Peguero v. United States*, 526 U.S. 23, 24 (1999) (failing to inform the defendant of his right to appeal where the defendant nonetheless knew of his right);

United States v. Addonizio, 442 U.S. 178, 186–87 (1979) (determining a claim based on a later updated parole regulation was non-cognizable when the regulation interfered only with the sentencing court's subjective expectation of the time the petitioner would spend in prison); *United States v. Timmreck*, 441 U.S. 780, 784–85 (1979) (finding noncognizable a formal violation of Federal Rule of Criminal Procedure 11 at a guilty plea hearing); *Hill*, 368 U.S. at 429 (finding noncognizable the failure to ask if the counseled defendant wanted to speak at his sentencing hearing).

As applied to miscalculations of the advisory career offender guidelines, however, the reasoning and holdings of these cases are distinguishable. Although these cases establish "miscarriage of justice" as the applicable standard for non-jurisdictional or non-constitutional § 2255 motions, the holdings are limited and do not suggest that defendants who have incorrectly been designated as career offenders under the advisory guidelines may never bring § 2255 motions.

First, *Hill*, *Timmreck*, and *Peguero* all considered narrow, procedural errors which did not cause the defendant any prejudice. *See Davis*, 417 U.S. at 346 (noting that in *Hill* the Court had held collateral relief was not available based on a failure to follow a formal requirement "in the absence of any indication that the defendant was prejudiced by the asserted technical error"); *Peguero*, 526 U.S. at 24 ("We hold that a district court's failure to advise the defendant of his right to appeal [did] not entitle him to habeas relief if he knew of his right and hence suffered no prejudice from the omission."); *Timmreck*, 441 U.S. at 784 (finding no cognizable claim when the defendant was aware of his rights and would not have acted differently even if the particular procedural rule had been followed). None of these cases considered instances in which, due to a clear legal error at sentencing, a criminal defendant was sentenced to significantly increased prison time, thus establishing the necessary prejudice. *See, e.g.*, *Spencer v. United States*, 773 F.3d 1132, 1148 (11th Cir. 2014) (Wilson, J., dissenting) (arguing the defendant should be permitted to bring his § 2255 claim and noting the defendant had clearly shown he had been prejudiced by the sentencing guideline error as the judge explained that, absent the career offender enhancement, the defendant would be looking at half the prison time); *Hawkins v. United States*, 706 F.3d 820, 821 (7th Cir. 2013) (explaining that that without the enhancement,

the defendant's range was between 15 and 30 months and that with the designation, the guideline range jumped to 151 to 188 months); *id.* at 827 (Rovner, J., dissenting) (noting this enhancement was prejudicial to the petitioner).

Second, as the Court noted in *Hill*, *Timmreck*, and *Peguero*, the determination of whether a certain error constitutes a "miscarriage of justice" is largely fact specific. *See Hill*, 368 U.S. at 429 ("Whether § 2255 relief would be available if a violation of Rule 32(a) occurred *in the context of other aggravating circumstances* is a question we . . . do not consider." (emphasis added)); *see also Peguero*, 526 U.S. at 27, 29 (noting "[a] violation of Rule 32(a)(2), however, does not entitle a defendant to collateral relief *in all circumstances*" and determining the defendant was not prejudiced when he had independent knowledge of his right to appeal (emphasis added)); *Timmreck*, 441 U.S. at 784–85 (determining it was "unnecessary to consider whether § 2255 relief would be available if a violation of Rule 11 occurred in the context of other aggravating circumstances"). Outside these specific instances (i.e., without additional "aggravating circumstances"), the Court in *Hill*, *Timmreck*, and *Peguero* expressed no opinion as to whether other, more significant, sentencing errors could constitute a miscarriage of justice. Indeed, by engaging in a more fact intensive examination, the Court endorsed a limited, rather than broader, cognizability analysis.

The Court's decision in *Addonizio* is similarly narrow. Specifically, the Court examined whether "[t]he claimed error here—that the judge was incorrect in his assumptions about the future course of parole proceedings—does not meet any of the established standards of collateral attack." 442 U.S. at 186. In that limited context, the Court concluded "there is no basis for enlarging the grounds for collateral attack to include claims *based not on any objectively ascertainable error but on the frustration of the subjective intent of the sentencing judge*." *Id.* at 187 (emphasis added); *see also Spencer*, 773 F.3d at 1165 (Rosenbaum, J., dissenting) ("*Addonizio* holds only that a lawful sentence that is imposed because of a judge's incorrect subjective expectation of the actual amount of time that a defendant will serve in prison under the judge's sentence—and *only* from a sentencing judge's frustrated subjective intent—does not result in a complete miscarriage of justice and is not cognizable under § 2255."). Unlike the

subjective frustration at issue in *Addonizio*, an incorrect career offender designation under the advisory guidelines is clearly based on an "objectively ascertainable error."

The fact that the ultimate sentence imposed in *Addonizio* "did not affect the lawfulness of the judgment itself—then or now" was not wholly determinative of the petitioner's ability to bring the claim. 442 U.S. at 187. Although the Court determined that the sentence in *Addonizio* was not unlawful, it nonetheless went on to consider whether, despite the lawfulness of the sentence, the defendant could still receive relief under § 2255. *Id.* at 187–90 (discussing why the subjective intent of a judge cannot form the basis of a cognizable § 2255 claim). Such an examination would be unnecessary if the Court had adopted a per se rule that all "lawful" sentences, such as an incorrect advisory career offender designation, are incapable of collateral attack. *See Spencer*, 773 F.3d at 1147 (Wilson, J., dissenting); *see also Johnson v. United States*, 544 U.S. 295, 298 (2005) (implicitly recognizing a § 2255 claim when the sentence imposed was "lawful" at the time and became subject to collateral attack only after the predicate offenses were vacated by the state court in a separate proceeding).

Finally, case law in this Circuit does not preclude all advisory career offender guideline claims under § 2255. For instance, in *Gibbs v. United States*, we held that a criminal defendant could not look to guideline miscalculations to excuse a procedurally defaulted claim based on "actual innocence." 655 F.3d 473, 478 (6th Cir. 2011). Although the court ultimately determined that mistakes in sentencing guidelines did not rise to the level of "actual innocence" required to excuse the defendant's procedural default, in part because the guidelines are advisory, the court was not presented with the question I consider today: whether, despite the advisory nature of the guidelines, a clear miscalculation can ever create a miscarriage of justice under § 2255. Consequently, the reasoning of *Gibbs* is similarly limited as the cases noted above.[1]

[1]In the majority's discussion of *United States v. Foote*, 784 F.3d 931 (4th Cir. 2015), the majority quotes *Foote*'s conclusion that the Supreme Court has found a "miscarriage of justice" only if the petitioner was "actually innocent" of the underlying crime. Op. at 10. However, this ignores the Court's opinion in *Johnson v. United States*, in which the Court implicitly recognized a claim for relief under § 2255 when the defendant's predicate state offenses were vacated not because he was "actually innocent" of them but because he had not sufficiently waived his right to counsel. 544 U.S. 295, 301 (2005).

Similarly, our Circuit has expressly recognized that sentencing errors may constitute "miscarriages of justice," despite producing sentences below the statutory maximum. *See Hill v. Masters*, 836 F.3d 591, 596–97, 600 (6th Cir. 2016) (determining that a prisoner's sentence could constitute a "miscarriage of justice" warranting a 28 U.S.C. § 2241 petition, even though the defendant's pre-*Booker* sentence was below the statutory maximum); *Oliver v. United States*, 90 F.3d 177, 179 (6th Cir. 1996) (implicitly recognizing a § 2255 claim regarding a pre-*Booker* sentence when the court examined the merits of the defendant's sentencing claim). Similarly, in *United States v. Behrens*, the defendant's § 2255 claim was cognizable when, despite being sentenced *below* the statutory maximum, neither the defendant nor his attorney were present at the defendant's final sentencing hearing, in violation of Federal Rule of Criminal Procedure 32(a). 375 U.S. 162, 163–66 (1963). This was true despite the fact that, when the defendant was sentenced in the 1960s, there were no mandatory guidelines and sentences were firmly within the discretion of the district court. *See Beckles v. United States*, 137 S. Ct. 886, 893 (2017) (noting that before the guidelines became mandatory, "Congress historically permitted district courts wide discretion to decide whether the offender should be incarcerated and for how long" (internal quotation marks omitted)); *see also Spencer*, 773 F.3d at 1158 (Jordan, J., dissenting) ("The Supreme Court in *Behrens*, therefore, used § 2255 to set aside a sentence below the statutory maximum (i.e., a sentence the majority would characterize as 'lawful') for a non-constitutional violation (i.e., the violation of a federal rule)."). Finally, a rule which dictates that a sentence may be challenged under § 2255 only if it exceeds the statutory maximum would ignore the plain language of 28 U.S.C. § 2255, which permits a defendant to challenge his sentence by asserting, among other things, that the sentence was "in excess of the maximum authorized by law" *or* was "otherwise subject to collateral attack." 28 U.S.C. § 2255(a).

Because I conclude that neither the Supreme Court nor previous cases in this Circuit categorically preclude advisory career offender guideline claims under § 2255, I now consider whether, in certain circumstances, a defendant's erroneous designation as a career offender under the advisory guidelines can create a miscarriage of justice. I conclude it can.

II. COGNIZABILITY OF CAREER OFFENDER CLAIMS

The proper scope of § 2255 has produced closely divided resolutions in our fellow Circuits. Although four Circuits have determined that defendants may not collaterally attack their advisory guideline sentences under § 2255, three of those opinions were heavily contested. *See Spencer*, 773 F.3d at 1135, 1145, 1149, 1156, 1164 (five to four decision); *Hawkins v. United States*, 706 F.3d at 825 (J. Rovner, dissenting in a three-judge panel); *Sun Bear v. United States*, 644 F.3d 700, 701, 707 (8th Cir. 2011) (six to five decision); *see also United States v. Foote*, 784 F.3d 931, 939 (4th Cir. 2015) ("[W]e cannot ignore that these decisions are extremely close and deeply divided."). Moreover, two of the cases—*Spencer* and *Sun Bear*—were decided *en banc* after a previous panel had granted the defendant relief under § 2255. *See Spencer v. United States*, 727 F.3d 1076, 1087–88 (11th Cir. 2013); *Sun Bear v. United States*, 611 F.3d 925, 930–32 (8th Cir. 2010). I concur with the reasoning articulated in these carefully considered dissents, as well as the case law of this court and the Supreme Court, in my analysis today.

A. *Johnson v. United States*

Similar to the paths taken by the four dissenting judges in *Spencer*, I begin by examining the Supreme Court's decision in *Johnson v. United States*, 544 U.S. 295 (2005).[2] In *Johnson*, the Court considered the appropriate statute of limitations for a prisoner attempting to attack his sentence collaterally after the predicate state offenses underlying his sentence enhancements were vacated by the state court. *Id.* at 298. Noting that the Court's precedent assumes "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, the Court implicitly recognized the validity of a § 2255 claim when the defendant's enhanced sentence was later shown to be in error. *Id.*; *see also Spencer*, 773 F.3d at 1168 n.2 (Rosenbaum, J., dissenting) ("[I]f Johnson's claim of Sentencing Guidelines error were not cognizable on a § 2255 petition, the . . . Court's opinion . . . would be *dicta* . . . because it would never be necessary to determine [the appropriate statute of limitations]

[2]Although the majority here does not address *Johnson* at length, I believe *Johnson* offers an important foundation from which to examine the type of claim that Snider attempts to raise.

if a challenge to the application of career-offender status under the Sentencing Guidelines were not cognizable.").

Although other courts have used the reasoning of *Johnson* to distinguish guideline claims based on vacatur of the predicate crime with an advisory guideline calculation error, *see, e.g.*, *Foote*, 784 F.3d at 936 n.5; *Spencer*, 773 F.3d at 1143, I do not believe such a distinction is meritorious or just. As Judge Beverly Martin succinctly put it:

> [i]t seems to me to draw an arbitrary line to say (on the one hand) that a prisoner may use § 2255 to collaterally attack his career offender status if that prior conviction has been vacated . . . but not (on the other) if that same prior conviction was never a qualifying conviction in the first place—in light of an authoritative statutory interpretation by the Supreme Court.

Spencer, 773 F.3d at 1153 (Martin, J., dissenting) (internal citation omitted). In both cases, it is clear that the individual is not, in fact, a career offender. *See id.* (arguing that individuals who have been incorrectly designated as career offenders may be more deserving of § 2255 relief because, unlike Johnson, their designation as career offenders was incorrect the day they were sentenced). Furthermore, although in one scenario the predicate offense is now legally non-existent, resentencing courts would be incapable of using the predicate offense for either defendant to designate him as a career offender. *See Spencer*, 773 F.3d at 1160 (Jordan, J., dissenting) ("Under either scenario, the pertinent prior conviction cannot lawfully be used to establish career offender status, and the sentence imposed constitutes a miscarriage of justice."). In short, neither offense would constitute a "predicate offense" on resentencing. And although there may be a distinction between factual innocence (for example the vacatur of a conviction) and legal innocence (statutory reinterpretation of the sentencing guidelines), "this distinction is nowhere found in § 2255." *Id.* at 1153 (Martin, J., dissenting). Consequently, not only does *Johnson* suggest that generally sentencing errors may be cognizable under § 2255, but also, the logical extension of its reasoning supports the proposition that inaccurate career-offender designations can be similar in kind to the error in *Johnson*, and, therefore, cognizable under § 2255.

B. Controlling Authority of the Guidelines

The majority suggests that, because the guidelines are now "advisory" and cannot dictate a certain sentence, misapplication of them in Snider's case is not a sufficiently extreme injustice to form the basis of a § 2255 claim. I believe that in certain scenarios, such a characterization is largely speculative and completely unresponsive to the reality of federal sentencing today.

First, although the guidelines are advisory following *Booker*, they often still have an outsized impact on criminal sentencings. Specifically, the guidelines remain "the starting point and the initial benchmark" for sentencing, *Gall v. United States*, 552 U.S. 38, 49 (2007), and thus constitute the "lodestar" for sentencing judges, *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1346 (2016). Because district courts "*must* begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process," *Molina-Martinez*, 136 S. Ct. at 1345 (quoting *Peugh v. United States*, 569 U.S. 530, 541 (2013)), "[i]n most cases, it is the range set by the Guidelines, not the minimum or maximum term of imprisonment set by statute, that specifies the number of years a defendant will spend in prison," *Beckles v. United States*, 137 S. Ct. 886, 900 (2017) (Sotomayor, J., dissenting). Thus, when "the judge uses the sentencing range as the beginning point to explain the decision to deviate from it, *then the Guidelines are in a real sense the basis for the sentence*." *Molina-Martinez*, 136 S. Ct. at 1345 (quoting *Peugh*, 569 U.S. at 542); *see also Beckles*, 137 S. Ct. at 901 (Sotomayor, J., dissenting) (explaining a defendant "must take the range as the starting point for his request" for a sentencing deviation); *Hawkins*, 706 F.3d at 826–27 (Rovner, J., dissenting); *Spencer*, 773 F.3d at 1161 (Jordan, J., dissenting) ("We routinely tell district courts that we ordinarily expect a sentence within the Sentencing Guidelines to be reasonable, and it is folly to pretend that such pronouncements do not have an impact on sentencing decisions in the trenches." (internal citation omitted)). As the Supreme Court has noted, "[i]n most cases district courts continue to impose either within-Guidelines sentences or sentences that depart downward from the Guidelines on the Government's motion." *Molina-Martinez*, 136 S. Ct. at 1346 (internal quotation marks omitted). Consequently, the Supreme Court has recognized that, on direct review, an incorrect guideline calculation can generally impact a defendant's "substantial rights for purposes of obtaining relief

under" plain-error review, *even if* the sentence was within the correct guideline range. *Id.* at 1349; *accord United States v. Susany*, 893 F.3d 364, 368 (6th Cir. 2018).

This impact is particularly relevant to individuals designated as career offenders, as "[t]he imposition of the career offender status brand[s criminal defendants] as . . . malefactor[s] deserving of far greater punishment than that usually meted out for an otherwise similarly situated individual . . . . No amount of evidence in mitigation or extenuation could erase that branding." *Narvaez v. United States*, 674 F.3d 621, 629 (7th Cir. 2011); *see also Beckles*, 137 S. Ct. at 900 n.1 (Sotomayor, J., dissenting) (noting that when lower courts ordered resentences based on the (at the time) inapplicability of the residual clause of the career offender guidelines, sentences were usually much lower); *Molina-Martinez*, 136 S. Ct. at 1346 (noting that "[i]n less than 20% of cases since 2007 have district courts imposed above- or below-Guidelines sentences absent a Government motion" (internal quotation marks omitted)). Requiring a defendant who, based on an unequivocal change in the law, is no longer a "career offender" nonetheless to carry that designation often creates very real and cognizable consequences. *See, e.g.*, *Spencer*, 773 F.3d at 1148 (Wilson, J., dissenting) (noting the defendant clearly showed he had been prejudiced by the guideline error as the district judge made clear that, absent the enhancement, the defendant would be looking at half the prison time); *Hawkins*, 706 F.3d at 821 (explaining that without the enhancement, the defendant's range was between 15 and 30 months and that with the designation, the guideline range jumped to 151 to 188 months).

Furthermore, although some courts have determined that advisory calculation claims are not cognizable because the defendant would be sentenced to the same original sentence, *see, e.g.*, *Spencer*, 773 F.3d at 1143, I do not believe this possibility means they are automatically excluded from relief under § 2255. Specifically, to rely on the possibility that an offender might be resentenced to the same sentence previously imposed is too speculative a consideration to determine whether all career-offender guideline claims are cognizable. *See Spencer*, 773 F.3d at 1178 (Rosenbaum, J., dissenting) ("[A]ttempting to divine any sentence imposed on resentencing . . . constitutes pure speculation."); *Hawkins*, 706 F.3d at 826 (Rovner, J., dissenting) ("[T]o assume that the same sentence would have been imposed in the absence of the career offender provision . . . is frail conjecture that evinces in itself an arbitrary disregard of the petitioner's

right to liberty." (quoting *Narvaez*, 674 F.3d at 629)). This is particularly true since, as Judge Robin Rosenbaum noted in *Spencer*, the defendant in *Johnson* could also have been given the same sentence on remand, as the court likely could have considered the vacated state-court convictions independently because Johnson had not been found actually innocent of those crimes. *Spencer*, 773 F.3d at 1177 (Rosenbaum, J., dissenting). Conversely, given the importance of the sentencing guidelines for career offenders particularly, there *is* evidence suggesting that individuals granted § 2255 relief will be resentenced to a lower guideline range, thus enabling them to advocate for sentences from a more appropriate starting point. *See Beckles*, 137 S. Ct. at 900 n.1 (Sotomayor, J., dissenting) (noting that in resentencings under the career-offender guidelines most defendants received lower sentences). Thus, although I do not believe the mere distinction between mandatory and advisory guidelines should automatically doom advisory guideline claims brought under § 2255, in any case the advisory guidelines have an extraordinary impact and in certain scenarios the same "miscarriages of justice" may occur with advisory guideline errors if left uncorrected as with mandatory guideline errors. *See Hill*, 836 F.3d at 596–97, 600 (determining that a prisoner's mandatory-guideline sentence could constitute a "miscarriage of justice" warranting a 28 U.S.C. § 2241 petition); *Narvaez*, 674 F.3d at 623 (concluding that an improperly calculated pre-*Booker* sentence could form the basis of a cognizable § 2255 claim).

C. Justice and Finality

Finally, I briefly note that a decision which holds that § 2255 claims based on career-offender guideline miscalculations are categorically unavailable would undermine the expectation of justice and fairness that all individuals are entitled to have in the criminal justice system and, furthermore, would not support the concerns of finality often used to justify such an exclusion. *See, e.g.*, *Hawkins v. United States*, 724 F.3d 915, 918 (7th Cir. 2013) ("Judicial systems that ignore the importance of finality invite unreasonable delay in the disposition of cases.").

The justification of finality is generally predicated on four considerations: "(1) to build confidence in the integrity of the judicial system; (2) to minimize administrative costs and delay; (3) to avoid spoliation of evidence; and (4) to honor comity." *Gilbert v. United States*, 640 F.3d

1293, 1334 (11th Cir. 2011) (Martin, J., dissenting). I do not believe these factors apply in such a way as to bar all individuals from relief under § 2255. For instance, in a case in which a defendant was incorrectly designated as a career offender based on later-determined judicial error, the "integrity of the judicial system" would hardly be supported by requiring that defendant to remain in prison, particularly if he has consistently (and correctly) argued as to the inapplicability of the enhancement. *See Spencer*, 773 F.3d at 1154 (Martin, J., dissenting); *Sun Bear*, 644 F.3d at 712 (Melloy, J., dissenting) ("[D]enying relief does not build confidence in our court system because this looks to the world like a court refusing to acknowledge or make amends for its own mistake." (quoting *Gilbert*, 640 F.3d at 1334 (Martin, J., dissenting))). Similarly, because these cases present purely legal questions (whether an individual is a "career offender" under the guidelines), there is no concern that evidence will have been lost or destroyed; in most cases, the defendant will still be guilty and his criminal history will remain the same. *See Spencer*, 773 F.3d at 1154 (Martin, J., dissenting). And because these cases involve federal sentencing statutes and guidelines, "[t]he contrary result dictated by the majority's holding promotes finality at the expense of justice in a situation where, unlike most AEDPA cases, there are no concerns of comity or federalism." *Sun Bear*, 644 F.3d at 707 (Melloy, J., dissenting). Finally, in cases where the career-offender enhancement has drastically increased an individual's sentence, administrative costs are hardly saved by incarcerating the defendant for more time than he would otherwise be required to serve. *Spencer*, 773 F.3d at 1154 (Martin, J., dissenting). As Judge James Hill eloquently noted in his dissent in *Gilbert v. United States*, "I recognize that without finality there can be no justice. But it is equally true that, without justice, finality is nothing more than a bureaucratic achievement." 640 F.3d at 1337.

For all the reasons stated above, I do not believe that all advisory guideline claims are non-cognizable under § 2255; rather, I conclude that there are plausible scenarios in which a defendant's incorrect designation as a career offender under the advisory guidelines would necessarily create a "fundamental miscarriage of justice." Consequently, I respectfully dissent.

APPENDIX 024a

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
VS.	)	No. 06-10005-JDT
	)	
JEREMY SNIDER,	)	
	)	
Defendant.	)	

ORDER DISMISSING COUNT SIX
AND
RESENTENCING DEFENDANT ON COUNTS ONE THROUGH FIVE

On July 6, 2007, Defendant Jeremy Snider was convicted by a jury on six charges: Count One, conspiracy to manufacture over 50 grams of methamphetamine, in violation of 21 U.S.C. § 846; Count Two, manufacturing and attempting to manufacture methamphetamine, in violation of 21 U.S.C. § 841(a)(1); Count Three, possessing materials that may be used to manufacture methamphetamine, in violation of 21 U.S.C. § 843(a)(6); Count Four, possessing a firearm after having been convicted of a felony, in violation of 18 U.S.C. § 922(g); Count Five, knowingly possessing a stolen firearm which had been transported in interstate commerce, in violation of 18 U.S.C. § 922(j); and Count Six, possessing a firearm in furtherance of a drug-trafficking crime, in violation of 18 U.S.C. § 924(c). Snider was sentenced on April 18, 2008, to a prison term of 300 months on each of Counts One and Four; 240 months on Count Two; and 120 months on each of Counts Three and Five, all to run concurrently. On Count Six, he was sentenced to a prison term of 60 months, to run consecutively, for a total prison term of 360 months.

On appeal, the Defendant and the Government agreed that the conviction on Count Six should be vacated because the indictment mixed elements of the two separate offenses under § 924(c)(1)(A). Therefore, the United States Court of Appeals for the Sixth Circuit issued a decision reversing Snider's conviction on Count Six and remanding for further proceedings consistent with the opinion. United States v. Snider, No. 08-5528, 2010 WL 2161790 (6th Cir. May 28, 2010). The mandate issued on June 21, 2010. In accordance with the Court of Appeals' decison, Count Six of the second superseding indictment is hereby DISMISSED.

A resentencing hearing is not necessary in this case because the Court is resentencing Snider only on the five counts that were not reversed by the Court of Appeals, is not considering any new evidence, and is reimposing the original sentence on those counts. After reconsidering all of the relevant evidence and all of the sentencing factors set out in 18 U.S.C. § 3553(a), the Court finds that the sentence initially imposed on Counts One through Five was appropriate. Thus, for the reasons stated in open court during the original sentencing hearing, the Defendant is hereby sentenced to a term of imprisonment for 300 months on each of Counts One and Four of the second superseding indictment; 240 months on Count Two; and 120 months on each of Counts Three and Five, all to run concurrently with each other, for a total sentence of 300 months. Upon release from prison, the Defendant will be placed on supervised release for four years on Count One, and for three years on each of Counts Two through Five, all to run concurrently with each other.

Within 72 hours of release from the custody of the Bureau of Prisons, the Defendant shall report in person to the United States Probation Office in the district to which he is released. While on supervised release, the Defendant shall not commit any other crimes, federal, state or local. Defendant shall comply with the standard conditions of supervision adopted by this Court and the

following additional conditions: (1) that he not possess a firearm or any other dangerous weapon; and (2) that he participate in a program of testing and treatment for drug abuse, as directed by the Probation Officer, until he is released from that program.

The Court finds that Defendant has no assets with which to pay a fine; therefore, the fine is waived in this case.

A special assessment of $100 is required on each count. However, following the original sentencing, Defendant paid the required special assessments of $100 on each of the six counts of conviction, for a total of $600. The special assessments were paid through the Bureau of Prisons' Inmate Financial Responsibility Program. Accordingly, no additional special assessment is due at this time. The Clerk is directed to refund the $100 special assessment that was paid on Count Six, which has now been dismissed. The refund shall be sent to:

Federal Bureau of Prisons
Register #20500-076
Jeremy Snider
P.O. Box 474701
Des Moines, IA 50947-0001

The Clerk is directed to prepare an amended judgment.

IT IS SO ORDERED.

s/ **James D. Todd**
JAMES D. TODD
UNITED STATES DISTRICT JUDGE

APPENDIX 027a

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
VS.	)	Civ. No. 11-1174-JDT-egb
	)	Crim. No. 06-10005-JDT
JEREMY SNIDER,	)	
	)	
Defendant.	)	

ORDER PARTIALLY DENYING MOTION PURSUANT TO 28 U.S.C. § 2255
AND
ORDER DIRECTING GOVERNMENT TO RESPOND TO THE REMAINING ISSUE

On June 16, 2011, Defendant Jeremy Snider, Bureau of Prisons inmate registration number 20500-076, an inmate at the Federal Correctional Institution—Medium in Forrest City, Arkansas, filed a *pro se* motion pursuant to 28 U.S.C. § 2255, accompanied by a legal memorandum. (Docket Entry 1.)

On January 23, 2006, a federal grand jury returned an indictment against Snider. (Criminal Docket Entry 1.) The grand jury returned a superseding indictment on August 29, 2006 (Cr. D.E. 24), and a second superseding indictment on November 20, 2006 (Cr. D.E. 32). The first count of the Second Superseding Indictment charged that, beginning at an unknown time and continuing through at least on or about November 22, 2005, Snider conspired to manufacture over 50 grams of a mixture and substance containing a detectable amount of methamphetamine, in violation of 21 U.S.C. § 846. The second count charged

Snider with manufacturing and attempting to manufacture a mixture and substance containing a detectable amount of methamphetamine on or about November 22, 2005, in violation of 21 U.S.C. §§ 841(a)(1) and 846. Count 3 charged Snider with possessing equipment, chemicals, products, and materials that may be used to manufacture methamphetamine on or about November 22, 2005, in violation of 21 U.S.C. § 843(a)(6). Count 4 charged Snider, a convicted felon, with possessing a firearm on or about November 22, 2005, in violation of 18 U.S.C. § 922(g). The fifth count charged Snider with possession of a stolen firearm on or about November 22, 2005, in violation of 18 U.S.C. § 922(j). The sixth count charged that, from on or about November 15, 2005, through on or about November 22, 2005, Snider possessed a firearm during and in relation to the drug-trafficking crime charged in counts 1 and 2, in violation of 18 U.S.C. § 924(c).

The factual basis for these charges is set forth in the Presentence Investigation Report ("PSR"):

> 4. On May 6, 2005, Weakley County Sheriff's Department Investigator Marty Plunk attempted to conduct a traffic stop on Jeremy Snider, however, Defendant Snider fled in his vehicle. During the pursuit, Investigator Plunk observed Mr. Snider moving around a lot in his seat. The investigator ultimately took the defendant into custody. Subsequent to his arrest, Jeremy Snider advised Investigator Plunk that he had fled from him as he had cooked fifteen grams of methamphetamine and shoved the drugs up his anus.
>
> 5. On July 11, 2005, Lt. Jason Arant and Patrolman Nicholas Glenn of the Martin Police Department responded to a call regarding an individual who was trespassing on Martin Housing Authority Property at 27 East Heights Circle. Upon their arrival, the officers made contact with Lori Dean, who twice advised that Jeremy Snider was not on the property. Ms. Dean gave her consent for the officers to search the property for Defendant Snider. Officers observed a locked closet and asked Lori Dean for a key, and she indicated that

she did not have a key to the closet. The officers were able to open the latch, and they encountered Mr. Snider, who was attempting to hold the closet door closed from the inside. The officers ordered the defendant from the closet, and he resisted being arrested as he exited the closet. Jeremy Snider bit Patrolman Glenn, and Patrolman David Bell deployed a tazer [sic] to Defendant Snider's shoulder in order to subdue him. The tazer [sic] failed to subdue Mr. Snider, however, officers were able to apprehend him a short time later. While the officers attempted to place handcuffs on the defendant, Lori Dean became physically and verbally combative with the officers and began striking the officers.

6. On November 8, 2005, officers of the Martin Police Department were attempting to serve warrants on Jeremy Snider, as he was found to be in a parked vehicle at 120 Fulton Street. Officers made contact with Ricky Black, who was standing at the rear of the residence. Officers placed Mr. Black under arrest and asked Ricky Black for consent to search his automobile. Officer [sic] located a duffel bag in the truck that contained syringes, a spoon, and cotton swabs. Officers ordered Defendant Snider from his vehicle, and Mr. Snider refused to come out and locked the doors of the car. Lt. Jason Arant kicked a window in to gain entry to the vehicle, and the defendant put the automobile in reverse. Defendant Snider fled in his automobile from the officers, almost striking Ricky Black. He rammed his car into an automobile belonging to Barbara Sneed, denting the driver's side door of her vehicle. Jeremy Snider then struck her residence, causing the carport roof to fall onto her car. Defendant Snider backed into Captain Teal's patrol cruiser, bounced his vehicle into Lt. Arant's patrol cruiser, and fled the scene at a high rate of speed. As a result of Mr. Snider's actions, Ricky Black, Captain Teal, Lt. Arant, and Investigator Randal Walker were placed in danger of serious bodily harm. A pursuit ensued, however, the defendant was able to elude officers. On November 8, 2005, Patrolman Reed responded to the residence at 120 Fulton Street and located drug paraphernalia on the defendant's person. Patrolman Reed located a small foil wrapper containing burnt residue in the pocket of Jeffrey Graves, who admitted picking up the foil wrapper in an ashtray at the residence located at 120 Fulton Street.

7. During the time frame between November 8, 2005 and November 22, 2005, when law enforcement officers were actively looking to locate Jeremy Snider, officers spoke with Jason Seymour at his residence in Bradford, Tennessee, and Mr. Seymour advised that Defendant Snider had been at his residence on November 9, 2005 after being dropped off by a male in a stolen vehicle. Jason Seymour was aware of Mr. Snider's fugitive status

at that time, however, he allowed the defendant to stay with him while Jeremy Snider made his plans for escape. Defendant Snider used a cellular telephone belonging to Mr. Seymour's sister, Amanda Seymour, to call someone to pick him up. Amanda Seymour assisted Mr. Snider by taking him to the Sonic Drive-In in Greenfield, Tennessee, where two females picked him up.

8. On November 10, 2005, officers with the Martin Police Department received information that Jeremy Snider might be at the residence of Danny Young on Hyndsver Road. Officers additionally received information that a warrant was active for Mr. Young's arrest. Officers proceeded to Danny Young's residence and observed him talking on his cellular telephone. After he terminated his call, Mr. Young advised officers that he was talking to Jeremy Snider.

9. An offense report from the Weakley County Sheriff's Department reveals that on November 22, 2005, officers received information that Jeremy Snider, who was wanted on several felony warrants, was hiding in a mobile home located on Pillowville Road and Sandhill Lane in Weakley County, Tennessee. Investigators went to the residence and were allowed in by the owner, who advised that Defendant Snider was in a bedroom of the residence. Officers went to the stated bedroom and announced their presence, however, there was no response. One of the investigators, Sgt. Andrews, kicked the door open, however, no one was visible in the bedroom. Officers entered the bedroom and announced their presence at a closed bathroom door, however, there was no response. Officers kicked the bathroom door open, and located Mr. Snider in the bathtub. The defendant was ordered to come out of the bathtub and was taken into custody. A search of the immediate area revealed a loaded 9mm Glock pistol in Jeremy Snider's coat pocket, along with an extra magazine that was also loaded. Officers searched Mr. Snider's car and discovered an active methamphetamine laboratory. Officers located two propane tanks containing approximately seven to ten gallons of anhydrous ammonia, plastic jars with pseudoephedrine residue, stirring spoons with pseudoephedrine residue, liquid fire, salt, plastic tubing, lithium batteries, an electric pill crusher, a needle and a syringe, plastic bags, a small bag of methamphetamine, along with numerous items used to manufacture methamphetamine. Additional methamphetamine was located in coffee filters that had been used to manufacture methamphetamine. According to Investigator Plunk, the anhydrous ammonia was improperly, unlawfully stored in propane "gas grill" tanks which are highly combustible and present a danger to persons in the vicinity of the tanks.

10. At the time of Defendant Snider's arrest on November 22, 2005, Sarah Webb was also arrested. Ms. Webb advised officers that she had left Defendant Snider at the mobile home and she went to the residence of Danny Young on Oxford Street in Martin, Tennessee. She and Mr. Young loaded propane tanks into a white van owned by Jon Austin. Ricky Mason was employed as a maintenance worker for Mr. Austin, and used Mr. Austin's van as he pleased. Mr. Mason allowed Danny Young to use the van to take Sarah Webb and the propane tanks containing anhydrous ammonia back to the trailer where Jeremy Snider was hiding, for the purpose of manufacturing methamphetamine. At the time, [sic] Jeremy Snider was taken into custody, he admitted to "getting prepared" to have another methamphetamine cook. Sarah Webb admitted that she had been with Defendant Snider since the first part of October 2005, and had cooked methamphetamine a couple of times per week. Investigator Plunk spoke with Andrea Dinning subsequent to Mr. Snider's arrest, and she admitted to cooking methamphetamine with the defendant, providing transportation for him, and providing a place for him to stay. Ms. Dinning also admitted to destroying evidence of three methamphetamine laboratories by burning them within three days of Jeremy Snider's arrest.

11. During the defendant's trial on the instant offense, Sarah Webb testified that she provided Jeremy Snider with two to three boxes of pseudoephedrine pills (60 milligrams, ten pills per box; 120 milligrams, 20 pills per box) for use in manufacturing methamphetamine once or twice per week from October 2005 until their arrest on November 22, 2005. Ms. Webb stated that she was frequently at the methamphetamine cooks, and that Defendant Snider cooked methamphetamine at Tommy Raspberry's residence on the Fulton Highway twice per week. Sarah Webb testified that each methamphetamine cook yielded ten grams of finished-product methamphetamine. Ms. Webb indicated that she would be present at many of the cooks, as Mr. Snider would give her up to one-half of a gram of methamphetamine from the cooks. Sarah Webb testified that Jamie Petty, Andrea Dinning, Danny Young and others also assisted Jeremy Snider in the conspiracy to manufacture methamphetamine, as they provided Defendant Snider with materials and products used in the manufacturing process. Ms. Webb related that Danny Young and Andrea Dinning provided pseudoephedrine pills and batteries, while Jamie Petty provided pseudoephedrine pills for the cooks. Ms. Webb concluded her testimony with and [sic] estimate that she was with Jeremy Snider during approximately ten methamphetamine cooks that yielded approximately ten grams of finished-

product methamphetamine each, from October 2005 until his arrest on November 22, 2005.

12. During the defendant's trial on the instant offense, Andrea Dinning testified that she bought pseudoephedrine pills for Jeremy Snider at his direction in exchange for finished-product methamphetamine beginning September 2005. Ms. Dinning stated that she was present at seven of the methamphetamine cooks conducted by Defendant Snider, which yielded eight to ten grams each cook between September 2005 and November 2005. Andrea Dinning reported that Danny Young, Melissa Washburn, Sarah Webb, Jamie Petty, and herself were often present with Jeremy Snider during the manufacturing process, as they all bought pills and supplies for the cooks at Mr. Snider's direction for his methamphetamine cooks. Additionally, Richard Black testified during Mr. Snider's trial and stated that he was present during some of the cooks with Jeremy Snider. His testimony echoed that of Ms. Dinning and Ms. Webb in that he and the individuals named by Ms. Dinning and Ms. Webb supplied Defendant Snider with precursors and materials for the methamphetamine manufacturing process.

13. According to an Official Forensic Chemistry Report from the TBI dated July 5, 2006 (lab case no. 063001453), the amount of methamphetamine seized from Jeremy Snider was 0.1 grams. No analysis was performed on the residue. According to Investigator Plunk, the methamphetamine laboratory located in Mr. Snider's car could have yielded ten to fifteen grams of methamphetamine.

14. Special Agent Alan Oxley with the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), U.S. Department of Justice, examined a description of the firearm and determined that it was not manufactured in the State of Tennessee, and therefore traveled in interstate and/or foreign commerce. Agent Oxley additionally determined that the firearm met the statutory definition of "firearm" as defined in Title 18 U.S.C., Chapter 44, Section 921(a). A firearm trace was conducted and the Glock, model 17, 9mm caliber pistol, serial no. KD438US was determined to be stolen. The pistol was registered and had been purchased by Christopher Van Dinning. According to Investigator Plunk, Mr. Dinning's younger sister, Andrea Dinning, had assisted Jeremy Snider in hiding out, and had given him a key to Mr. Dinning's residence. While Mr. Snider was staying at this residence, he stole the pistol from Christopher Van Dinning.

> 15. Pursuant to the criminal investigation of Jeremy Snider, investigators determined that Defendant Snider had previously been convicted on May 22, 1995, in the Circuit Court of Weakley County, Tennessee, on three counts of Aggravated Burglary, Dkt. nos. 2602, 2603, and 2604.

(PSR ¶¶ 4-15.)

Snider was tried before a jury on July 5 - 6, 2007, at the conclusion of which the jury returned a guilty verdict on all of the charges. (Cr. D.E. 61 & 62.) At a sentencing hearing on April 18, 2008, the Court sentenced Snider as a career offender to a 360-month term of imprisonment, to be followed by a four-year period of supervised release. (Cr. D.E. 82.)[1] Judgment also was entered on April 18, 2008. (Cr. D.E. 83 & 84.)

On appeal, the United States Court of Appeals for the Sixth Circuit reversed Snider's conviction on count 6 and remanded the case for further proceedings. United States v. Snider, 379 F. App'x 430 (6th Cir. 2010). On remand, the Court issued an order on July 9, 2010, that dismissed count 6 and reimposed the original sentence on count 1 through 5, for

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[1] Snider was sentenced to 300 months on counts 1 and 4, 240 months on count 2, and 120 months on counts 3 and 5, all to run concurrently. He was sentenced to a consecutive term of 60 months on count 6.

The PSR calculated Snider's sentence in the following manner: pursuant to § 3D1.2(d) of the United States Sentencing Guidelines ("U.S.S.G."), counts 1, 2, and 3 were grouped into a single group. Counts 4 and 5 had no effect on the guideline range. § 2K2.4. The drug quantity for sentencing purposes was 56 grams of methamphetamine. (PSR ¶ 20.) The base offense level for a drug offense involving between 50 and 200 grams of methamphetamine is 26. U.S.S.G. § 2D1.1(c)(7). The PSR recommended that Defendant receive a two-point enhancement because the offense involved the illegal storage of a hazardous waste, § 2K1.1(b)(6)(A)(ii); a four-point enhancement because Defendant was the organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, § 3B1.1(a); and a two-point enhancement for obstruction of justice, § 3C1.2, resulting in a total offense level of 34. The PSR calculated Defendant's criminal history category as VI, resulting in a guideline sentencing range of 262-327 months.

Defense counsel filed objections to the enhancements and to the criminal history category, which were rendered moot because the Court concluded that Snider qualified as a career offender under § 4B1.1(a) as a result of his three prior felony convictions for aggravated burglary. The adjusted offense level remained at 34 pursuant to § 4B1.1(b)(B) because the statutory maximum sentence for a drug offense involving 56 grams of methamphetamine was 40 years. 21 U.S.C. § 841(b)(1)(B)(viii). Because Defendant also was convicted under 18 U.S.C. § 924(c), the sentencing range was 360 months to life. U.S.S.G. § 4B1.1(c)(3).

a total sentence of 300 months. (Cr. D.E. 104.) An amended judgment was entered on July 19, 2010. (Cr. D.E. 105 & 106.) Snider did not appeal.

In this motion pursuant to 28 U.S.C. § 2255 motion, Snider raises the following issues:

> 1. Whether defense counsel rendered ineffective assistance, in violation of the Sixth Amendment, by failing to object to application of the career offender guideline;
>
> 2. Whether defense counsel rendered ineffective assistance, in violation of the Sixth Amendment, by failing to raise a personal use argument at sentencing;
>
> 3. Whether the mandatory application of the career offender guideline in U.S.S.G. § 4B1.1 violates the Sixth Amendment; and
>
> 4. Whether Defendant was sentenced in violation of Apprendi v. New Jersey, 530 U.S. 466 (2000).

(D.E. 1 at 4-5.)

Pursuant to 28 U.S.C. § 2255(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.

"A prisoner seeking relief under 28 U.S.C. § 2255 must allege either (1) an error of constitutional magnitude; (2) a sentence imposed outside the statutory limits; or (3) an error of fact or law that was so fundamental as to render the entire proceeding invalid." Short v. United States, 471 F.3d 686, 691 (6th Cir. 2006) (internal quotation marks omitted).

A § 2255 motion is not a substitute for a direct appeal. See Sunal v. Lange, 332 U.S. 174, 178 (1947). "[N]onconstitutional claims that could have been raised on appeal, but were not, may not be asserted in collateral proceedings." Stone v. Powell, 428 U.S. 465, 477 n.10 (1976). "Defendants must assert their claims in the ordinary course of trial and direct appeal." Grant v. United States, 72 F.3d 503, 506 (6th Cir. 1996). This rule is not absolute:

> If claims have been forfeited by virtue of ineffective assistance of counsel, then relief under § 2255 would be available subject to the standard of Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In those rare instances where the defaulted claim is of an error not ordinarily cognizable or constitutional error, but the error is committed in a context that is so positively outrageous as to indicate a "complete miscarriage of justice," it seems to us that what is really being asserted is a violation of due process.

Id.

Even constitutional claims that could have been raised on direct appeal, but were not, will be barred by procedural default unless the defendant demonstrates cause and prejudice sufficient to excuse his failure to raise those issues previously. El-Nobani v. United States, 287 F.3d 417, 420 (6th Cir. 2002) (withdrawal of guilty plea); Peveler v. United States, 269 F.3d 693, 698-99 (6th Cir. 2001) (new Supreme Court decision issued during pendency of direct appeal); Phillip v. United States, 229 F.3d 550, 552 (6th Cir. 2000) (trial errors). Alternatively, a defendant may obtain review of a procedurally defaulted claim by demonstrating his "actual innocence." Bousley v. United States, 523 U.S. 614, 623 (1998).

After a § 2255 motion is filed, it is reviewed by the Court and, "[i]f it plainly appears from the motion, any attached exhibits, and the record of prior proceedings that the moving

party is not entitled to relief, the judge must dismiss the motion." Rule 4(b), Rules Governing § 2255 Proceedings ("§ 2255 Rules"). "If the motion is not dismissed, the judge must order the United States attorney to file an answer, motion, or other response within a fixed time, or to take other action the judge may order." Id. The movant is entitled to reply to the Government's response. § 2255 Rule 5(d). The Court may also direct the parties to provide additional information relating to the motion. § 2255 Rule 7.

"In reviewing a § 2255 motion in which a factual dispute arises, 'the habeas court must hold an evidentiary hearing to determine the truth of the petitioner's claims.'" Valentine v. United States, 488 F.3d 325, 333 (6th Cir. 2007) (quoting Turner v. United States, 183 F.3d 474, 477 (6th Cir. 1999)). "'[N]o hearing is required if the petitioner's allegations cannot be accepted as true because they are contradicted by the record, inherently incredible, or conclusions rather than statements of fact.'" Id. (quoting Arredondo v. United States, 178 F.3d 778, 782 (6th Cir. 1999)). Where the judge considering the § 2255 motion also presided over the criminal case, the judge may rely on his or her recollection of the prior case. Blanton v. United States, 94 F.3d 227, 235 (6th Cir. 1996); see also Blackledge v. Allison, 431 U.S. 63, 74 n.4 (1977) ("[A] motion under § 2255 is ordinarily presented to the judge who presided at the original conviction and sentencing of the prisoner. In some cases, the judge's recollection of the events at issue may enable him summarily to dismiss a § 2255 motion."). Defendant has the burden of proving that he is entitled to relief by a preponderance of the evidence. Pough v. United States, 442 F.3d 959, 964 (6th Cir. 2006).

Snider's first two issues assert that defense counsel rendered ineffective assistance, in violation of the Sixth Amendment. (D.E. 1 at 5; D.E. 1-1 at 2-20.) A claim that ineffective assistance of counsel has deprived a defendant of his Sixth Amendment right to counsel is controlled by the standards stated in Strickland v. Washington, 466 U.S. 668 (1984). To demonstrate deficient performance by counsel, a petitioner must demonstrate that "counsel's representation fell below an objective standard of reasonableness." Id. at 688. "A court considering a claim of ineffective assistance must apply a 'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance. [Id. at 689.] The challenger's burden is to show 'that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.' [Id. at 687.]" Harrington v. Richter, ___ U.S. ___, 131 S. Ct. 770, 787 (2011).

To demonstrate prejudice, a prisoner must establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694.[2] "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694. "It is not enough 'to show that the errors had some conceivable effect on the outcome of the proceeding.' [Id. at 693.] Counsel's errors must be 'so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.' [Id. at 687.]" Richter, 131 S. Ct. at 787-88; see also id. at 791-92 ("In assessing prejudice under Strickland, the question is not whether a court can be certain counsel's

[2] "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant." Strickland, 466 U.S. at 697. If the reviewing court finds a lack of prejudice, it need not then determine whether, in fact, counsel's performance was deficient. Id. at 697.

performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. . . . The likelihood of a different result must be substantial, not just conceivable." (citations omitted)); Wong v. Belmontes, ___ U.S. ___, 130 S. Ct. 383, 390-91 (2009) (per curiam) ("But Strickland does not require the State to 'rule out' [a more favorable outcome] to prevail. Rather, Strickland places the burden on the defendant, not the State, to show a 'reasonable probability' that the result would have been different."). Where, as here, a defendant contends that his attorney rendered ineffective assistance at a sentencing hearing, prejudice is established where a misapplication of the Sentencing Guidelines increased a defendant's sentence. Glover v. United States, 531 U.S. 198, 202-04 (2001).

"Surmounting Strickland's high bar is never an easy task." Padilla v. Kentucky, ___ U.S. ___, 130 S. Ct. 1473, 1485 (2010).

> An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the Strickland standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. Strickland, [466 U.S. at 689-690.] Even under *de novo* review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence." [Id. at 689]; see also Bell v. Cone, [535 U.S. 685, 702 (2002)]; Lockhart v. Fretwell, [506 U.S. 364, 372 (1993)]. The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. Strickland, [466 U.S. at 690].

Richter, 131 S. Ct. at 788.

In his first issue, Snider argues that his attorney rendered ineffective assistance by failing to object to application of the career offender guideline on the ground that his three convictions for aggravated robbery were not committed on "occasions different from one another." (D.E. 1-1 at 2-7.) For the reasons that follow, it would appear that Defendant is correct that he was erroneously sentenced as a career offender.

Under U.S.S.G. § 4B1.1(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.

On its face, there is no requirement in § 4B1.1 that the predicate convictions be committed on different occasions; that requirement applies only to convictions used to sentence a defendant as an armed career criminal under 28 U.S.C. § 924(e)(1) and U.S.S.G. § 4B1.4. However, under § 4B1.2(c),

> the term "two prior felony convictions" means (1) the defendant committed the instant offense of conviction subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense (i.e., two felony convictions of a crime of violence, two felony convictions of a controlled substance offense, or one felony conviction of a crime of violence and one felony conviction of a controlled substance offense), and (2) the sentences for at least two of the aforementioned felony convictions are counted separately under the provisions of § 4A1.1(a), (b), or (c). . . .

It is, therefore, necessary to determine whether Snider's three prior convictions for aggravated assault qualify as separate sentences under § 4A1.1.

Although the PSR used the 2006 version of the Sentencing Guidelines, § 4A1.1 was amended by Amendment 709, which took effect on November 1, 2007, prior to Snider's sentencing on April 18, 2008.[3] Section 4A1.2(a)(2), as amended by Amendment 709, provides:

> If the defendant has multiple prior sentences, determine whether those sentences are counted separately or as a single sentence. Prior sentences always are counted separately if the sentences were imposed for offenses that were separated by an intervening arrest (i.e., the defendant is arrested for the first offense prior to committing the second offense). If there is no intervening arrest, prior sentences are counted separately unless (A) the sentences resulted from offenses contained in the same charging instrument; or (B) the sentences were imposed on the same day. Count any prior sentence covered by (A) or (B) as a single sentence. See also § 4A1.1(e).[4]

In this case, Snider was sentenced as a career offender because of three prior convictions for aggravated burglary obtained in the Circuit Court for Weakley County, Tennessee, in 1995, which are set forth in ¶¶ 37, 38, and 39 of the PSR. The offenses were committed on March 19, 1995, and March 21, 1995 (¶ 37); March 22, 1995 (¶ 38); and March 24, 1995 (¶ 39). The PSR reflects that Snider was arrested for all of these offenses on April 19, 1995, with no intervening arrest. In addition, the sentences for these offenses were imposed on the same day, May 22, 1995. Therefore, because these four convictions should have been counted as a single sentence under § 4A1.2(a)(2), it appears that Snider

[3] See U.S. Sentencing Guidelines Manual, App. C, Vol. III at 235-41, Amend. 709 (Nov. 1, 2011).

[4] Amendment 709 also amended§ 4A1.1(e), formerly paragraph (f), so that it provides: "Add **1** [criminal history] point for each prior sentence resulting from a conviction of a crime of violence that did not receive any points under (a), (b), or (c) above because such sentence was counted as a single sentence, up to a total of **3** points for this item."

does not qualify as a career offender. See generally United States v. Curb, 625 F.3d 968, 970-71 (6th Cir. 2010) (analyzing § 4B1.1 in light of § 4A1.2).

That Defendant was erroneously sentenced as a career offender does not necessarily mean that he is entitled to relief in a § 2255 proceeding. Ordinarily, errors in the application of the sentencing guidelines are not cognizable in a § 2255 motion. Grant v. United States, 72 F.3d at 506; see also United States v. Lankford, Nos. 99-5870, 99-6075, 2000 WL 1175592, at *1 (6th Cir. Aug. 9, 2000) ("Technical violations of the federal sentencing guidelines will not warrant [§ 2255] relief."); Hunter v. United States, 160 F.3d 1109, 1114 (6th Cir. 1998) ("Relief is not available in a section 2255 proceeding for a claim of nonconstitutional, sentencing-guideline error when that error was procedurally defaulted through the failure to bring a direct appeal."). Although Defendant argues that his attorney was ineffective for failing to challenge the application of the career offender guideline, his legal memorandum does not properly analyze the issue but, instead, argues that the predicate crimes were not separate offenses under the Armed Career Criminal Act, 18 U.S.C. § 924(e), which is not the issue under the career offender guideline. The reason why Defendant was not properly sentenced as a career offender is entirely distinct from whether the three aggravated burglaries were "committed on occasions different from one another" within the meaning of § 924(e)(1). It could be argued, therefore, that Snider has not properly raised the issue that his attorney was ineffective for failing to challenge his sentence under U.S.S.G. § 4A1.2(a). Moreover, even if the issue was properly raised, it may be that trial counsel's failure to recognize the error does not raise to the level of ineffective assistance, especially

where, as here, none of the other participants in the sentencing hearing, including the probation officer who prepared the PSR, noticed the possible error. Therefore, the Government will be required to respond to the first issue.

In his second issue, Defendant argues that his attorney rendered ineffective assistance by failing to object that some of the drugs included in the drug quantity calculation were intended for personal use. (D.E. 1 at 5; D.E. 1-1 at 10-19.) Drugs intended for personal use are not part of the relevant conduct for sentencing purposes where a defendant is charged with distributing, or possessing with the intent to distribute, a controlled substance. United States v. Gill, 348 F.3d 147, 153 (6th Cir. 2003). In this case, however, Snider was charged with conspiring to manufacture methamphetamine (count 1) and with manufacturing and attempting to manufacture methamphetamine (count 2). Because Snider was convicted of conspiring to manufacture methamphetamine, "the personal use of some of the methamphetamine [he] manufactured was without question 'part of the same course of conduct or common scheme or plan as the offense of conviction[.]'" United States v. Myers, Nos. 98-5767, 98-5768, 1999 WL 1073671, at *4 (6th Cir. Nov. 15, 1999) (quoting U.S.S.G. § 1B1.3(a)(2)) (alteration in original); see also United States v. Harding, Cr. No. 6:04-65-DCR, Civ. No. 6:07-251-DCR, 2008 WL 4073393, at *16-17 (E.D. Ky. Aug. 29, 2008) (same, applying Myers). Snider was not charged with distributing, or intending to distribute, the product of the manufacturing process, so it is irrelevant whether some of the methamphetamine might have been intended for personal use. See United States v. Frost, Nos. 97-6351, 97-6352, 1999 WL 455434, at *2 (6th Cir. June 24, 1999) ("Under the plain

reading of the statute, it makes no difference whether the manufacturer of marijuana intended to distribute or to consume himself.").

Because Snider cannot establish deficient performance or prejudice, the second issue is DISMISSED.

In his third issue, Snider argues that the mandatory application of the career offender guideline in U.S.S.G. § 4B1.1 violates the Sixth Amendment. (D.E. 1 at 5; D.E. 1-1 at 20-21.) This issue will be moot if Defendant obtains relief on his first issue. The third issue, as framed, is not cognizable in a § 2255 motion because it could have been raised on direct appeal. Snider does not argue that his attorney was ineffective in failing to raise a constitutional challenge to the career offender guideline on direct appeal.[5]

The third issue is also meritless. In Apprendi v. New Jersey, 530 U.S. at 490, the Supreme Court held that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." The Sixth Circuit has held that "a district court does not violate the Sixth Amendment by determining the fact and nature of a defendant's prior convictions and using those findings to impose an increased sentence under the Armed Career Criminal Act." United States v. Beasley, 442 F.3d 386, 391 (6th Cir. 2006); see also United States v. Sanders, 470 F.3d 616 (6th Cir. 2006); United States v. Barnett, 398 F.3d

[5] Snider asserts that his attorney was ineffective in failing to argue that application of the career offender guideline resulted in a sentence that was twice the statutory maximum. (D.E. 1-1 at 21.) Snider is mistaken because the statutory maximum sentence for a drug offense involving 56 grams of methamphetamine was 40 years. See *supra* note 1.

516, 524-25 (6th Cir. 2005); United States v. Burgin, 388 F.3d 177, 183-86 (6th Cir. 2004). Likewise, the Sixth Circuit has held that Apprendi and its progeny do not preclude a district court from making the factual findings required to sentence a defendant as a career offender. United States v. Martinez, 430 F.3d 317, 343 (6th Cir. 2005) ("The career offender enhancement is based on the fact of [the defendant's] prior convictions and does not violate the Sixth Amendment."); United States v. Bradley, 400 F.3d 459, 462-63 (6th Cir. 2005) ("From Apprendi to Blakely to Booker, the Court has continued to except such factfinding from the requirements of the Sixth Amendment."); United States v. Newton, 389 F.3d 631, 639 (6th Cir. 2005), *vacated on other grounds*, 546 U.S. 803 (2005).[6]

For these reasons, the Defendant's third issue is without merit and also is DISMISSED.

In his fourth issue, Snider contends that he was sentenced in violation of Apprendi. (D.E. 1 at 4; D.E. 1-1 at 21-37.) Even if Snider's failure to raise this issue on direct appeal were overlooked, the issue is substantively meritless. The issue of whether Snider conspired to manufacture in excess of 50 grams of methamphetamine was specifically submitted to the jury, which found in the affirmative. (Cr. D.E. 62.) Therefore, the fourth issue is DISMISSED.

The Government is directed to file an answer with regard to the first issue within twenty-three (23) days after the date of this order. The Government's answer should address

[6] The judgment in Newton was vacated in light of Booker, and the case was remanded for a new sentencing hearing. United States v. Newton, 431 F.3d 991 (6th Cir. 2005).

(i) whether Snider was properly sentenced as a career offender in light of Amendment 709; (ii) whether Snider's § 2255 motion fairly raises this issue; (iii) if the issue is fairly before the Court, whether defense counsel rendered ineffective assistance by failing to raise an appropriate objection at the sentencing hearing and on direct appeal; and (iv) what relief, if any, should be afforded Defendant on this issue.[7] Snider shall have 28 days after the Government's answer is filed to file a reply if he so chooses.

IT IS SO ORDERED.

s/ **James D. Todd**
JAMES D. TODD
UNITED STATES DISTRICT JUDGE

[7] If Snider was not properly sentenced as an armed career criminal, U.S.S.G. § 4B1.1(a)(2) and 4A1.1(e) would also appear to reduce Defendant's criminal history score. See also *supra* note 4.

APPENDIX 046a

United States District Court
WESTERN DISTRICT OF TENNESSEE

JUDGMENT IN A CIVIL CASE

JEREMY SNIDER,
Movant,

v.

CASE NUMBER: 1:11-cv-1174-T

UNITED STATES OF AMERICA,
Respondent,

Decision by Court. This action came to consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that in compliance with the order entered in the above-styled matter on 11/14/13, the his motion pursuant to 28 U.S.C. § 2255 is DENIED.

It is therefore CERTIFIED, pursuant to Fed. R. App. P. 24(a), that any appeal in this matter is not taken in good faith, and leave to appeal *in forma pauperis* is DENIED. Accordingly, if the Movant files a notice of appeal, he must also pay the full $455 appellate filing fee or file a motion to proceed *in forma pauperis* and supporting affidavit in the Sixth Circuit Court of Appeals within 30 days.

APPROVED:

s/ **James D. Todd**
JAMES D. TODD
UNITED STATES DISTRICT JUDGE

THOMAS M. GOULD
CLERK

BY: s/Anna Jordan
DEPUTY CLERK

APPENDIX 047a

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

JEREMY SNIDER,	)	
	)	
Movant,	)	
	)	
VS.	)	Civ. No. 11-1174-JDT-egb
	)	Crim. No. 06-10005-JDT
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

ORDER DENYING MOTIONS TO ALTER OR AMEND (ECF Nos. 18, 19 & 20)
AND TRANSFERRING ALL OTHER MOTIONS TO SIXTH CIRCUIT
AS SECOND OR SUCCESSIVE MOTIONS PURSUANT TO 28 U.S.C. § 2244(b)(3)

The Movant, Jeremy Snider, Bureau of Prisons register number 20500-076, an inmate at the U.S. Penitentiary Lee in Jonesville, Virginia, filed a *pro se* motion pursuant to 28 U.S.C. § 2255. (ECF No. 1.) The Court partially denied the motion but directed the United States to respond to one remaining claim. (ECF No. 5.) After the United States filed an answer (ECF No. 10), Snider moved to supplement the § 2255 motion to raise additional issues (ECF No. 15). The Court subsequently granted the motion to supplement and denied relief on the final claims. (ECF No. 16.) Snider then filed a timely motion to alter or amend pursuant to Federal Rule of Civil Procedure 59(e). (ECF No. 17.) He later filed several motions to supplement the motion for reconsideration. (ECF Nos. 19, 20, 21, 22, 25, 26, 27, 28, 33 & 36.)

On November 20, 2006, a superseding indictment was returned, charging Snider with conspiracy to manufacture over 50 grams of methamphetamine, in violation of 21 U.S.C. § 846; manufacturing and attempting to manufacture methamphetamine, in violation of 21 U.S.C.

§§ 841(a)(1) and 846; possessing equipment, chemicals, products, and materials that may be used to manufacture methamphetamine, in violation of 21 U.S.C. § 843(a)(6); possessing a firearm after having been convicted of a felony, in violation of 18 U.S.C. § 922(g); possessing a stolen firearm, in violation of 18 U.S.C. § 922(j); and possessing a firearm during and in relation to a drug-trafficking crime, in violation of 18 U.S.C. § 924(c). (No. 06-10005-JDT, Crim. ECF No. 32). A jury found him guilty on all counts on July 6, 2007. (*Id.*, Crim. ECF Nos. 61 & 62.) Snider was later sentenced as a career offender to a 360-month term of imprisonment, to be followed by a four-year period of supervised release. (*Id.*, Crim. ECF No. 82.)[1]

The claims raised in Snider's motion to supplement were whether he was entitled to relief under the Supreme Court's decisions in *Alleyne v. United States*, 133 S. Ct. 2151 (2013), and/or *Descamps v. United States*, 133 S. Ct. 2276 (2013). In his motion to alter or amend, Snider argues this Court erroneously denied relief on the basis of those decisions.

In *Alleyne*, the Supreme Court held that any fact that increases the mandatory minimum sentence for a crime is an "element" that must be submitted to the jury, rather than a "sentencing factor." 133 S. Ct. at 2155. In denying Snider relief on his claim based on that decision, this Court initially determined he was properly subject to a mandatory minimum sentence of five years based on drug quantity because the indictment properly charged that he conspired to manufacture over 50 grams of methamphetamine and the jury convicted Snider on that charge. (ECF No. 16 at 9-10.)

[1] On direct appeal, the Sixth Circuit reversed Snider's § 924(c) conviction for possessing a firearm during and in relation to a drug-trafficking crime and remanded for further proceedings. *United States v. Snider*, 379 F. App'x 430 (6th Cir. 2010). On remand, this Court dismissed the § 924(c) charge and reimposed the original sentence on counts 1 through 5, for a total sentence of 300 months. (No. 06-10005, Crim. ECF No. 104.) Snider did not appeal.

In the motion to alter or amend, Snider contends that during the sentencing hearing, "it was found that the factual drug weight only amounted to .10 grams." (ECF No. 18 at 6.) Therefore, he argues that the indictment charging 50 grams, and the jury's verdict, were defectively unconstitutional. Snider elaborates on this argument in his motions to supplement the motion to alter or amend filed January 30, 2014 and March 14, 2014. (ECF Nos. 19 & 20.) However, Snider is mistaken concerning the quantity of drugs that he was found to be responsible for at sentencing.

The Presentence Investigation Report ("PRS") indicates that the drug quantity on which the sentence was based was 56 grams of methamphetamine. (PSR at 9, ¶¶ 19-20; *id.* at 31.) It is clear from the sentencing hearing that the .10 figure Snider focuses on was merely the amount of drugs present at the time of his arrest, found in witness Sara Webb's purse. (No. 06-10005, Crim. ECF No. 89, Sent. Tr. at 12.) However, the relevant charge is the conspiracy charge, and during the sentencing hearing Snider's defense counsel stated, "we have to abide by the jury's verdict, and I understand that. But I also understand that the drug weight in this case that supported that verdict, again, was testimony from unindicted co-conspirators on every gram except .10 grams that was found in her purse." (*Id.* at 12-13.) Thus, counsel conceded, and rightfully so, that the jury's verdict finding Snider guilty of conspiring to manufacture at least 50 grams of methamphetamine was supported by the evidence at trial. Therefore, Snider's argument based on *Alleyne* is without merit.

Snider also reiterates his argument, based on the decision in *Descamps*, that he was not properly sentenced as a career offender. He contends that the offense of aggravated burglary under Tennessee law is not categorically a crime of violence under the Career Offender guideline, U.S.S.G. § 4B1.1(a) because it is not a "generic" burglary. That argument is also without merit. As the Court noted in the order denying the § 2255 motion, the Sixth Circuit held, in *United States v. Nance*, 481

F.3d 882, 887-88 (6th Cir. 2007), that "Tennessee aggravated burglary represents a generic burglary capable of constituting a violent felony for ACCA purposes." (*Id.* at 888.)[2] Even after the decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), the Sixth Circuit has reaffirmed the holding in *Nance*. *See United States v. Priddy*, 808 F.3d 676, 684 (6th Cir. 2015).

For the foregoing reasons, Snider's motion to alter or amend (ECF No. 18) and his first two motions to supplement the Rule 59(e) motion (ECF Nos. 19 & 20) are DENIED.

Pursuant to 28 U.S.C. § 2244(b)(3), the remainder of Snider's motions (ECF Nos. 21, 22, 25, 26, 27, 28, 33 & 36) are hereby TRANSFERRED to the Sixth Circuit as attempts to file a second or successive § 2255 motion. The Clerk is directed to terminate all motions on the docket.

IT IS SO ORDERED.

s/ **James D. Todd**
JAMES D. TODD
UNITED STATES DISTRICT JUDGE

[2] The definitions of "violent felony" in the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B), and the Career Offender guideline are almost identical and are interpreted in the same way. *See, e.g.*, *United States v. Gibbs*, 626 F.3d 344, 352 n.6 (6th Cir. 2010).

APPENDIX 051a

No. 16-6607

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JEREMY SNIDER,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

O R D E R

Before: GUY and MOORE, Circuit Judges; HOOD, District Judge.*

This matter is before the court upon initial consideration to determine whether appeal No. 16-6607 was taken from an appealable order.

Jeremy Snider filed a motion to vacate his sentence pursuant to 28 U.S.C. § 2255 on June 16, 2011. In an order entered on February 2, 2012, the district court partially denied the motion but directed the government to respond to the remaining claim. After the government responded, Snider filed a motion to amend his § 2255 motion to raise additional claims. On November 18, 2013, the district court granted the motion to amend and denied relief on all claims. Snider filed a Federal Rule of Civil Procedure 59(e) motion to alter or amend and later filed ten motions to amend the Rule 59(e) motion. By order entered on September 16, 2016, the district court denied Snider's Rule 59(e) motion and his first two motions to amend the Rule 59(e) motion. The remainder of Snider's motions were transferred to this court for consideration as an application for leave to file a second or successive § 2255 motion. The transferred action was docketed in

*The Honorable Joseph M. Hood, United States District Judge for the Eastern District of Kentucky, sitting by designation.

this court as case No. 16-6457. Snider filed a notice of appeal on October 25, 2016, from the September 16, 2016 order. That appeal was docketed as appeal No. 16-6607, the current appeal.

This court lacks jurisdiction over appeal No. 16-6607 insofar as Snider appeals the September 16, 2016 transfer order. An order transferring a motion to an appellate court for consideration as a second or successive motion to vacate is not appealable. *See Howard v. United States*, 533 F.3d 472, 474 (6th Cir. 2008).

Accordingly, it is ordered that appeal No. 16-6607 is dismissed to the extent that Snider appeals the September 16, 2016 transfer order. Only issues regarding the September 16, 2016 order denying Snider's Rule 59(e) motion and his first two motions to amend the Rule 59(e) motion may be raised in this appeal.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

APPENDIX 053a

No. 16-6607

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
May 16, 2017
DEBORAH S. HUNT, Clerk

JEREMY SNIDER,)
)
Petitioner-Appellant,)
)
v.) O R D E R
)
UNITED STATES OF AMERICA,)
)
Respondent-Appellee.)

Jeremy Snider, a federal prisoner proceeding pro se, appeals a district court order denying his 28 U.S.C. § 2255 motion to vacate, set aside, or correct his sentence. Snider has filed an application for a certificate of appealability.

Snider was sentenced as a career offender to 300 months of imprisonment after being convicted of conspiracy to manufacture over 50 grams of methamphetamine; manufacturing and attempting to manufacture methamphetamine; possessing equipment, chemicals, products, and materials that may be used to manufacture methamphetamine; being a felon in possession of a firearm; and possessing a stolen firearm. Snider then filed a § 2255 motion, claiming that he received ineffective assistance of counsel when counsel failed to object to the application of the career offender guidelines and failed to raise a personal use argument; the mandatory application of the career offender guidelines violated his rights under the Sixth Amendment; he was sentenced in violation of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Alleyne v. United States*, 133 S. Ct. 2151 (2013); and he was incorrectly designated a career offender in light of

Descamps v. United States, 133 S. Ct. 2276 (2013). The district court denied the § 2255 motion and declined to issue a certificate of appealability.

Snider now moves for a certificate of appealability on his claims that the district court erred in classifying him as a career offender; he received ineffective assistance of counsel when counsel failed to object to the application of the career offender guidelines; and he was sentenced in violation of *Apprendi* and *Alleyne*. To the extent that Snider argues that there is insufficient evidence in support of his convictions, this claim was not raised in his habeas petition and we will not consider new issues raised for the first time on appeal. *See United States v. Ellison*, 462 F.3d 557, 560 (6th Cir. 2006). Snider has also waived review of his remaining claims because he did not raise them in his application for a certificate of appealability. *See* 28 U.S.C. § 2253(c)(3); *Jackson v. United States*, 45 F. App'x 382, 385 (6th Cir. 2002).

A certificate of appealability may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To satisfy this standard, the petitioner must demonstrate "that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). When the district court's denial is on the merits, "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Reasonable jurists could find it debatable whether the district court erred in denying Snider's claims that he was incorrectly classified as a career offender and that he received ineffective assistance of counsel. Pursuant to the Sentencing Guidelines, a defendant qualifies as a career offender if he is convicted of either a crime of violence or a controlled substance offense and has been previously convicted of at least two crimes of violence or controlled substance offenses. USSG § 4B1.1(a). At the time Snider was sentenced, a crime of violence was defined, among other things, as any offense punishable by imprisonment of more than one year that is arson, burglary of a dwelling, extortion, or involves the use of explosives. USSG § 4B1.2(a)(2)

(2010). While we have held that Tennessee's aggravated burglary statute constitutes a crime of violence under the enumerated-offenses clause, *United States v. Priddy*, 808 F.3d 676, 684 (6th Cir. 2015), we recently granted en banc review in another case to reconsider whether Tennessee's aggravated-burglary statute qualifies as generic burglary. *See United States v. Stitt*, 637 F. App'x 927 (6th Cir. 2016), *vacated and reh'g en banc granted*, 646 F. App'x 454 (6th Cir. 2016). Because it is unclear whether Snider's aggravated-burglary convictions constitute crimes of violence, reasonable jurists could debate the district court's resolution of these claims.

Reasonable jurists would not find it debatable whether the district court erred in denying Snider's claims that he was sentenced in violation of *Apprendi* and *Alleyne*. The Supreme Court's decisions in *Apprendi* and *Alleyne* stand for the proposition that any fact that increases the prescribed statutory maximum or minimum sentence is an element of the crime that must be found by a jury beyond a reasonable doubt. *Alleyne*, 133 S. Ct. at 2155; *Apprendi*, 530 U.S. at 490. Neither *Apprendi* nor *Alleyne* apply to this case because the jury, not the judge, determined that Snider engaged in a conspiracy to distribute more than 50 grams of methamphetamine. Accordingly, reasonable jurists would not debate the district court's resolution of these claims.

For the foregoing reasons, we **GRANT** a certificate of appealability on Snider's claims that he was incorrectly sentenced as a career offender and that he received ineffective assistance of counsel, and we **DENY** relief as to all other claims. The clerk of court is directed to appoint counsel and thereafter issue a briefing schedule on the certified claims.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

APPENDIX 056a

No. 16-6607

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Dec 18, 2018
DEBORAH S. HUNT, Clerk

JEREMY SNIDER,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

ORDER

BEFORE: SUHRHEINRICH, MOORE, and BUSH, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied. Judge Moore would grant rehearing for the reasons stated in her dissent.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

APPENDIX 057a

28 U.S. Code § 2255: Federal custody; remedies on motion attacking sentence

(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.

(d) An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

(e) An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

(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.

(g) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(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.

(June 25, 1948, ch. 646, 62 Stat. 967; May 24, 1949, ch. 139, § 114, 63 Stat. 105; Pub. L. 104–132, title I, § 105, Apr. 24, 1996, 110 Stat. 1220; Pub. L. 110–177, title V, § 511, Jan. 7, 2008, 121 Stat. 2545.)

APPENDIX 060a

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Deborah S. Hunt
Clerk

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Filed: June 14, 2017

Mr. Dennis G. Terez
Law Office
P.O. Box 22128
Beachwood, OH 44122-9998

Re: Case No. 16-6607, *Jeremy Snider v. USA*
Originating Case No. : 1:11-cv-01174 : 1:06-cr-10005-1

Dear Counsel,

This confirms your appointment to represent the defendant in the above appeal under the Criminal Justice Act, 18 U.S.C. § 3006A.

You must file your appearance form and order transcript within 14 days of this letter. The appearance form and instructions for the transcript order process can be found on this court's website. Please note that transcript ordering in CJA-eligible cases is a two-part process, requiring that you complete both the financing of the transcript (following the district court's procedures) and ordering the transcript (following the court of appeals' docketing procedures). Additional information regarding the special requirements of financing and ordering transcripts in CJA cases can be found on this court's website at http://www.ca6.uscourts.gov/criminal-justice-act under "Guidelines for Transcripts in CJA Cases."

Following this letter, you will receive a notice of your appointment in the eVoucher system. That will enable you to log into the eVoucher system and track your time and expenses in that system. To receive payment for your services at the close of the case you will submit your voucher electronically via eVoucher. Instructions for using eVoucher can be found on this court's website. Your voucher must be submitted electronically no later than 45 days after the final disposition of the appeal. *No further notice will be provided that a voucher is due*. Questions regarding your voucher may be directed to the Clerk's Office at 513-564-7078.

Finally, if you become aware that your client has financial resources not previously disclosed or is no longer eligible for appointed counsel under the Criminal Justice Act, please contact the Clerk or Chief Deputy for guidance.

Sincerely yours,

s/Ken Loomis
Administrative Deputy
Direct Dial No. 513-564-7067

cc: Mr. Bryant L. Crutcher
Mr. Thomas M. Gould
Mr. Jerry R. Kitchen
Mr. Jeremy Snider