APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DWIGHT BULLARD, *Petitioner-Appellant*, v. UNITED STATES OF AMERICA, *Respondent-Appellee.*	No. 17-3731

Appeal from the United States District Court for the Northern District of Ohio at Cleveland. Nos. 1:14-cr-00411-1; 1:17-cv-00061—James S. Gwin, District Judge.

Argued: August 1, 2019

Decided and Filed: September 4, 2019

Before: GUY, THAPAR, and NALBANDIAN, Circuit Judges.

COUNSEL

ARGUED: Samantha M. Goldstein, O'MELVENY & MYERS LLP, Washington, D.C., for Appellant. Rebecca C. Lutzko, UNITED STATES ATTORNEY'S OFFICE, Cleveland, Ohio, for Appellee. **ON BRIEF:** Samantha M. Goldstein, O'MELVENY & MYERS LLP, Washington, D.C., Anton Metlitsky, O'MEL-

VENY & MYERS LLP, New York, New York, for Appellant. Rebecca C. Lutzko, Danielle K. Angeli, UNITED STATES ATTORNEY'S OFFICE, Cleveland, Ohio, for Appellee. Dwight Bullard, Lisbon, Ohio, pro se.

OPINION

NALBANDIAN, Circuit Judge. Dwight Bullard pleaded guilty to distributing heroin and being a felon in possession of a firearm. At sentencing, the district court determined that Bullard qualified as a career offender under the Sentencing Guidelines. Bullard now challenges that determination, arguing that his Arizona conviction for attempting to sell drugs is not a "controlled substance offense."

Bullard has a bit of a point. We recently explained, sitting en banc, that "[t]he Guidelines' definition of 'controlled substance offense' does not include attempt crimes." *United States v. Havis*, 927 F.3d 382, 387 (6th Cir. 2019) (en banc) (per curiam). In other words, "attempt crimes no longer qualify as controlled substance offenses for purposes of the career offender enhancement." *United States v. Garrett*, 772 F. App'x 311, 311 (6th Cir. 2019) (per curiam). Indeed, the government admits that "under *Havis,* Bullard's attempted transport for sale of a narcotic drug conviction, under Arizona Revised Statute § 13-3408, would not constitute a predicate 'controlled substance offense.'" So if Bullard received his sentence today, he would not be a career offender under the Guidelines.

But Bullard runs into a problem getting to the merits of his argument: he is not on direct review. Instead, Bullard filed a § 2255 habeas petition, arguing that the district court misclassified him as a career offender, which resulted in a higher recommended sentence. This is not a cognizable claim on collateral review. *See Snider v. United States*, 908 F.3d 183, 189–91 (6th Cir. 2018) ("[A] non-constitutional challenge to [an] advisory guidelines range suffers from a greater defect: it is not cognizable under § 2255."). As a result, Bullard cannot challenge his classification as a career offender under the Guidelines—and *Havis* provides no relief on collateral review.

To get around this prohibition, Bullard also argues that he received ineffective assistance of counsel because his trial and appellate counsel failed to object to his status as a career offender. While this claim is at least cognizable under § 2255, it fares no better. Bullard cannot satisfy his heavy burden under *Strickland*. As a result, we affirm the denial of Bullard's petition.

I.

Back in 2014, Bullard was charged with trafficking heroin and for being a felon in possession of a firearm. The charges followed a search of Bullard's apartment, where officers found fifty-two bags of heroin. The officers seized more than 140 grams (or $20,000) worth of heroin. Bullard was also in possession of a .40 caliber Glock pistol. Bullard moved to suppress the evidence from his apartment—arguing that the warrant was not supported by probable cause. The district court denied the motion to suppress, "rul[ing]

that probable cause existed to support the issuance of the warrant, and indicated that the good-faith exception under *Leon* applied." *United States v. Bullard*, 659 F. App'x 288, 292 (6th Cir. 2016). (*See also* Mot. Hr'g Tr., R. 62 at 67 (finding probable cause "more than sufficient" to support the warrant).)

Unable to keep the evidence out, Bullard entered a plea deal with the government. The plea deal recognized that Bullard could face anywhere between ten years to life in prison. But it omitted any agreement about the appropriate sentencing range under the Guidelines. The plea deal did, however, recognize that Bullard "may be classified as a career offender based on his prior criminal record." (Plea Deal, R. 40 at 5.) Bullard had two prior convictions that could support a career-offender designation: a 2003 Arizona conviction for attempting to sell cocaine (under Ariz. Rev. Stat. § 13–3408), and a 2013 Ohio conviction for selling drugs (under Ohio Rev. Code § 2925.03(A)(2)).

At sentencing, the district court determined that Bullard qualified as a career offender. This set Bullard's recommended range at 292 to 365 months in prison. (Sentencing Hr'g Tr., R. 65 at 3.) Without the enhancement, Bullard's sentencing range would have been 92 to 115 months. But these sentencing ranges under the Guidelines are, of course, just advisory. And the district court ultimately varied downward, sentencing Bullard to 140 months in prison—i.e., "significantly below the guideline range." (*Id.* at 16.) In doing so, it recognized that although Bullard had a "long history of dealing drugs," he was still "kind of a low-level guy." (*Id.* at 6.) The downward variance tracked Bullard's argument at sentencing:

while he agreed that the Arizona and Ohio convictions made him a career offender, he argued that he was not "an authentic career offender." (*Id.* at 12.) In other words, the district court believed Bullard that he was not as bad as your typical (and often violent) career criminal.

Bullard waived most his appellate rights—reserving the right to appeal just four issues. Among those four, only two applied: the right to appeal "any determination by the Court that defendant qualifies as a Career Offender," and "the denial of [the] motion to suppress." (Plea Deal, R. 40 at 7.) On direct appeal, Bullard decided to appeal only the latter, and we affirmed.

Bullard then filed a § 2255 habeas petition—arguing that the district court misclassified him as a career offender under the Guidelines—and that he received ineffective assistance of counsel when his trial and appellate counsel failed to challenge this designation. Bullard provided two theories on why the Arizona conviction did not qualify as a "controlled substance offense." First, the Arizona statute criminalized drugs (benzylfentanyl and thenylfentanyl) that are not federally controlled. And second, the Arizona statute criminalized conduct (attempts to sell drugs) that falls outside the Guidelines' definition. *See* U.S.S.G. § 4B1.1. Simply put, Bullard argued that Arizona's statute is too broad to qualify. Bullard also challenged his Ohio conviction for selling drugs.

The district court denied the petition, explaining that the state convictions qualified as "controlled sub-

stance offenses." (Op. & Order, R. 76.) This also defeated Bullard's ineffective assistance claim: because the district court properly classified Bullard as a career offender, he could not show prejudice in his failure-to-object claim. We granted Bullard's application for a certificate of appealability, but only for his claims related to the Arizona conviction. We review the trial court's factual findings for clear error and its legal conclusions de novo. *Cradler v. United States*, 891 F.3d 659, 664 (6th Cir. 2018). And we examine de novo whether a prior conviction counts as a predicate offense under the Guidelines. *Havis*, 927 F.3d at 384.

II.

Section 2255 does not provide relief for just any alleged error. Instead, we can grant habeas relief under § 2255 only in a narrow set of circumstances: "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 a sentence, or . . . the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack[.]'" *Snider*, 908 F.3d at 189 (quoting 28 U.S.C. § 2255(a)). To start, Bullard brings no constitutional challenge. Nor does Bullard challenge the jurisdiction of the district court. And his sentence was below the maximum he faced—life in prison. *See* 28 U.S.C. § 841(b)(1)(B).

This leaves just the last option—a "collateral attack." When a § 2255 claim falls under this category, the claim is "generally cognizable only if [it] involved 'a fundamental defect which inherently results in a complete miscarriage of justice.'" *Snider*, 908 F.3d at

189 (quoting *Davis v. United States*, 417 U.S. 333, 346 (1974)). To meet this demanding standard, a prisoner typically must "prove that he is either actually innocent of his crime or that a prior conviction used to enhance his sentence has been vacated." *Spencer v. United States,* 773 F.3d 1132, 1139 (11th Cir. 2014) (en banc); *accord Snider*, 908 F.3d at 190–91 (analyzing *United States v. Foote*, 784 F.3d 931, 940–43 (4th Cir. 2015)). But Bullard does not allege that he is actually innocent of his crimes. Nor does he claim that Arizona vacated his conviction for attempting to sell cocaine.

Rather, Bullard alleges that his career-offender designation is erroneous under the advisory Sentencing Guidelines. This is fatal to his claim. We recently rejected an almost identical § 2255 claim, where the defendant "allege[d] that an intervening change in the law rendered his career offender designation erroneous." *Snider*, 908 F.3d at 191. In doing so, we relied on the Fourth Circuit's decision in *Foote*, which explained why these "misapplication-of-the-guidelines-range" claims are not cognizable on collateral review. *See id.* (analyzing *Foote*, 784 F.3d at 940–43). The Fourth Circuit was skeptical that a "complete miscarriage of justice" could ever occur when a district court is simply exercising its discretion in sentencing under the now-advisory Guidelines. *Foote*, 784 F.3d at 940–42.

This makes sense. Misapplication-of-the-guidelines-range claims challenge the district court's choice between alternative sentences "under an *advisory* Guidelines scheme." *Id.* at 941 (emphasis original). Indeed, the Guidelines are just "meant to *guide* the

district court to the proper sentence." *Id.* But the district court is free to vary from the Guidelines—and can impose a sentence at, below, or above the Guidelines. *See United States v. Booker,* 543 U.S. 220, 245 (2005). For example, if a defendant is a career offender and the Guidelines recommend a long sentence, the district court can nevertheless impose a much shorter sentence. That's exactly what happened to Bullard. But the opposite is also true. If a defendant does not have a career-offender designation and the Guidelines recommend a short sentence, the district court still has the discretion to impose a much longer sentence. *See Foote*, 784 F.3d at 942 (giving examples of upward variances supported by § 3553(a) factors). This discretion confirms the absence of any "miscarriage of justice" in Guidelines calculations: a district court can lawfully impose the same sentence with or without the career offender designation.

We agreed with this reasoning in *Snider*, explaining that "[a]lthough the career designation may have affected the ultimate sentence imposed, 'it did not affect the lawfulness of the [sentence] itself—then or now.'" 908 F.3d at 191 (quoting *United States v. Addonizio*, 442 U.S. 178, 187 (1979) (brackets original)). Bullard asks us to distinguish *Snider* because the defendant's Guidelines range in *Snider*, unlike his own, "would have been the same absent the career-offender designation." (Appellee's Br. at 48–49 n.14.) But that is not entirely accurate. In *Snider*, "[w]ith the career offender designation, Snider's guidelines range was 360 months to life." 908 F.3d at 186. "However, without the career offender designation, . . . Snider's resulting advisory guidelines range was 262 to 327

months." *Id.* But the district court eventually sentenced Snider to just 300 months—i.e., within his lower non-career-offender range. Still, despite the below-Guidelines sentence, Snider filed a § 2255 challenging his career-offender designation.

In affirming the dismissal of his § 2255 petition, we noted the lack of prejudice in Snider's sentence: "Snider's 300-month sentence is within the middle of [the allegedly correct] range." *Id.* at 191 (quoting *Davis*, 417 U.S. at 346). So Snider could not possibly meet his demanding burden under § 2255 to show a "miscarriage of justice" because his sentence fell within the Guidelines range he wanted: 262 to 327 months. In other words, even if Snider was correct about his career-offender status, it didn't matter. To be sure, Snider's Guideline range would have been lower without the career-offender designation. But because the district court deviated from Snider's "360 months to life" career-offender range, he already received a sentence within his non-career-offender-Guidelines range.

Bullard argues that his sentence is different than *Snider*—and that this difference allows him to bring a § 2255 claim. While the district court sentenced Snider within his non-career-offender-Guidelines range (of 262 to 327 months), Bullard received a sentence higher than his non-career-offender-Guidelines range (of 92 to 115 months). So even though the district court gave Bullard a sentence substantially below his career-offender range (140 months instead of 292 to 365 months), it still did not deviate as low as the district court in *Snider*.

But this difference does not matter—and for good reason. As the Fourth Circuit explained in *Foote*, if an inmate's ability to challenge his Guidelines range under § 2255 depends on a comparison between the actual sentence and the allegedly correct Guidelines range, "it is hard to fathom what the dividing line would be between a fundamental defect and mere error." 784 F.3d at 943. This would leave courts "to guess about which types of guideline error could be corrected on collateral review." *Spencer*, 773 F.3d at 1140. For example, the career-offender designation in *Foote* "increased dramatically [the defendant's] advisory Guidelines range"—jumping from "151–188 to 262–327 months in prison." 784 F.3d at 933, 944. And the district court ultimately sentenced the defendant to 262 months, with no deviation from the career-offender range. *Id.* at 933. This resulted in almost a forty percent increase in the defendant's otherwise top-of-the-Guidelines sentence (without the career-offender designation). So while the defendant in *Snider* received a sentence "within-the-correct-Guidelines" range, so to speak, the defendant in *Foote* certainly did not. Still, neither court thought the sentence involved a miscarriage of justice.

Bullard finds himself somewhere in the middle. With the district court's downward variance, he received a sentence roughly twenty-two percent above his otherwise top-of-the-Guidelines sentence (without the career-offender designation). So while Bullard's sentence is higher than *Snider*, it is much lower than *Foote*. This comparative line-drawing exercise just highlights (all over again) the problem with these

types of § 2255 claims: the district court's broad discretion in sentencing under the *advisory* Guidelines. Some sentences will be high, others will be low. *See United States v. Johnson*, No. 18-3720, 2019 WL 3788232, at *3 (6th Cir. Aug. 13, 2019) ("*Any* system of advisory guidelines will lead to all kinds of variations that affect individual criminal defendants, sometimes in their favor, sometimes not."). But in all these scenarios, the district court could, with its discretion, impose an identical sentence even without the career-offender designation, and the sentence could remain lawful. *See Foote*, 784 F.3d at 941 ("Thus, even if we vacate and remand at this juncture, the same sentence could be legally imposed."). And a lawful sentence does not create a miscarriage of justice. *Spencer*, 773 F.3d at 1138 (citing *United States v. Addonizio*, 442 U.S. 178, 186–87 (1979)).

So rather than speculate about when, if ever, an incorrect designation under the advisory Guidelines could create a "fundamental miscarriage of justice," the better practice is to broadly repeat what we said in *Snider*: "[a] misapplication-of-an-advisory-guidelines-range claim is . . . not cognizable under § 2255." 908 F.3d at 191. Indeed, every circuit to "look[ ] at the issue has agreed that a defendant cannot use a § 2255 motion to vindicate non-constitutional challenges to advisory guideline calculations." *Id.*; *see also, e.g.*, *Foote*, 784 F.3d at 932 (same); *Spencer*, 773 F.3d at 1135 (same); *Hawkins v. United States*, 706 F.3d 820, 824–25 (7th Cir. 2013) (same); *Sun Bear v. United States*, 644 F.3d 700, 704–06 (8th Cir. 2011) (en banc) (same); *United States v. Williamson*, 183 F.3d 458, 461–62 (5th Cir. 1999) (same). As a result, Bullard

cannot use § 2255—or our decision in *Havis*—to attack collaterally his designation as career offender under the Sentencing Guidelines. Both are best left for direct review.

III.

This leaves Bullard's claim for ineffective assistance of counsel, "which is cognizable under § 2255." *Snider*, 908 F.3d at 192. To succeed on this claim, Bullard "must establish two things." *Monea v. United States*, 914 F.3d 414, 419 (6th Cir. 2019). "First, that the attorney's performance fell below 'prevailing professional norms.'" *Id.* (quoting *Kimmelman v. Morrison*, 477 U.S. 365, 381 (1986)). "And second, that the attorney's poor performance prejudiced the defendant's case." *Id.* But we need not address both elements. Indeed, ineffectiveness claims are often disposed of for lack of sufficient prejudice because "[p]roving prejudice is not easy." *Id.* Defendants "face[ ] a 'high burden' in demonstrating 'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id.* (quoting *Davis v. Lafler*, 658 F.3d 525, 536 (6th Cir. 2011)).

Bullard argues that his attorneys made the same mistake twice. At sentencing, his attorney did not object when the district court labeled him a career offender. And then on direct appeal, his attorney did not challenge Bullard's career offender enhancement. In both instances, Bullard argues that his attorneys should have raised the same two arguments he now makes in his § 2255 petition about his Arizona conviction: the overbroad drugs and conduct.

We start with the easier claim first—the conduct. Bullard argues that his Arizona conviction is not a controlled substance offense because he was *attempting* to sell drugs. Following our decision in *Havis*, Bullard is correct. *See* 927 F.3d at 387 ("The text of § 4B1.2(b) controls, and it makes clear that attempt crimes do not qualify as controlled substance offenses."). But looking back to when the district court sentenced Bullard and when he filed his direct appeal, as we must, our caselaw was different. *Snider*, 908 F.3d at 192 (quoting *Strickland v. Washington*, 466 U.S. 668, 688–89 (1984) ("We assess counsel's performance based on 'counsel's perspective at the time' . . . rather than 'in the harsh light of hindsight[.]'")). At that time, our decision in *Evans* held the opposite: "offering to sell a controlled substance constitutes an attempt to distribute a controlled substance, and thus a conviction under the statute categorically qualifies as a controlled substance offense." *United States v. Evans*, 699 F.3d 858, 868 (6th Cir. 2012). And "[w]e have repeatedly held that counsel is not ineffective for failing to predict developments in the law." *Snider*, 908 F.3d at 192 (collecting cases).[1] As a result, Bullard's

[1] Bullard briefly argues that his Arizona drug conviction is not a controlled substance offense even under *Evans*. (Appellant's Br. at 41–43.) *Evans* found that the Ohio statute at issue required an "intent to sell a controlled substance," as opposed to a mere "intent to offer to sell." 699 F.3d at 867. In other words, the Ohio statute did not criminalize fraudulent offers to sell drugs—i.e., a scam, where the seller had no intention of actually distributing the drugs. *Id.* (distinguishing *United States v. Savage,* 542 F.3d 959, 965–66 (2d Cir. 2008) ("An offer to sell can be fraudulent, such as when one offers to sell the Brooklyn Bridge.")). Bullard argues that Arizona *does* criminalize such fraudulent offers—so

ineffectiveness claim on the conduct argument fails under the first prong: it was reasonable for his attorneys not to object.

Next, Bullard argues that the Arizona statute does not qualify as a controlled substance offense because Arizona criminalizes two drugs (benzylfentanyl and thenylfentanyl) that are not criminalized on the federal level. To explain why his attorneys should have made this argument, Bullard points to several cases from our sister circuits, which explain that "'controlled substance' refers exclusively to a substance controlled by the [federal government]." *United States v. Townsend*, 897 F.3d 66, 72 (2d Cir. 2018) (collecting cases from 2011–2015). In response, the government cites caselaw we developed after Bullard's direct appeal, which comes to the opposite conclusion: "there is no requirement that the particular controlled substance underlying a state conviction also be controlled by the federal government." *United States v. Smith*, 681 F. App'x 483, 489 (6th Cir. 2017).

To be sure, this is a harder question to answer (at least on the prejudice question), especially because there is some pre-2015 caselaw (though non-binding

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the statute is too broad even under *Evans*. But Arizona courts have explained the opposite: the requirement that the defendant "knowingly" offer to sell drugs prevents Arizona from "punish[ing] persons whose 'offers' are 'fraudulent, insincere or made in jest.'" *State v. Strong*, 875 P.2d 166, 167 (Ariz. Ct. App. 1993); *see also State v. Alvarado*, 875 P.2d 198, 201 (Ariz. Ct. App. 1994) ("Appellant could not be convicted of offering to sell marijuana . . . if his only intention was to take [the] money and disappear."). With this backdrop, it was reasonable for Bullard's attorney not to object on this ground.

caselaw) to support part of Bullard's argument. *See, e.g.*, *United States v. Gomez-Alvarez*, 781 F.3d 787 (5th Cir. 2015); *United States v. Leal-Vega*, 680 F.3d 1160 (9th Cir. 2012); *United States v. Sanchez-Garcia*, 642 F.3d 658 (8th Cir. 2011). But on collateral review, Bullard's argument is not as straightforward as he would like. It does not matter only whether Bullard's argument could have been a winner. Instead, Bullard must satisfy a demanding standard: he must show that "the likelihood of a different result [was] substantial, not just conceivable." *Storey v. Vasbinder*, 657 F.3d 372, 379 (6th Cir. 2011) (citation omitted).

Here, Bullard arguably cannot show the latter, much less the former. Indeed, at the time of Bullard's sentence and direct appeal, we had yet to address whether a "controlled substance offense" can include substances that are not criminalized under federal law. Since then, we remain conflicted whether such statutes qualify. *Compare Smith*, 681 F. App'x at 489, *with United States v. Pittman,* 736 F. App'x 551, 554 (6th Cir. 2018). And "[w]e have not yet taken up this question in a published opinion." *United States v. Solomon*, 763 F. App'x 442, 447 (6th Cir. 2019) (recognizing disagreement between *Smith* and *Pittman* but refusing to resolve it because the Ohio statute at issue was divisible as to drug type). Nor has the Supreme Court addressed this question.

Take also the Second Circuit's decision in *United States v. Townsend*, 897 F.3d 66 (2d Cir. 2018). Bullard cites *Townsend* to suggest that the "great weight" of authority supports his position. (Appellant's Br. at 25.) But as *Townsend* explains, before it resolved the overbroad-drug question (recently in

2018), several district courts within the Second Circuit concluded that a "conviction for an offense involving a substance controlled only under state law would qualify" as a controlled substance offense. 897 F.3d at 70 (citing *United States v. Laboy*, No. 16-cr-669, 2017 WL 6547903, at *3 (S.D.N.Y. Dec. 20, 2017) ("Absent the importation of the word 'federal' into the Guidelines definition at issue here, there is no reason to believe that offenses under state law would be limited to those drugs regulated by federal law.")). Said another way, the law did not plainly support Bullard's position.

Remember also, Bullard pleaded guilty to trafficking cocaine—a federally controlled substance. So if the Arizona statute is divisible by drug type, he remains a career offender (making any objection futile). This fact alone could explain why Bullard's counsel did not object to the enhancement. Bullard relies on pre-2015 caselaw that unanimously affirmed career-criminal enhancements because the defendants in each case sold drugs criminalized at both state and federal levels. *Gomez-Alvarez*, 781 F.3d at 796 (enhancement still applied because the conviction was for heroin); *Sanchez-Garcia*, 642 F.3d at 662 (enhancement still applied because the conviction was for meth); *Leal-Vega*, 680 F.3d at 1169 (enhancement still applied because the conviction was for tar heroin). And as the government explains, there is significant support that the Arizona statute is likewise divisible. (*See* Appellee's Br. at 29–33 (citing *State v. Wright*, 239 P.3d 1122, 1122–23 (Ariz. Ct. App. 2016) (upholding two counts of possession of a narcotic drug arising out of a single incident because the officers

found two different drug types: crack cocaine and heroin)).) *See also United States v. Esquival-Centeno*, 632 F. App'x 233, 234 (5th Cir. 2016) (per curiam) (affirming enhancement when the defendant's "conviction was for the specific offense of attempted transport of cocaine"). Put differently, it is not substantially likely, had Bullard's attorney objected to the Arizona statute using the overbroad-drug argument, that the district court would have dropped his enhancement as a career offender.

In sum, it is enough to say that this is a tough question. Indeed, our circuit has yet to publish a decision to resolve our intra-circuit disagreement. *Solomon*, 763 F. App'x at 447. So while we *might* agree with Bullard's argument—and while the district court *might* have decided to drop the enhancement had Bullard objected—that is not enough on collateral review.

In addition, with such uncertainty in the caselaw, it was reasonable for his trial counsel not to object on this ground. And to be sure, Bullard's trial counsel was not silent about his career offender status at sentencing. Instead, he argued that Bullard was not "an authentic career offender" (Sentencing Tr., R. 65 at 12–13), which yielded positive results: the district court gave Bullard a sentence 152-months below the Guidelines, commenting that Bullard was "kind of a low-level guy" who did not have "the typical background of people who qualify [as] a career offender[.]" (*Id.* at 6, 9–10, 16–17.) In other words, Bullard's trial counsel was successful at sentencing—cutting his client's sentence by more than fifty percent. This was not ineffective assistance of counsel.

To show ineffective assistance of counsel on his direct appeal, Bullard faces an even higher hurdle: plain error review. *See United States v. Koeberlein*, 161 F.3d 946, 949 (6th Cir. 1998) (applying plain error when defendant fails to object at sentencing). As we explained, "a lack of binding case law that answers the question presented will also preclude our finding of plain error." *United States v. Al-Maliki*, 787 F.3d 784, 795 (6th Cir. 2015). So without binding precedent for his appeal (to overcome plain error review), Bullard cannot show that his appellate counsel performed deficiently, or that he suffered prejudice, when his appellate counsel failed to appeal his career offender enhancement. Thus, Bullard's ineffectiveness claim on the drug-mismatch argument fails under both prongs of *Strickland*.

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We affirm the district court.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

DWIGHT BULLARD, Petitioner, vs. UNITED STATES OF AMERICA, Respondent.	Case No. 1:14-CR-411 Case No. 1:17-CV-61 OPINION & ORDER [Resolving Doc. 70]

JAMES S. GWIN, UNITED STATES DISTRICT JUDGE:

On January 9, 2017, Petitioner Dwight Bullard petitioned for habeas corpus relief under 28 U.S.C. § 2255.[1] Bullard argues that this Court improperly classified him as a career offender and that he received ineffective assistance of counsel. For the following reasons, the Court **DENIES** Bullard's motion.

I. BACKGROUND

On November 13, 2014, the United States indicted Petitioner Bullard for distribution of heroin, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(B), and with being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1).[2]

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[1] Doc. 70. The Government responds. Doc. 72. Petitioner Bullard replies. Doc. 73.

[2] Doc. 1.

On December 10, 2014, Bullard filed a motion to suppress evidence and to return illegally seized property.[3] Following a hearing, the Court denied Bullard's suppression motion.[4]

Bullard pled guilty to the indictment on January 13, 2015.[5] Bullard's presentence investigation report recommended that the Court sentence Bullard as a career offender because of two prior controlled substance convictions: a 2004 Arizona conviction for the attempted transport of cocaine, in violation of Arizona Rev. Stat. § 13-3408, and a 2014 Ohio conviction for drug trafficking, in violation of Ohio R.C. § 2925.03(A)(2).[6] The career offender classification subjected Bullard to a mandatory minimum of 120 months imprisonment.

The Presentence Report recommended an offense level of 35 and a criminal history category of VI, resulting in a guideline range of 292 to 365 months. At sentencing, Bullard's counsel did not challenge Bullard's classification as a career offender.[7] The Court sentenced Bullard to 140 months imprisonment followed by eight years of supervised release.[8]

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[3] Doc. 18.

[4] Doc. 62.

[5] Doc. 40.

[6] Doc. 45 (sealed).

[7] Doc. 65 at 12 (defense counsel stating, "I think I adopt the Court's analysis that . . . he is classified as a career offender based on that second conviction").

[8] Doc. 50.

Petitioner Bullard appealed the Court's denial of his motion to suppress, but did not appeal his career offender classification. The Sixth Circuit affirmed this Court's suppression decision on October 6, 2016.[9]

On January 9, 2017, Bullard petitioned for habeas corpus relief under 28 U.S.C. § 2255.[10] Bullard argues that the Court misclassified him as a career offender, which "constitutes a complete miscarriage of justice."[11] Bullard argues that neither the Arizona nor the Ohio conviction qualifies as a Sentencing Guidelines "controlled substance" offense.[12] Bullard also alleges ineffective assistance of counsel due to his lawyer's failure to object to the career offender classification at sentencing or on appeal.[13]

The Government opposes.[14] The Government states that Bullard's Guidelines arguments are non-constitutional claims that he cannot raise in a § 2255 petition.[15] The Government further argues that Bullard received effective assistance of counsel because it would have been "frivolous" to challenge the career offender classification.[16]

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[9] Doc. 69.

[10] Doc. 70.

[11] *Id.* at 4.

[12] Doc. 70-2 at 7-10.

[13] *Id.* at 12-16.

[14] Doc. 72.

[15] *Id.* at 6-7.

[16] *Id.* at 8.

II. LEGAL STANDARD

Title 28 United States Code Section 2255 gives a federal prisoner post-conviction means of collaterally attacking a conviction or sentence that violates federal law. Section 2255 provides four grounds upon which a federal prisoner may challenge his conviction or sentence:

> 1) That the sentence was imposed in violation of the Constitution or laws of the United States;
>
> 2) That the court was without jurisdiction to impose such sentence;
>
> 3) That the sentence exceeded the maximum authorized by law; or
>
> 4) That the sentence is otherwise subject to collateral attack.[17]

To prevail on a § 2255 motion alleging a constitutional error, the movant "must establish an error of constitutional magnitude which had a substantial and injurious effect or influence on the proceedings."[18]

III. DISCUSSION

A. Guidelines Calculation

Petitioner Bullard argues that the Court improperly characterized him as a career offender under Sentencing Guidelines § 4B1.1. Bullard argues that both his 2004 Arizona state conviction for attempted

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[17] 28 U.S.C. § 2255(a).

[18] *Watson v. United States*, 165 F.3d 486, 488 (6th Cir. 1999) (citing *Brecht v. Abrahamson*, 507 U.S. 619, 637-38 (1993)).

transportation of narcotic drugs for sale and his 2014 Ohio state conviction for drug trafficking do not qualify as predicate Sentencing Guidelines "controlled substance" offenses.

The Guidelines classify a defendant as a "career offender" when the defendant "has at least two prior felony convictions of either a crime of violence or a controlled substance offense."[19] The Guidelines define qualifying controlled substance offenses as those "that prohibit[ ] the manufacture, import, export, distribution, or dispensing of a controlled substance . . . or the possession of a controlled substance . . . with intent to manufacture, import, export, distribute, or dispense."[20]

The Sixth Circuit has adopted a "categorical" approach for determining whether a defendant's prior conviction is a "controlled substance offense."[21] Typically, sentencing courts only use the fact of the prior conviction and the statutory definition of the predicate offense to determine whether a prior conviction is a controlled substance offense.[22]

Certain statutes, however, are what the Supreme Court calls "divisible" offenses because they "se[t] out one or more elements of the offense in the

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[19] U.S.S.G. § 4B1.1(a).

[20] U.S.S.G. § 4B1.2(b).

[21] *United States v. Galloway*, 439 F.3d 320, 322 (6th Cir. 2006).

[22] *Id.*

alternative."[23] When a statute "list[s] potential offense elements in the alternative," it "renders opaque which element played a part in the defendant's conviction."[24]

Accordingly, when a divisible statute is involved, courts employ a "modified categorical approach."[25] Under the modified categorical approach, courts first determine whether the relevant statute of conviction encompasses conduct that would be a "controlled substance offense," plus conduct that would not.[26] If that is the case, the federal sentencing court consults the state-court indictment and the jury instructions or plea agreement for the specific conduct with which the defendant was charged in order to appropriately characterize the offense.[27] Finally,

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[23] *Descamps v. United States*, 133 S. Ct. 2276, 2281 (2013); *see also Mathis v. United States*, 136 S. Ct. 2243, 2253 (2016) ("[T]he modified approach serves—and serves solely—as a tool to identify the elements of the crime of conviction when a statute's disjunctive phrasing renders one (or more) of them opaque.").

Although *Descamps* and *Mathis* concerned sentencing enhancements under the Armed Career Criminal Act (ACCA), lower courts have applied the Supreme Court's modified categorical approach reasoning to Sentencing Guidelines cases. *See United States v. Hinkle*, 832 F.3d 569, 574 (5th Cir. 2016); *see also United States v. Jeffery*, No. 14-CR-20427-01, 2017 WL 764608, at *2-3 (W.D. Mich. Feb. 28, 2017).

[24] *Id.* at 2283.

[25] *United States v. Prater*, 766 F.3d 501, 511 (6th Cir. 2014).

[26] *Id.*; *see also United States v. Douglas*, 563 F. App'x 371, 377 (6th Cir. 2014).

[27] *United States v. Martin*, 378 F.3d 578, 581 (6th Cir. 2004).

the court assesses whether the specific crime of conviction is a controlled substance offense.[28]

Arizona Conviction

Petitioner Bullard argues that his Arizona Rev. Stat. § 13–3408 conviction does not categorically qualify as a predicate controlled substance offense. Citing the Ninth Circuit's *Vera-Valdevinos v. Lynch*[29] decision, Bullard argues that § 13-3408 is too broad to be a "controlled substance offense" because it criminalizes two substances that are not on the Federal Controlled Substance Schedule.[30]

In 2004, Bullard pleaded guilty to violating Arizona Revised Statute § 13–3408.[31] Section 13-3408 criminalizes a variety of conduct:

A person shall not knowingly:

1. Possess or use a narcotic drug.

2. Possess a narcotic drug for sale.

3. Possess equipment or chemicals, or both, for the purpose of manufacturing a narcotic drug.

4. Manufacture a narcotic drug.

5. Administer a narcotic drug to another person.

6. Obtain or procure the administration of a narcotic drug by fraud, deceit, misrepresentation or subterfuge.

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[28] *See Prater*, 766 F.3d at 511.

[29] 649 F. App'x 597 (9th Cir. 2016).

[30] Doc. 70-2 at 8.

[31] Doc. 75-3.

> 7. Transport for sale, import into this state, offer to transport for sale or import into this state, sell, transfer or offer to sell or transfer a narcotic drug.[32]

Because Arizona Rev. Stat. § 13-3408 "comprises multiple, alternative versions of the crime,"[33] the statute is divisible and subject to the modified categorical approach. The alternative versions of a § 13-3408 crime include drug possession, drug manufacturing, drug administration, and drug trafficking.

Furthermore, § 13-3408 encompasses both conduct that qualifies as a § 4B1.1 "controlled substance offense" and conduct that does not. For example, § 13-3408(A)(1) criminalizes possession or use of a narcotic drug. Mere possession or use would not be a qualifying offense under the Guidelines, which limits the enhancement to "manufacture, import, export, distribution, or dispensing" offenses or possession with the intent to manufacture, import, export, distribute, or dispense.[34] Accordingly, this Court must "identify, from among several alternatives, the crime of conviction" so that the Court can determine if Bullard's crime is a § 4B1.1 qualifying offense.[35]

Having consulted Petitioner Bullard's indictment and plea agreement, the Court finds that the

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[32] Ariz. Rev. Stat. § 13-3408(A).

[33] *Descamps*, 133 S. Ct. at 2284.

[34] *See* U.S.S.G. § 4B1.2(b).

[35] *See Descamps*, 133 S. Ct. at 2285.

crime forming the basis of Bullard's Arizona conviction was attempted transportation of narcotic drugs. Bullard's indictment charges him with "knowingly transport[ing] for sale, import[ing] into this state, in an amount of 9 grams or more, or offer[ing] to transport for sale or import into this state a narcotic drug, to-wit: COCAINE."[36] Likewise, in his plea agreement, Bullard pleaded guilty to "attempted transportation of narcotic drugs for sale."[37]

Petitioner Bullard's conviction was therefore under Ariz. Rev. Stat. § 13-3408(A)(7), which criminalizes the "[t]ransport for sale, import into this state, offer to transport for sale or import into this state, sell, transfer or offer to sell or transfer a narcotic drug."[38]

Arizona Rev. Stat. § 13-3408(A)(7) only criminalizes conduct that qualifies for the career offender enhancement. Each act proscribed by subsection (A)(7) "meets the definition of a controlled substance offense under § 4B1.2(b)(2) because each involves either the import or distribution of a controlled substance or the possession of a controlled substance with intent to import or distribute."[39] The

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[36] Doc. 75-1 at 1.

[37] Doc. 75-2 at 1. The Yavapi County Superior Court of Arizona's judgment uses identical language to describe the offense. Doc. 75-3 at 1.

[38] The conviction was also under Arizona Rev. Stat. § 13-1001, which classifies the crime as an "attempt" offense.

[39] *George v. United States*, No. 4:11-CV-1179, 2014 WL 4206966, at *3 (E.D. Mo. Aug. 25, 2014) (reaching same conclusion for Ariz. Rev. Stat. § 13-3405(A)(4), which criminalizes "[t]ransport[ing] for sale, import[ing] into this state or offer[ing] to

Court therefore properly classified Bullard's Arizona drug conviction as a predicate offense under § 4B1.1 of the Sentencing Guidelines.[40]

Petitioner Bullard's reliance on the Ninth Circuit's *Vera-Valdevinos* decision is misplaced. In that case, the Ninth Circuit held that Ariz. Rev. Stat. § 13-3408(A)(7)—the same subsection under which Bullard was convicted—was not a "controlled substance offense" for the purposes of the Immigration and Nationality Act (INA).[41] The INA makes an alien deportable if he is convicted of an offense "relating to a controlled substance."[42] The INA specifies that the offense must involve a "controlled substance" as defined by "section 802 of Title 21"—the Federal Controlled Substance Schedule.[43]

In holding that § 13-3408(A)(7) was not an INA "controlled substance" offense, the Ninth Circuit emphasized that Ariz. Rev. Stat. § 13-3408 prohibits criminal possession of two substances not on the Federal Controlled Substance Schedule.[44] Because a §13-3408(A)(7) conviction did not necessarily mean that a defendant illicitly trafficked in a federally

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transport for sale or import into this state, sell, transfer or offer to sell or transfer marijuana").

[40] *Matthis*, 136 S. Ct. at 2257.

[41] 649 F. App'x at 598.

[42] *See* 8 U.S.C. § 1227(a)(2)(B)(i).

[43] *Id.*

[44] 649 F. App'x at 598. Arizona prohibits possession of Benzylfentanyl and Thenylfentanyl.

controlled substance, § 13-3408(A)(7) failed the categorical test with respect to the INA.

Bullard misses a key distinction between the Sentencing Guidelines and INA's definitions of a "controlled substance" offense. Under the INA, a "controlled substance" offense must involve substances on the Federal Controlled Substance Schedule.[45] In contrast, the Sentencing Guidelines do not narrow "controlled substance" offenses to offenses involving only substances controlled by the federal government. Section 4B1.2 lacks a definition of "controlled substance" and does not restrict it to federally controlled substances.

Indeed, the Sixth Circuit recently foreclosed Bullard's argument that § 4B1.2 enhancements only apply to offenses involving federally controlled substances:

> Because there is no requirement that the particular controlled substance underlying a state conviction also be controlled by the federal government, and because the Guidelines specifically include offenses under state law in § 4B1.2, the fact that [Arizona] may have criminalized the 'manufacture, import, export, distribution, or dispensing' of some substances that are not criminalized under federal law does not prevent conduct prohibited under the [Arizona] statute from qualifying, categorically, as a predicate offense.[46]

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[45] 8 U.S.C. § 1227(a)(2)(B)(i).

[46] *United States v. Smith*, --- F. App'x ---, 2017 WL 908225, at *5 (6th Cir. Mar. 7, 2017).

Under the modified categorical approach, Petitioner Bullard's Arizona Rev. Stat. § 13-3408 conviction for drug transportation qualifies as a § 4B1.1 "controlled substance offense."

Ohio Conviction

Petitioner Bullard also argues that his 2014 Ohio Rev. Code § 2925.03(A)(2) conviction for drug trafficking does not categorically qualify as a predicate "controlled substance offense."[47] Bullard argues that the underlying statute criminalizes conduct beyond that described in U.S.S.G. § 4B1.2(b).

Sixth Circuit precedent defeats Bullard's argument. Although Section 2925.03 includes both qualifying and non-qualifying crimes,[48] Bullard's 2013 indictment specifies that he was charged under Section 2925.03(A)(2). Therefore, the Court examines whether a conviction under that subsection is a qualifying offense.

The Sixth Circuit has concluded that Ohio Rev. Code § 2925.03(A)(2) criminalizes the "possession of a controlled substance with intent to distribute it," and therefore is a U.S.S.G. § 4B1.2(b) controlled-substance offense.[49] Under the categorical approach, Bullard's Ohio Rev. Code § 2925.03(A)(2)

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[47] Doc. 70-2 at 9.

[48] *See United States v. Wright*, 43 F. App'x 848, 852 (6th Cir. 2002).

[49] *Id.* at 852-53; *see also United States v. Robinson*, 333 F. App'x 33, 35-36 (6th Cir. 2009) ("Because § 2925.03(A)(2) includes an element of 'manufacture, import, export, distribution, or dispensing,' or intent to do those things, that subsection of the Ohio statute falls within the ambit of U.S.S.G. § 4B1.2(b)."); *United*

conviction is a qualifying offense under U.S.S.G. § 4B1.2(b).

B. Ineffective Assistance of Counsel

Petitioner Bullard argues that he was denied the effective assistance of counsel during the sentencing hearing and on appeal because of counsel's failure to "adequately prepare and investigate in preparation for sentencing."[50] Bullard claims that his trial and appellate counsel should have objected to Bullard's classification as a career offender based on prior drug convictions.[51]

The government counters that Bullard's attorney performed at the "objective standard of reasonableness."[52]

To prevail on an ineffective assistance of counsel claim, a habeas petitioner must satisfy the two-pronged *Strickland v. Washington*[53] test.

First, the petitioner must show that his counsel's performance was deficient, meaning it "fell below an objective standard of reasonableness."[54] The Court determines "whether, in light of all the circum-

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States v. Karam, 496 F.3d 1157, 1167 (10th Cir. 2007) (holding that "[t]here can be no dispute that" a conviction under Ohio R.C. § 2925.03(A)(2) is a controlled substance offense).

[50] Doc. 70-2 at 12.

[51] *Id.* at 13-15.

[52] Doc. 72 at 7.

[53] 466 U.S. 668 (1984).

[54] *Id.* at 688.

stances, the identified acts or omissions were outside the wide range of professionally competent assistance."[55] The Court's review is deferential, as "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable."[56]

Second, the petitioner must show that the deficiency prejudiced his defense; in other words, "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[57]

Petitioner Bullard fails to satisfy either *Strickland* prong. As discussed above, both the Arizona and Ohio drug convictions qualify as controlled substance offenses. Defense counsel did not render ineffective assistance by failing to make arguments that would be denied. It was objectively reasonably for counsel not to challenge Bullard's career offender classification. Moreover, because such a challenge would not have changed the course of Bullard's proceedings, counsel's "alleged failure to dig deeper or object more robustly to the career offender classification" could not have prejudiced Bullard.[58]

Accordingly, Petitioner Bullard's claim for ineffective assistance of counsel fails.

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[55] *Id.* at 690.

[56] *Id.* at 690-91.

[57] *Id.* at 695.

[58] *Gibbs v. United States*, 3 F. App'x 404, 406 (6th Cir. 2001).

IV. CONCLUSION

For the reasons above, this Court **DENIES** Petitioner Bullard's § 2255 petition. Furthermore, there is no basis upon which to issue a certificate of appealability.[59]

IT IS SO ORDERED.

Dated: May 25, 2017 */s/James S. Gwin*

JAMES S. GWIN
UNITED STATES
DISTRICT JUDGE

[59] 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b).

APPENDIX C

No. 17-3731

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DWIGHT BULLARD, Petitioner-Appellant, v. UNITED STATES OF AMERICA, Respondent-Appellee.	ORDER **FILED** Dec. 26, 2019 DEBORAH S. HUNT, Clerk

BEFORE: GUY, THAPAR, and NALBANDIAN, 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.

ENTERED BY ORDER OF THE COURT

/s/Deborah S. Hunt

Deborah S. Hunt, Clerk

APPENDIX D

No. 17-3731

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DWIGHT BULLARD, Petitioner-Appellant, v. UNITED STATES OF AMERICA, Respondent-Appellee.	ORDER **FILED** Jan. 04, 2018 DEBORAH S. HUNT, Clerk

Dwight Bullard, a federal prisoner proceeding pro se, appeals a district court order denying his motion to vacate, set aside, or correct sentence filed pursuant to 28 U.S.C. § 2255. Bullard requests a certificate of appealability. *See* 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b).

With the benefit of a written plea agreement, Bullard pleaded guilty to possession with intent to distribute heroin in violation of 21 U.S.C. § 841(a)(1), and possession of a firearm and ammunition by a felon in violation of 18 U.S.C. § 922(g)(1). The district court determined that Bullard was a career offender, *see* USSG § 4B1.1, subject to a sentencing range of 292 to 365 months of imprisonment. The district court varied downward from the applicable career-offender sentencing guidelines range and sentenced Bullard to serve a total of 140 months of imprisonment followed by eight years of

supervised release. This court affirmed the denial of Bullard's motion to suppress evidence. *United States v. Bullard*, 659 F. App'x 288 (6th Cir. 2016).

In his motion to vacate, Bullard raised the following grounds for relief: (1) his "140-month sentence of imprisonment, imposed as a result of his misclassification as a career offender, constitutes a complete miscarriage of justice"; (2) he was denied effective assistance of trial counsel "during the sentencing hearing and as a result of counsel's failure to adequately prepare and investigate in preparation for sentencing" because counsel did not object to his career-offender designation either in the presentence report or at sentencing; and (3) he was denied effective assistance of appellate counsel because counsel did not challenge his career-offender designation on appeal on the basis that "he lacked the requisite predicate felonies" to support it. The district court denied Bullard's motion to vacate and denied a certificate of appealability.

A certificate of appealability may issue only if a petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "A petitioner satisfies this standard by demonstrating 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). A certificate of appealability analysis is not the same as "a merits analysis." *Buck v. Davis*, 137 S. Ct. 759, 773 (2017). Instead, "[a] 'court of appeals should limit its examination [at the

[certificate of appealability] stage] to a threshold inquiry into the underlying merit of [the] claims,' and ask 'only if the District Court's decision was debatable.'" *Id.* at 774 (quoting *Miller-El*, 537 U.S. at 327, 348).

In his first ground for relief, Bullard challenged his career-offender status, arguing that neither his prior Arizona conviction for "attempted transport/import of a narcotic for sale" nor his prior Ohio conviction "for a drug trafficking offense" qualified as a "controlled substance offense" under the definition of that term set forth in USSG § 4B1.2(b). He argued that his Arizona conviction did not qualify as a controlled substance offense because the criminal statute at issue—Arizona Revised Statutes § 13-3408—is overbroad in that it criminalizes at least two drugs that are not listed in the federal schedules of controlled substances, *see* 21 U.S.C. § 812, and it "proscribes conduct not included in the Guidelines definition of a 'controlled substance offense,' namely offers to transport and offers to sell such narcotics." He argued that his Ohio conviction did not qualify as a controlled substance offense because the criminal statute at issue—Ohio Revised Code § 2925.03(A)(2)—is also overbroad in that it criminalizes "conduct beyond that described in U.S.S.G. § 4B1.2(b)" and "dilutes the *mens rea* requirement of a 'controlled substance offense' under U.S.S.G. § 4B1.2(b)."

A defendant may be sentenced as a career offender if he "was at least eighteen years old" when he committed the current offense; his current offense "is a felony that is either a crime of violence or

a controlled substance offense"; and he "has at least two prior felony convictions of either a crime of violence or a controlled substance offense." USSG § 4B1.1(a). A "controlled substance offense" is defined as an offense punishable by more than one year in prison "that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance . . . or the possession of a controlled substance . . . with intent to manufacture, import, export, distribute, or dispense." USSG § 4B1.2(b).

To determine whether a prior drug conviction qualifies as a controlled substance offense for career-offender status, this court employs the "categorical approach," which compares the elements of the prior conviction with the definition of "controlled substance offense" in § 4B1.2(b). *See United States v. House*, 872 F.3d 748, 753 (6th Cir.), *cert. denied*, 138 S. Ct. 367 (2017) (No. 17-6013); *see also Descamps v. United States*, 570 U.S. 254, __, 133 S. Ct. 2276, 2281 (2013). A prior drug offense qualifies as a predicate offense only when "its elements are the same as, or narrower than" the definition of controlled substance offense. *See Mathis v. United States*, 136 S. Ct. 2243, 2247 (2016). When a statute is "divisible," in that it lists alternative elements, this court employs the "modified categorical approach." *House*, 872 F.3d at 753. "That approach entails sorting through the alternative elements to determine whether any of them 'matches [the controlled substance offense definition],' and if one does, 'consult[ing] a limited class of documents . . . to determine which alternative formed the basis of

the defendant's prior conviction.'" *Id.* (quoting *Descamps*, 133 S. Ct. at 2281).

The district court reviewed the Arizona criminal statute at issue, concluded that the statute prohibits more conduct than is included within the definition of "controlled substance offense," and summarily held that the statute contains alternative elements. The court thus applied the modified categorical approach to determine which version of the crime Bullard committed. *See Mathis*, 136 S. Ct. at 2249. The district court referred to the indictment and plea agreement in the Arizona case to conclude that "the crime forming the basis of Bullard's Arizona conviction was attempted transportation of narcotic drugs" in violation of Arizona Revised Statutes § 13-3408(A)(7). The district court compared the elements of § 13-3408(A)(7) with the definition of "controlled substance offense" in § 4B1.2(b). Based on that comparison, the district court concluded that Bullard's Arizona drug conviction qualified as a controlled substance offense to support his career-offender sentence. Jurists of reason could debate that conclusion, for at least two reasons: first, it is debatable whether § 13-3408(A)(7) is divisible, *see Ibanez-Beltran v. Lynch*, 858 F.3d 294, 297-98 (5th Cir. 2017) (Arizona courts have come to different conclusions as to whether § 13-3408(A)(7) and a nearly identical statute list alternative means rather than alternative elements); and second, it is debatable whether an offer to sell a controlled substance under Arizona law is included within the definition of "controlled substance offense," *see United States v. Evans*, 699 F.3d 858, 866-68 (6th Cir. 2012)

(offer to sell a controlled substance is a controlled substance offense if intent to sell, and not just intent to offer to sell, is required); *State v. Strong*, 875 P.2d 166, 167 (Ariz. Ct. App. 1993) (§ 13-3408(A)(7) requires proof that defendant "knowingly" offered to sell a controlled substance, not that he specifically intended to sell a controlled substance).

The district court further rejected Bullard's contention that § 13-3408 is overbroad because it criminalizes two drugs that are not listed in the federal schedules of controlled substances. The district court said that Bullard's reliance on *Vera-Valdevinos v. Lynch*, 649 F. App'x 597 (9th Cir. 2016), a case involving the Immigration and Nationality Act (INA), was misplaced because the INA requires controlled substance offenses to involve controlled substances listed in the federal schedules of controlled substances while the sentencing guidelines do not. *Compare* 8 U.S.C. § 1227(a)(2)(B)(i) *with* USSG § 4B1.2(b). The district court based its conclusion on *United States v. Smith*, 681 F. App'x 483, 489 (6th Cir.), *cert. denied*, 137 S. Ct. 2144 (2017), but, as an unpublished decision, *Smith* does not bind future panels, *see* 6th Cir. R. 32.1(b). And at least two courts of appeals have rejected the district court's conclusion, holding instead that the guidelines' definition of "controlled substance" covers only federally controlled substances. *See United States v. Gomez-Alvarez*, 781 F.3d 787, 792-94 (5th Cir. 2015); *United States v. Leal-Vega*, 680 F.3d 1160, 1164-67 (9th Cir. 2012). Hence, jurists of reason could debate the district court's resolution of this issue.

The district court also held that Bullard's Ohio drug conviction under § 2925.03(A)(2) qualified as a controlled substance offense to support his career-offender sentence in light of precedent from this court. *See United States v. Robinson*, 333 F. App'x 33, 35-36 (6th Cir. 2009). Reasonable jurists could not disagree with this conclusion. *See id.*; *see also United States v. Karam*, 496 F.3d 1157, 1167-68 (10th Cir. 2007) (each act prohibited by § 2925.03(A)(2) involves distribution of a controlled substance).

The district court held that Bullard was a career offender because his Arizona and Ohio convictions were for controlled substance offenses under the guidelines. Since it is debatable whether Bullard's Arizona conviction qualifies as a controlled substance offense, it is also debatable whether he was a career offender. *See* USSG § 4B1.1(a) (career-offender status requires "at least two prior felony convictions of either a crime of violence or a controlled substance offense"). We therefore grant Bullard a certificate of appealability on this issue. *See Miller-El*, 537 U.S. at 327.

In his second and third grounds for relief, Bullard argued that trial and appellate counsel were ineffective for failing to challenge his career-offender classification.

To establish ineffective assistance of counsel, a defendant must show deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The performance inquiry re-

quires the defendant to "show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. The district court concluded that neither trial nor appellate counsel was ineffective for failing to challenge Bullard's career-offender status because his "Arizona and Ohio drug convictions qualify as controlled substance offenses," and counsel is not ineffective for failing to raise a meritless objection or argument. *See Sutton v. Bell,* 645 F.3d 752, 755 (6th Cir. 2011). Since the district court's conclusion as to Bullard's Arizona conviction is debatable, so too is its resolution of Bullard's ineffective-assistance claims.

Accordingly, Bullard's application for a certificate of appealability is **GRANTED** insofar as his claims are based on his Arizona conviction.

ENTERED BY ORDER OF THE COURT

/s/Deborah S. Hunt

Deborah S. Hunt, Clerk