

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2024

CRAIG FOOTE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

SALVATORE C. ADAMO
Counsel of Record
1866 Leithsville Road, #306
Hellertown, PA 18055
Tel: 610-751-1735
Email: scadamo11@aol.com

QUESTION PRESENTED

1. Was Petitioner denied the effective assistance of counsel?

PARTIES TO THE PROCEEDING

The petitioner is:

Craig Foote

The respondent is:

United States of America

TABLE OF CONTENTS

Questions Presented	i
Parties to the Proceeding	ii
Table of Authorities	iv
Opinions Below	1
Statement of Jurisdiction	1
Constitutional and Statutory Provisions Involved.....	1
Statement of the Case.....	2
Reasons for Granting the Writ	
Point I	
Was the Petitioner denied effective assistance of counsel	4
Conclusion	9
Appendix:	
United States Court of Appeals for the Third Circuit Order and Opinion.....	App. 1-6
United States District Court for the Middle District of Pennsylvania Order and Opinion	App. 7-19

TABLE OF AUTHORITIES

Cases

<i>George v. Sively</i> , 254 F.3d 438, 443 (3 rd . Cir. 2001)	4
<i>Jermyn v. Horn</i> , 266 F.3d 257, 282 (3 rd . Cir. 2001)	5
<i>Rolan v. Vaughn</i> , 445 F.3d 671, 682 (3 rd . Cir. 2006)	5
<i>Strickland v. Washington</i> , 466 U.S. 668, 687-88 (1984)	4
<i>United States v. Davis</i> , 927 F.3d 383, 386 (6 th Cir. 2019)	7
<i>United States v. Molina</i> , 75 F. App'x 111, 113 (3 rd . Cir. 2003)	4
<i>United States v. Nahodil</i> , 36 F.3d 323, 326 (3 rd . Cir. 1994)	4
<i>United States v. Nasir</i> , 982 F.3d 144 (3 rd . Cir. 2020)	6, 7
<i>United States v. Norman</i> , 935 F.3d 232 (4 th Cir. 2019)	7
<i>United States v. Roman</i> , 2021 U.S. App. 24649 (3 rd . Cir.)	7
<i>United States v. Swinton</i> , 797 F. App'x 589, 602 (2 nd . Cir. 2019)	7
<i>United States v. Winstead</i> , 890 F.3d 1082, 1091, 435 U.S. App. D.C. 395 (D.C. Cir. 2018)	7

Statutes

18 U.S.C. 924(c)	8
28 U.S.C. § 1254(1)	1

28 U.S.C. § 2254(a)	4
U.S.S.G. § 4B1.1	6

Other Sources

Amendment 5 of the United States Constitution	1
---	---

OPINIONS BELOW

The United States Court of Appeals for the Third Circuit affirmed Petitioner Craig Foote's Judgment of Conviction. App. 1-6.

STATEMENT OF JURISDICTION

Craig Foote seeks review of the August 14, 2024, Order of the United States Court of Appeals for the Third Circuit. Jurisdiction of this Court to review the judgment of the Third Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment 6 of the United States Constitution, which provides:

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

STATEMENT OF THE CASE

On October 03, 2018, a grand jury for the Middle District of Pennsylvania charged appellant as follows: conspiracy to distribute and possess with intent to distribute 28 grams and more of cocaine base and additional quantities of heroin and fentanyl, in violation of 21 U.S.C. § 846 (Count 1); four counts of distribution and possession with intent to distribute cocaine base, in violation of 21 U.S.C. § 841 (Counts 2-4 and 6); possession with intent to distribute cocaine base, heroin and fentanyl, in violation of 21 U.S.C. § 841 (Count 5); possession of firearms, in violation of 18 U.S.C. § 924(c) (Count 7); maintaining a drug premises, in violation of 18 U.S.C. § 856 (Count 8); and felon in possession of a firearm, in violation of 18 U.S.C. § 922(g) (Count 9).

On June 4, 2020, appellant entered a plea of guilty to Counts 1 and 7 of the indictment. The plea was a written plea agreement in which the parties agreed, with regard to Count 1, that Mr. Foote was only pleading to an unspecified amount of cocaine base, rather than 28 grams and more of cocaine base as listed in the indictment.

On September 9, 2020, the U.S. Probation Office completed a presentence report “PSR” concluding that Mr. Foote was a career offender pursuant to 4B1.1 of the United States Sentencing Guidelines based upon two prior convictions for

possession with intent to deliver a controlled substance. As a result, the applicable guideline range was 262 to 327 months imprisonment.

Thereafter, the District Court granted a variance and sentenced Mr. Foote to 238 months, a sentence 24 months below the bottom end of the applicable guideline range.

On November 9, 2021, Mr. Foote filed a motion pursuant to 28 U.S.C. § 2255, alleging ineffective assistance of counsel, arguing that his attorney was ineffective for failing to object to his designation as a career offender. The District Court denied his motion but issued a certificate of appealability.

REASONS FOR GRANTING THE WRIT

WAS PETITIONER DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL

28 U.S.C. § 2255 permits a prisoner in custody to challenge his sentence “upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States or is otherwise subject to collateral attack.” Accordingly, this Court has held that a 2255 motion is a proper and indeed preferred vehicle for a federal prisoner to allege ineffective assistance of counsel. *United States v. Nahodil*, 36 F.3d 323, 326 (3rd. Cir. 1994); *United States v. Molina*, 75 F. App’x 111, 113 (3rd. Cir. 2003).

The Sixth Amendment to the United States Constitution guarantees the right of every criminal defendant to effective assistance of counsel. In *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984) the United States Supreme Court set forth a two-part standard. The appellant must establish that the performance of counsel fell below an objective standard of reasonableness; and but for counsel’s errors, the result of the underlying proceeding would have been different. The appellant must establish both *Strickland* prongs to prevail on a claim of ineffective assistance of counsel. *George v. Sively*, 254 F.3d 438, 443 (3rd. Cir. 2001).

As to the first prong, appellant must establish that counsel's performance was deficient. *Jermyn v. Horn*, 266 F.3d 257, 282 (3rd. Cir. 2001). This requires appellant to demonstrate that counsel made errors "so serious" that counsel was not functioning as guaranteed under the Sixth Amendment. Additionally, appellant must demonstrate that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. *Id.* However, in making this assessment "there is a strong presumption that counsel's performance was reasonable." *Id.*

In addition to showing deficient performance by counsel, appellant must demonstrate that he was prejudiced by counsel's errors. *Id.* This prejudice requires appellant to show that "there is a reasonable probability that, but for, counsel's unprofessional errors, the result of the proceeding would be different." *Id.* A "reasonable probability" is defined as a "probability sufficient to undermine confidence in the outcome." *Id.* Furthermore, in considering whether appellant suffered prejudice, "the effect of counsel's inadequate performance must be evaluated in light of the totality of the evidence at trial; a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Rolan v. Vaughn*, 445 F.3d 671, 682 (3rd. Cir. 2006).

Appellant argues that trial counsel was ineffective for failing to challenge his designation as a career offender pursuant to U.S.S.G. §4B1.1. Mr. Foote asserts that his conviction for Count 1, conspiracy to distribute a controlled substance, is an inchoate offense, and is not a proper predicate for a career offender designation pursuant to *United States v. Nasir*, 982 F.3d 144 (3rd. Cir. 2020).

Appellant was sentenced 12 days before this Court issued its opinion in *Nasir*. The District Court held that trial counsel cannot be ineffective for failing to predict a change in the law and denied appellant's Writ for Habeas Corpus.

Pursuant to the United States Sentencing Guidelines:

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.

Appellant argues that trial counsel had a duty to raise an issue that was beneficial to him, even where precedent, in this Circuit, foreclosed relief. Further, trial counsel had this duty since an opportunity for relief was pending before a higher court.

Firstly, the plain language of the Guideline does not include inchoate crimes as being “controlled substance offenses.” *United States v. Nasir*, 982 F.3d 144 (3rd. Cir. 2020); *United States v. Roman*, 2021 U.S. App. 24649 (3rd. Cir.).

Secondly, before this Court ruled on *Nasir*, the law was developing around federal circuits that “inchoate” offense could not be used to give rise to a career offender enhancement. *United States v. Norman*, 935 F.3d 232 (4th Cir. 2019); *United States v. Winstead*, 890 F.3d 1082, 1091, 435 U.S. App. D.C. 395 (D.C. Cir. 2018); *United States v. Davis*, 927 F.3d 383, 386 (6th Cir. 2019); *United States v. Swinton*, 797 F. App’x 589, 602 (2nd. Cir. 2019). Therefore, trial counsel had a basis to make an objection to appellant’s being sentenced as a career offender.

While it is understood that counsel cannot be held ineffective for failing to anticipate changes in the law, *United States v. Davis*, 394 F.3d 182 (3rd. Cir. 2005), trial counsel’s ability, nay duty, to raise issues beneficial to a client even where precedent may foreclose relief but where an opportunity is pending before a higher court, is surmised within the understanding of an attorney’s professional responsibility to act within his or her representation of each client. *Pa. RPC 1.3; Nasir* 982 F.3d at 191. This suggests that an attorney has an ethical obligation to raise issues despite a wall of circuit precedent foreclosing relief. Therefore, appellant has

established that trial counsel's performance fell below an objective standard of reasonableness under prevailing professional norms.

Consequently, the second issue is whether trial counsel's actions prejudiced appellant. Appellant must demonstrate that "there is a reasonable probability that, but for, counsel's unprofessional errors, the results of the proceedings would be different."

Appellant pled guilty to possessing 28 grams but less than 112 grams of cocaine. This produced a base offense level of 24 along with criminal history points of 11, giving him a criminal history category of V. After subtracting the three levels for acceptance of responsibility, the appellant's base offense level is 21 with a criminal history of V resulting in a guideline range of 70-87 months. With the 18 U.S.C. 924(c) 60 months mandatory minimum running consecutively, this provides a guideline range of 130 to 147 months. These guidelines provide a far less sentence than the 238 months that was imposed.

Therefore, appellant has demonstrated both prongs of the *Strickland* test and established that trial counsel was ineffective. In view of the above-mentioned arguments, the appellant respectfully requests that the Writ of Habeas Corpus be granted and a sentencing hearing ordered. App. 41-85.

CONCLUSION

For these reasons stated in this petition, Mr. Foote respectfully requests that a writ of certiorari be issued to review the decision below.

Respectfully submitted,


SALVATORE C. ADAMO
Attorney for Petitioner
1866 Leithsville Road, #306
Hellertown, PA 18055
(610) 751-1735
Scadamo11@aol.com

Dated: August 20, 2024

APPENDIX

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 22-3059

UNITED STATES OF AMERICA

v.

CRAIG FOOTE,
Appellant

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Criminal No. 1-18-cr-00320-001)
District Judge: Honorable Jennifer P. Wilson

Submitted Pursuant to Third Circuit L.A.R. 34.1(a)
June 6, 2024

Before: CHAGARES, *Chief Judge*, CHUNG, and FISHER, *Circuit Judges*.

(Filed: August 14, 2024)

OPINION*

FISHER, *Circuit Judge*.

In June 2020, Craig Foote pleaded guilty to conspiring to distribute and possess with intent to distribute an unspecified amount of cocaine base, as well as possession of

* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

Opn!

firearms in furtherance of drug trafficking. Foote's Presentence Report indicated that he was a career offender based on the instant conspiracy charge as well as two prior felony controlled substance charges. As a result of his career offender designation, Foote was subject to a Sentencing Guidelines range of 262 to 327 months' imprisonment. During his November 19, 2020 sentencing hearing, Foote's trial counsel argued for a downward variance but did not object to Foote's designation as a career offender. The District Court imposed a below-Guidelines-range sentence of 238 months' (nearly twenty years') imprisonment. Twelve days after Foote's sentencing, this Court issued its first decision in *United States v. Nasir*, 982 F.3d 144 (3d Cir. 2020) (en banc), which overruled existing precedent and held that inchoate crimes such as conspiracy are not "controlled substance offenses" as relevant to career offender designation. Foote filed a motion to vacate his sentence alleging ineffective assistance of counsel, which the District Court denied. We will affirm.¹

I.

At the time of Foote's sentencing, the United States Probation Office properly designated him as a career offender. Under the then-operative 2018 United States Sentencing Guidelines, a defendant was a career offender (and subject to an enhanced

¹ The District Court had jurisdiction under 28 U.S.C. § 2255 (federal habeas corpus). We have jurisdiction under 28 U.S.C. § 1291 (final decisions of district courts) and 28 U.S.C. § 2253(a) (review of final habeas orders). We review the District Court's legal conclusions de novo and factual findings for clear error. *United States v. Folk*, 954 F.3d 597, 601 (3d Cir. 2020).

Guidelines range) if the instant conviction was for a controlled substance offense and the defendant had been previously convicted of at least two controlled substance offenses.² Commentary to this guideline clarified that a “controlled substance offense” included conspiracy to commit that offense.³

But Foote argues that, notwithstanding the state of the law at sentencing, his trial counsel was ineffective in failing to object to that designation because: (1) courts around the country were developing a consensus that inchoate crimes were not proper predicates for a career offender designation; and (2) *Nasir*—a case concerning the same question—was pending before this Court sitting en banc. In light of the fact that “an opportunity for relief was pending before a higher court,” Foote asserts that his “trial counsel had a duty to raise an issue . . . beneficial to [Foote].”⁴ Like the District Court, we disagree.

We evaluate ineffective assistance of counsel claims under *Strickland v. Washington*’s familiar two-prong test.⁵ First, a defendant must show that his counsel’s representation “fell below an objective standard of reasonableness.”⁶ We judge the reasonableness of the challenged conduct on the facts of the specific case, viewed as of the time of the conduct.⁷ *Strickland* instructs that we must “indulge a strong presumption

² U.S.S.G. § 4B1.1(a) (2018).

³ *Id.* at § 4B1.2 n.1 (2018); *see also United States v. Hightower*, 25 F.3d 182, 187 (3d Cir. 1994) (holding this commentary to be binding).

⁴ Foote Br. 4.

⁵ 466 U.S. 668 (1984).

⁶ *Id.* at 688–89.

⁷ *Id.* at 690.

that counsel's conduct falls within the wide range of reasonable professional assistance.”⁸

Second, a defendant must establish that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”⁹ Only after a defendant meets his burden as to both prongs can counsel’s conduct be deemed ineffective and relief be granted.¹⁰

Foote’s claim fails under *Strickland*’s first prong.¹¹ It had been settled law in this Circuit for more than twenty-five years by the time of Foote’s sentencing that courts should defer to the definition of a “controlled substance offense” set forth in Commentary to the Guidelines, which explicitly included inchoate offenses like conspiracy.¹² Foote recognizes this and correctly concedes that, at the time of his sentencing, “precedent, in this Circuit, foreclosed relief.”¹³ But Foote argues that his trial counsel’s failure to object anyway was objectively unreasonable. Not so.

We acknowledge that, at the time of Foote’s sentencing, a number of our sister circuits had reached the conclusion that we would ultimately adopt in *Nasir*: in light of the Supreme Court’s decision in *Kisor v. Wilkie*,¹⁴ deference to the relevant commentary

⁸ *Id.* at 689.

⁹ *Id.* at 694.

¹⁰ *Id.* at 687.

¹¹ Because Foote is unable to satisfy *Strickland*’s first prong, we need not consider whether he has demonstrated prejudice under the second prong.

¹² *Hightower*, 25 F.3d at 187.

¹³ Foote Br. 8.

¹⁴ 588 U.S. 558 (2019).

is not appropriate and inchoate crimes are not properly included in the definition of “controlled substance offenses.”¹⁵ But *Nasir* represented an about-face on that issue, and our Court has consistently held that “there is no general duty on the part of defense counsel to anticipate changes in the law.”¹⁶ The same is true here.

At the time of Foote’s sentencing, he had two prior felony controlled substance convictions and then-binding precedent held that the instant conspiracy offense was a proper predicate for career offender designation. The fact that the law changed after Foote’s sentencing does not support a finding that trial counsel acted unreasonably when he did not object to the career offender designation. Had he made such an objection, it would have been rejected on the merits. Trial counsel’s conduct was not inconsistent with his professional duty, nor did it violate Foote’s constitutional rights. Foote’s claim of ineffective assistance of counsel therefore fails, and he is not entitled to relief.

II.

For these reasons, we will affirm.

¹⁵ *Nasir*, 982 F.3d at 160.

¹⁶ *Sistrunk v. Vaughn*, 96 F.3d 666, 670 (3d Cir. 1996) (internal quotation marks omitted); *see also United States v. Davies*, 394 F.3d 182, 191 (3d Cir. 2005); *Gov’t of Virgin Islands v. Forte*, 865 F.2d 59, 62 (3d Cir. 1989) (“Only in a rare case” can an attorney’s failure to make an objection which would not succeed under existing law “be considered unreasonable”).

Case: 22-3059 Document: 43-2 Page: 1 Date Filed: 08/14/2024

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 22-3059

UNITED STATES OF AMERICA

v.

CRAIG FOOTE,
Appellant

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Criminal No. 1-18-cr-00320-001)
District Judge: Honorable Jennifer P. Wilson

Submitted Pursuant to Third Circuit L.A.R. 34.1(a)
June 6, 2024

Before: CHAGARES, *Chief Judge*, CHUNG, and FISHER, *Circuit Judges*.

JUDGMENT

This cause came on to be considered on the record from the United States District Court for the Middle District of Pennsylvania and was submitted pursuant to Third Circuit L.A.R. 34.1(a) on June 6, 2024. On consideration whereof, it is now hereby

ORDERED and ADJUDGED by this Court that the order of the District Court entered July 19, 2022, be and the same is hereby AFFIRMED. All of the above in accordance with the Opinion of this Court.

Costs shall not be taxed.

ATTEST:
s/ Patricia S. Dodszuweit
Clerk

Dated: August 14, 2024

3 of 3

App

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA	:	Crim. No. 1:18-CR-00320
	:	
	:	
v.	:	
	:	
	:	
CRAIG FOOTE	:	Judge Jennifer P. Wilson

ORDER

This case is on remand from the United States Court of Appeals for the Third Circuit to determine whether a certificate of appealability should issue in this matter. (Doc. 145.) On July 19, 2022, this court issued an order denying Foote's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. 2255, holding that Foote's trial counsel was not ineffective for failing to raise an objection that was beneficial to Foote, even where precedent foreclosed relief, but where an opportunity for relief was pending before a higher court. (See Doc. 142.) Foote's petition asserted that his trial counsel should have objected to his Career Offender designation on the basis of the *United States v. Nasir*, which was pending before the Third Circuit Court of Appeals at the time of his sentencing hearing, but was decided twelve days after he was sentenced. (*Id.*)

A court may issue a certificate of appealability only if the petitioner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This requires that the petitioner "demonstrate that reasonable jurists

App'd 7

would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Here, notwithstanding the court's ruling, jurists of reasons may find it debatable whether Foote's trial counsel was constitutionally ineffective under the unique circumstances presented in this case. Therefore, a certificate of appealability shall issue.

s/Jennifer P. Wilson
JENNIFER P. WILSON
United States District Court Judge
Middle District of Pennsylvania

Date: November 21, 2022

app 8

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA : No. 1:18-CR-00320

:

:

v.

:

:

:

CRAIG FOOTE : Judge Jennifer P. Wilson

ORDER

Before the court is Craig Foote’s motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. (Doc. 119.) For the reasons that follow, the court will deny his motion.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Between July 27, 2017, and July 31, 2017, undercover officers from Harrisburg Police Department conducted three controlled buys of crack cocaine from Craig Foote (“Foote”). (Doc. 75, p. 6.)¹ As a result, law enforcement officers obtained and executed a search warrant on Foote’s residence in Harrisburg. (*Id.* at 7.) Officers found cocaine base, heroin, and fentanyl, along with two firearms. (*Id.*) After being released on bail, Foote contacted an undercover officer and conducted another controlled purchase on August 7, 2021. (*Id.*) A second search warrant was executed, but officers found no narcotics or firearms during the second search. (*Id.*)

¹ For ease of reference, the court utilizes the page numbers in the CM/ECF header.

On October 3, 2018, a grand jury returned a nine-count Indictment charging Foote with conspiracy to distribute and possess with intent to distribute cocaine base, heroin, and fentanyl, in violation of 21 U.S.C. § 846; three counts of distribution and possession with the intent to distribute cocaine base, in violation of 21 U.S.C. § 841(a)(1); distribution and possession with the intent to distribute cocaine base, heroin, and fentanyl, in violation of 21 U.S.C. § 841(a)(1); distribution and possession with the intent to distribute cocaine base, in violation of 21 U.S.C. § 841(a)(1); possession of firearms in furtherance of drug trafficking, in violation of 18 U.S.C. § 924(c); maintaining a drug premises, in violation of 21 U.S.C. § 856(a)(1); and being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g) and 924(e). (Doc. 7.) On June 4, 2020, Foote entered a plea of guilty to Count 1 of the indictment, conspiracy to distribute and possess with intent to distribute cocaine base, heroin, and fentanyl, and Count 7 of the indictment, possession of firearms in furtherance of drug trafficking. (Doc. 62.) The plea was entered in accordance with a written plea agreement. (Doc. 57.)

On September 9, 2020, the United States Probation Office completed a pre-sentence report (“PSR”) concluding that Foote was a career offender pursuant to §4B1.1 of the United States Sentencing Guidelines based on two prior convictions for possession with intent to deliver a controlled substance. (Doc. 75, pp. 9, 11, 13.) As a result, the applicable guidelines range was 262 to 327 months

7/20/2022

imprisonment in accordance with U.S.S.G. §4B1.1(c)(3). (*Id.* at 9.) Ultimately, the court granted a variance and sentenced Foote to 238 months, a sentence 24 months below the bottom end of the applicable guideline range. (Doc. 97.)

Foote has now filed the instant motion, alleging ineffective assistance of counsel, arguing that his attorney was ineffective for failing to object to his designation as a career offender. (Doc. 119.) Upon review of the arguments raised, the court ordered supplemental briefing on two issues: (1) whether counsel is ineffective for failing to preserve an issue beneficial to a client where precedent may foreclose relief but an opportunity for relief is pending before a higher court; and (2) what impact, if any, the direct appeal waiver in the plea agreement has on the *Strickland* analysis if counsel's ineffectiveness is premised on a failure to preserve an issue for appeal. (See Doc. 137.) This motion is fully briefed and is ripe for resolution.

STANDARD OF REVIEW

Section 2255 allows a prisoner who is in custody to challenge his sentence "upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States . . . or is otherwise subject to collateral attack." 28 U.S.C. § 2255. Accordingly, the United States Court of Appeals for the Third Circuit has held that, "[a] § 2255 motion is a proper and indeed the preferred vehicle for a federal prisoner to allege ineffective assistance of counsel." *United States. v.*

θ aff/1

Nahodil, 36 F.3d 323, 326 (3d Cir. 1994) (citing *United States v. Sandini*, 888 F.2d 300, 311-12 (3d Cir. 1989)); *see also United States v. Molina*, 75 F. App'x 111, 113 (3d Cir. 2003) (“Because they are often highly fact-bound, claims of ineffective assistance of counsel are generally not considered on direct appeal. . . . Instead, ‘the proper avenue for pursuing such claims is through a collateral proceeding in which the factual basis for the claim may be developed’”) (internal citations omitted).

The Sixth Amendment to the United States Constitution guarantees the right of every criminal defendant to effective assistance of counsel. Under federal law, a collateral attack upon a conviction or a sentence based upon a claim of ineffective assistance of counsel must satisfy a two-part test established by the Supreme Court. Specifically, to prevail on a claim of ineffective assistance of counsel, a petitioner must establish that: (1) the performance of counsel fell below an objective standard of reasonableness; and (2) but for counsel’s errors, the result of the underlying proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687–88, 691–92 (1984). A petitioner must satisfy both *Strickland* prongs to prevail on a claim of ineffective assistance of counsel. *George v. Sively*, 254 F.3d 438, 443 (3d Cir. 2001).

At the outset, *Strickland* requires a petitioner to “establish first that counsel’s performance was deficient.” *Jermyn v. Horn*, 266 F.3d 257, 282 (3d Cir. 2001).

4 app/2

This threshold showing requires a petitioner to demonstrate that counsel made errors “so serious” that counsel was not functioning as guaranteed under the Sixth Amendment. *Id.* Additionally, the petitioner must demonstrate that counsel’s representation fell below an objective standard of reasonableness under prevailing professional norms. *Id.* However, in making this assessment “[t]here is a ‘strong presumption’ that counsel’s performance was reasonable.” *Id.* (quoting *Berryman v. Morton*, 100 F.3d 1089, 1094 (3d Cir. 1996)).

But a mere showing of deficient performance by counsel is not sufficient to secure habeas relief. Under the second *Strickland* prong, a petitioner also “must demonstrate that he was prejudiced by counsel’s errors.” *Id.* This prejudice requirement compels the petitioner to show that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* A “reasonable probability” is defined as “a probability sufficient to undermine confidence in the outcome.” *Id.*

Thus, as set forth in *Strickland*, a petitioner claiming that his criminal defense counsel was constitutionally ineffective must show that his lawyer’s “representation fell below an objective standard of reasonableness.” *Strickland*, 466 U.S. at 688. “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

10 App 13

counsel's perspective at the time." *Thomas v. Varner*, 428 F.3d 491, 499 (3d Cir. 2005) (quoting *Strickland*, 466 U.S. at 689). The petitioner must then prove prejudice arising from counsel's failings. "Furthermore, in considering whether a petitioner suffered prejudice, '[t]he effect of counsel's inadequate performance must be evaluated in light of the totality of the evidence at trial: a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.'" *Rolan v. Vaughn*, 445 F.3d 671, 682 (3d Cir. 2006) (quoting *Strickland*, 466 U.S. at 696).

DISCUSSION

In the instant motion, Foote argues that his counsel was ineffective for failing to challenge his designation as a career offender pursuant to § 4B1.1 of the Sentencing Guidelines. Foote asserts that his conviction at Count 1 for conspiracy to distribute a controlled substance is an inchoate offense, and is therefore not a proper predicate for a career offender designation pursuant to *United States v. Nasir*, 982 F.3d 144 (3d Cir. 2020). (Doc. 120, p. 3.)²

² In a supplemental counseled filing, Foote raises an additional issue relating to whether the elements of Pennsylvania's controlled substance offense correspond with or are broader than the definition set forth in the United States Sentencing Guidelines. (Doc. 132.) Foote requested that the court stay further proceedings pending the Third Circuit's resolution of this issue in *United States v. Dorian Dawson*, No. 20-3338. (*Id.*) The Government opposed this motion, arguing that no matter how *Dawson* is ultimately decided, because counsel is not ineffective for failing to predict changes in the law, the decision would have no impact on Foote's request for relief. (Doc. 136.) On May 2, 2022, the Third Circuit decided *Dawson*, holding that a drug trafficking offense under 35 Pa. Stat. § 780-113(a)(3) qualifies as a "controlled substance offense" under the career offender guideline, USSG §4B1.2. *United States v. Dawson*, 32 F.4th 254, 266 (3d Cir. 2022). Thus, notwithstanding the Government's assertion that this is not properly an ineffective

The Government, in opposition, argues that it is well established that counsel cannot be ineffective for failing to predict changes in the law. (Doc. 127, pp. 9–11.) Foote was sentenced twelve days before the Third Circuit issued an opinion in *Nasir*. (Doc. 127, p. 1.) The Government also argues that notwithstanding the competing arguments regarding Count 1, Foote suffered no prejudice because Count 7 is a career offender predicate offense in any event. (Doc. 127, pp. 11–13.)

Pursuant to the United States Sentencing Guidelines:

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.

USSG §4B1.1(a). Foote is challenging whether his “instant offense of conviction” was a controlled substance offense.

At the outset, the court notes that the Government is incorrect in its assertion that Foote would have been designated as a career offender based on his plea to Count 7 because it is a “crime of violence.” The Government has provided no case law, nor could the court locate any, stating that a conviction under § 924(c) was, in and of itself, sufficient as a predicate offense for career offender purposes. Rather, the crime underlying a § 924(c) charge must itself be a serious drug offense or a

assistance issue, the issue raised in Foote’s supplemental filing has now been resolved by the Third Circuit adversely.

2 App 15

crime of violence in order to be a predicate offense. U.S.S.G. § 4B1.2, App. Note

1. Accordingly, the same arguments made by Foote in relation to his conviction at Count 1 would apply to Count 7, as the underlying drug trafficking offense, according to the indictment, was the charge at Count 1.

In any event, Foote argues that trial counsel had a duty to raise an issue that was beneficial to his client, even where precedent foreclosed relief, where an opportunity for relief was pending before a higher court. (Doc. 132, p. 9.) Upon review of the issue, the court ordered supplemental briefing from the parties on this issue. After consideration of the supplemental briefs, the court finds that under controlling precedent, counsel's performance under these circumstances was not unreasonable because trial counsel is not ineffective for failing to predict changes in the law. *United States v. Stubbs*, 757 F. App'x 159, 161 (3d Cir. 2018). Therefore, Foote is unable to satisfy the first *Strickland* prong and the court need not undertake an analysis of the second prong.³

The primary case submitted by Foote in support of his argument that failure to preserve an issue for appeal where precedent forecloses relief but an opportunity for relief is pending before a higher court, is distinguishable on its facts. In *United*

³ The court also ordered supplemental briefing on the issue of what impact, if any, the plea agreement may have on the *Strickland* analysis where counsel's ineffectiveness was premised on a failure to preserve an issue for appeal. The court ordered such briefing in the event there was a finding that counsel's performance had been found to be unreasonable. However, given the conclusion that counsel's performance was not objectively unreasonable, the court need not reach this question.

States v. Sanders, 3 F. Supp. 2d 554, 562 (M.D. Pa. 1998), the court examined whether Sanders' trial counsel was ineffective for advising his client to plead guilty to an offense where there was a question of interpretation of the statute to which he plead guilty. The question of interpretation was, at that time, *an open question in the Third Circuit. Id.* In *Sanders*, while there was a circuit split on the issue of interpretation of the statute to which Sanders plead guilty, the Third Circuit had not yet ruled on the issue. That is in contrast to the situation confronting Foote here, as both parties concede that at the time Foote was sentenced, there was already binding precedent in the Third Circuit on the issue of whether inchoate crimes were included under the definition of a controlled substance offense in the Sentencing Guidelines. *See, e.g., United States v. Hightower*, 25 F.3d 182, 184–87 (3d Cir. 1994). Thus, this court need not undertake the same analysis as in *Sanders* because the reality of binding precedent rather than only persuasive precedent is a critical distinction that places Foote's case outside the reach of *Sanders* and within the bounds of the precedent cited by the Government and discussed next. The second case cited in Foote's supplemental brief is, by Foote's own admission, distinguishable and warrants no further analysis or discussion. (Doc. 140, p. 3.)

The Government has cited well-established Third Circuit precedent holding that where an objection would not be sustained on the basis of existing law, failure

App 17

to lodge such an objection can only constitute unreasonable performance under prevailing professional standards in rare circumstances. *Gov't of Virgin Islands v. Forte*, 865 F.2d 59, 62 (3d Cir. 1989). After thorough analysis, the court finds that such an exception does not apply in the instant case. In *Forte*, defense counsel failed to object when the prosecutor used her peremptory challenges to excuse all or almost all of the white jurors called (before *Batson*⁴ was decided). *Id.* at 61. The Third Circuit explained that this was a rare exception to the rule that counsel is not ineffective for failing to make an objection that could not be sustained on the basis of existing law. *Id.* at 62. Nonetheless, the court found Forte's counsel to be ineffective because Forte's motion alleged that trial counsel consulted with another attorney prior to trial and discussed the potential of the prosecutor using peremptory challenges to get an all-black jury and the pendency of *Batson*. *Id.* at 61–62. Trial counsel even indicated she would object if the prosecutor employed such a tactic. *Id.* Furthermore, Forte made a reasonable request for trial counsel to lodge this objection to preserve his rights. *Id.* at 63. Moreover, challenges such as this were being made at the time in other cases. *Id.* at 63. Lastly, *Batson* merely extended an existing holding that a black defendant was denied equal protection when black jurors had purposefully been excluded. *Id.* at 63. None of these circumstances exist in Foote's case, as there is no evidence that making such an

⁴ *Batson v. Kentucky*, 476 U.S. 79 (1986).

10-18 App 18

objection was previously discussed, that other attorneys were making *Nasir*-based objections, Foote has not alleged that he requested trial counsel object to his designation as a career offender, and *Nasir* overturned prior precedent, rather than extending an existing holding.

Given this existing precedent and absent binding case law to the contrary, Foote's trial counsel's failure to object to his career offender designation based on the pending appeal before the Third Circuit in *Nasir*, which ultimately overruled existing precedent when it was decided, was not unreasonable under prevailing professional standards. Having failed to establish the first *Strickland* prong, Foote is not entitled to relief.

CONCLUSION

For the reasons stated herein, **IT IS ORDERED THAT:**

1. Foote's motion to vacate, set aside, or correct his sentence, Doc. 119, is DENIED.
2. The Clerk Of Court is directed to close the civil case associated with Foote's motion, at No. 1:21-CV-01904.

s/Jennifer P. Wilson
JENNIFER P. WILSON
United States District Court Judge
Middle District of Pennsylvania

Dated: July 19, 2022

86 App 19