No. 24-5402

IN THE SUPREME COURT OF THE UNITED STATES

CRAIG FOOTE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly rejected petitioner's claim that he received ineffective assistance of counsel at sentencing, where his trial counsel did not raise an argument regarding the calculation of his advisory Sentencing Guidelines range that was foreclosed by circuit precedent at the time.

ADDITIONAL RELATED PROCEEDINGS

United States Court of Appeals (3d Cir.):

United States v. Foote, No. 22-3059 (Aug. 14, 2024)

United States District Court (M.D. Pa.):

United States v. Foote, No. 18-cr-320 (July 19, 2022)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-5) is not published in the Federal Reporter but is available at 2024 WL 3811984. The order of the district court (Pet. App. 9-19) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 14, 2024. The petition for a writ of certiorari was filed on August 21, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Middle District of Pennsylvania, petitioner was convicted on one count of conspiring to distribute and possess with intent to distribute cocaine base (crack cocaine), heroin, and fentanyl, in violation of 21 U.S.C. 846, and one count of possessing a firearm in furtherance of a drug-trafficking offense, in violation of 18 U.S.C. 924(c)(1)(A). Judgment 1. Petitioner was sentenced to 238 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. Petitioner did not appeal. The district court subsequently denied petitioner's motion to vacate, correct, or set aside his sentence under 28 U.S.C. 2255. Pet. App. 9-19. The court of appeals affirmed. Id. at 1-5.

1. In 2017, petitioner sold crack cocaine to undercover police officers in Harrisburg, Pennsylvania, on four separate occasions. Presentence Investigation Report (PSR) ¶¶ 5-7, 9. Based on the controlled sales, officers obtained a warrant to search petitioner's residence and found 25.4 grams of crack cocaine hidden in a couch cushion; 58 bundles in the refrigerator, later determined to contain a mix of heroin and fentanyl weighing about 10 grams in total; and two handguns. PSR ¶ 8.

A grand jury in the Middle District of Pennsylvania charged petitioner with one count of conspiring to distribute and possess with intent to distribute crack cocaine, heroin, and fentanyl, in violation of 21 U.S.C. 846; four counts of distributing and

possessing with intent to distribute crack cocaine, in violation of 21 U.S.C. 841(a)(1); one count of possessing crack cocaine, heroin, and fentanyl with intent to distribute, in violation of 21 U.S.C. 841(a)(1); one count of possessing a firearm in furtherance of a drug-trafficking offense, in violation of 18 U.S.C. 924(c)(1)(A); one count of maintaining a drug premises, in violation of 21 U.S.C. 856(a)(1); and one count of possessing a firearm after a felony conviction, in violation of 21 U.S.C. 922(g) and 924(e). Indictment 1-10. Petitioner pleaded guilty to the conspiracy and Section 924(c) counts, and the other counts were dismissed. Judgment 1.

In the plea agreement underlying that disposition, petitioner and the government agreed that he was responsible for at least 28 grams but not more than 112 grams of crack cocaine, and at least 4 grams but not more than 8 grams of fentanyl. PSR ¶ 10. Using those drug quantities, the Probation Office calculated his base offense level under the advisory Sentencing Guidelines to be 24. PSR ¶ 15. The Probation Office also determined that petitioner qualified as a "career offender" under the Guidelines. PSR ¶ 21.

The Guidelines generally prescribe significantly higher offense levels than would otherwise apply for an offense committed by a "career offender." Sentencing Guidelines § 4B1.1(b) (2018). A defendant is a "career offender" if the defendant was at least 18 years old at the time of the offense for which he is being sentenced, that offense was "a felony that is either a crime of

violence or a controlled substance offense," and the defendant previously committed two such felonies. Id. § 4B1.1(a). The version of the Guidelines in effect at petitioner's sentencing defined a "controlled substance offense" as "an offense under federal or state law, punishable by imprisonment for a term exceeding one year, 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." Id. § 4B1.2(b). Application Note 1 in the commentary to that guideline stated that the term "'controlled substance offense' include[s] the offenses of aiding and abetting, conspiring, and attempting to commit such [an] offense[]." Id. § 4B1.2, comment. (n.1) (emphasis omitted).

In applying the career-offender enhancement, the Probation Office treated the Section 846 conspiracy offense to which petitioner had pleaded guilty as a "controlled substance offense." PSR ¶ 21. The Probation Office also determined that petitioner had two qualifying prior state felony convictions. PSR ¶¶ 31, 34. Under the career-offender enhancement, petitioner's base offense level was increased to 32, and his Guidelines range was 262 to 327 months. PSR ¶¶ 21, 26.

Petitioner did not dispute that he qualified for the career-offender enhancement. At sentencing, the district court accepted the Probation Office's calculations but varied downward, imposing

a sentence of 238 months of imprisonment, to be followed by three years of supervised release. Sent. Tr. 17, 32-33; see Judgment 2-3. Petitioner did not appeal.

2. Twelve days after petitioner's sentencing, the court of appeals issued United States v. Nasir, 982 F.3d 144 (3d Cir. 2020) (en banc), in which it took the view that attempts or conspiracies to commit controlled substance offenses were not "controlled substance offense[s]" under the version of the career-offender guideline applied at petitioner's sentencing. Id. at 156-157. The court recognized that Application Note 1 stated that such offenses are included, see id. at 157, and the court acknowledged that its precedent had treated Application Note 1 as "binding," id. at 158 (citing United States v. Hightower, 25 F.3d 182, 185-187 (3d Cir.), cert. denied, 513 U.S. 952 (1994)). But the court concluded that its prior precedent had rested on a view of the degree of deference owed to the Sentencing Commission's commentary that had been overtaken by this Court's decision in Kisor v. Wilkie, 588 U.S. 558 (2019). See Nasir, 982 F.3d at 157-159. "In light of Kisor's limitations on deference to administrative agencies," the court of appeals "conclude[d] that inchoate crimes are not included in the definition of 'controlled substance offenses' given in section 4B1.2(b)" as then in effect, and the court overruled its pre-Kisor precedent giving effect to Application Note 1. Id. at 160.

This Court later granted the government's petition for a writ of certiorari in Nasir with respect to unrelated issues, vacated the court of appeals' judgment, and remanded for further consideration in light of Greer v. United States, 593 U.S. 503 (2021). See United States v. Nasir, 142 S. Ct. 56 (2021). On remand, the court of appeals adhered to its view that the definition of "controlled substance offense" applicable at the time did not include inchoate crimes. United States v. Nasir, 17 F.4th 459, 462 n.1, 468-472 (3d Cir. 2021) (en banc).

3. Eleven months after the court of appeals' initial decision in Nasir, petitioner filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. 2255. D. Ct. Doc. 119 (Nov. 9, 2021). Petitioner's sole claim was that his trial counsel had been constitutionally ineffective by not objecting to the career-offender enhancement at sentencing. Pet. App. 11. Petitioner maintained that, in light of Nasir, his conviction "for conspiracy to distribute a controlled substance [was] an inchoate offense, and [was] therefore not a proper predicate for a career offender designation," and that his attorney was constitutionally deficient in not raising an objection to the career-offender enhancement. Id. at 14.

The district court denied petitioner's motion, Pet. App. 9-19, but issued a certificate of appealability, id. at 7-8. The court observed that, at the time of sentencing, circuit precedent "foreclosed" any argument that petitioner's drug-trafficking

conspiracy was not a controlled substance offense under the career-offender guideline. Id. at 16. And the court determined that petitioner's trial counsel was not ineffective for "failing to predict changes in the law" after sentencing. Ibid.

4. The court of appeals affirmed in an unpublished decision. Pet. App. 1-5. The court explained that, "[a]t the time of [petitioner's] sentencing, the United States Probation Office properly designated him as a career offender." Id. at 2. And, like the district court, the court of appeals disagreed with petitioner's contention that his trial counsel had been ineffective for failing to anticipate the change in circuit law made by the en banc court in Nasir after his sentencing. Id. at 3-4. The court acknowledged that, by the time of petitioner's sentencing, "a number of [its] sister circuits had reached the conclusion that [it] would ultimately adopt in Nasir." Id. at 4. But the court emphasized that Nasir "represented an about-face" for the Third Circuit itself, which had given effect to Application Note 1 "for more than twenty-five years." Id. at 4-5. The court also noted that, for ineffective-assistance claims, it has "consistently held that 'there is no general duty on the part of defense counsel to anticipate changes in the law.'" Id. at 5 (citation omitted).

ARGUMENT

Petitioner renews his contention (Pet. 4-8) that his trial counsel was ineffective at sentencing by failing to object to

petitioner's career-offender designation under the Sentencing Guidelines. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or of another court of appeals. Further review is unwarranted.

1. This Court's decision in Strickland v. Washington, 466 U.S. 668 (1984), instructs that to establish a violation of the constitutional right to effective assistance of counsel in a criminal trial, a defendant must show both deficient performance and resulting prejudice. Id. at 687. Strickland's deficient-performance element requires a defendant to "show that counsel's representation fell below an objective standard of reasonableness" under "prevailing professional norms" and must overcome a "strong presumption" that counsel's conduct fell "within the wide range of reasonable professional assistance." Id. at 688-689. A "fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Id. at 689. An attorney's performance is only constitutionally deficient if "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 687.

The court of appeals correctly determined that the performance of petitioner's counsel here did not fall below the

constitutional floor. As the court explained, at the time of petitioner's sentencing, longstanding circuit precedent established that -- consistent with the Sentencing Commission's commentary in Application Note 1 to Section 4B1.2 -- conspiring to commit a controlled substance offense was itself a "controlled substance offense" for purposes of the career-offender enhancement. Pet. App. 4; see United States v. Hightower, 25 F.3d 182, 187 (3d Cir.), cert. denied, 513 U.S. 952 (1994). Only after petitioner's sentencing did the court of appeals, in "an about-face," change its position and conclude otherwise. Pet. App. 5; see United States v. Nasir, 982 F.3d 144, 156-160 (3d Cir. 2020) (en banc), vacated, 142 S. Ct. 56 (2021), reinstated in relevant part, 17 F.4th 459, 468-472 (3d Cir. 2021) (en banc).

Petitioner's trial counsel was not constitutionally ineffective in not anticipating that about-face. It is well-settled that "there is no general duty on the part of defense counsel to anticipate changes in the law." Pet. App. 5 (quoting Sistrunk v. Vaughn, 96 F.3d 666, 670 (3d Cir. 1996)); see, e.g., Parker v. Bowersox, 188 F.3d 923, 929 (8th Cir. 1999), cert. denied, 529 U.S. 1038 (2000); United States v. Gonzalez-Lerma, 71 F.3d 1537, 1542 (10th Cir. 1995), cert. denied, 517 U.S. 1114 (1996); Sullivan v. Wainwright, 695 F.2d 1306, 1309 (11th Cir.), cert. denied, 464 U.S. 922 (1983). As this Court has recognized in the context of an ineffective-assistance claim in the state context, "even the most informed counsel [often] will fail to

anticipate" an appellate court's willingness to reconsider a prior holding "or will underestimate the likelihood" that a superseding decision will repudiate established precedent. Smith v. Murray, 477 U.S. 527, 536 (1986).

Petitioner acknowledges (Pet. 7) that "counsel cannot be held ineffective for failing to anticipate changes in the law," but he contends that a different rule should apply when "an opportunity is pending before a higher court." He further contends (ibid.) that both "the plain language of the Guideline" and opinions from other circuits should have caused his trial counsel to preserve an objection to the career-offender enhancement, at least given the pendency of Nasir at the time. None of those contentions suggests any error in the decision below. The court of appeals recognized that that "a number of [its] sister circuits had reached the conclusion that [it] would ultimately adopt in Nasir," but it explained that counsel's alleged failure to anticipate the Third Circuit's own change of course -- a departure from a quarter century of established precedent -- fell within the bounds of reasonable professional conduct. Pet. App. 4. "[T]he Sixth Amendment guarantees a competent attorney, not a clairvoyant one." Kimbrough v. United States, 71 F.4th 468, 472 (6th Cir. 2023).

Petitioner errs in relying (Pet. 7) on Pennsylvania Rule of Professional Conduct 1.3. That provision merely states that "[a] lawyer shall act with reasonable diligence and promptness in representing a client." Pa. R. Prof'l Conduct 1.3. Nothing in

that rule or its commentary suggests that a lawyer fails to discharge her duty of "reasonable diligence," ibid., if she declines to raise an objection that is foreclosed by "a wall of circuit precedent," Pet. 7. At bottom, petitioner has not overcome the "strong presumption that counsel's representation was within the wide range of reasonable professional assistance." Harrington v. Richter, 562 U.S. 86, 104 (2011) (citation and internal quotation marks omitted).

2. Petitioner does not identify any sound basis for further review of the case-specific application of the first element of Strickland to his counsel's performance. Petitioner does not claim that the decision below is "in conflict with the decision of another United States court of appeals" or with any decision of this Court. Sup. Ct. R. 10(a). To the contrary, several other courts of appeals have made clear that counsel is not ineffective for failing to anticipate a change in law, even when a relevant case is pending before a higher court. See, e.g., Dell v. United States, 710 F.3d 1267, 1282 (11th Cir. 2013) (rejecting ineffective-assistance claim and observing that "it generally does not fall below the objective standard of reasonableness for trial counsel to fail to raise a claim * * * that undeniably would lose under current law but might succeed based on the outcome of a forthcoming Supreme Court decision"), cert. denied, 571 U.S. 1243 (2014); Honeycutt v. Mahoney, 698 F.2d 213, 216-217 (4th Cir. 1983) (counsel not ineffective for failing to anticipate a change

in law "foreshadowed by" Supreme Court and out-of-circuit precedent); Nelson v. Estelle, 642 F.2d 903, 908 (5th Cir. 1981) (counsel not ineffective for failing to anticipate case law developments that occurred two months after trial).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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