No. 13-1677

IN THE

Supreme Court of the United States

JADEN DUKE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

JOINT APPENDIX

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SUPREME COURT OF THE UNITED STATES

ORDER LIST

Certiorari Granted

September 15, 2014

13-1677 Duke v. United States

The petition for a writ of certiorari is granted on the following two questions:

1. Whether counsel renders ineffective assistance in violation of the Sixth Amendment by failing to file a notice of appeal at a defendant's request when the defendant has waived his right to appeal in a plea agreement.

2. Whether a prisoner may challenge his sentence under 28 U.S.C. § 2255 when an intervening change in law demonstrates that the prisoner was erroneously sentenced as a career offender.

IN THE UNITED STATES COURT OF APPEALS
FOR THE AMES CIRCUIT

JADEN DUKE v. UNITED STATES OF AMERICA	Docket No. 13-972

Before Littleton, Marsh, and Bowen, Circuit Judges.

LITTLETON, J.:

This cases raises two important questions that have divided circuit courts considering motions for relief under 28 U.S.C. § 2255. First, may a habeas petitioner establish a claim for ineffective assistance of counsel based on counsel's failure to file a requested notice of appeal when the petitioner waived his right to appeal pursuant to a plea agreement? Second, may a petitioner invoke § 2255 to challenge a sentence that was based on a career-offender enhancement when intervening precedent has shown the enhancement was erroneously applied? We find relief unavailable in either circumstance and accordingly affirm the District Court's denial of the § 2255 motion.

I.

The facts relevant to this appeal are undisputed. In February 2009, a federal grand jury issued a two-count indictment against Jaden Duke, charging him with possession with intent to distribute crack cocaine and possession of a firearm during and in relation to a drug trafficking crime. Duke subsequently entered into a written plea agreement pursuant to which he pleaded guilty to possession with intent to distribute 410 grams of crack cocaine in return for the government's dismissal of the firearm charge. The plea agreement acknowledged the possibility that Duke would be sentenced as a career offender under U.S.S.G. § 4B1.1. The agreement

further provided that, in exchange for the government's concessions, Duke agreed to waive "any and all rights to a direct appeal of his conviction or sentence, including all rights conferred by 18 U.S.C. § 3742, except that Defendant retains the right to appeal any sentence imposed in excess of the statutory maximum sentence." The District Court accepted Duke's plea after engaging in a thorough colloquy designed to ensure that the plea was knowing and voluntary and that Duke understood the rights he was relinquishing, including his right to a direct appeal.

The probation office subsequently prepared a presentence report. The report concluded that Duke qualified as a career offender under U.S.S.G. § 4B1.1(a), which applies, *inter alia*, when the defendant has "at least two prior felony convictions of . . . a controlled substance offense." The Guidelines further define a "controlled substance offense" to mean certain drug offenses that are "punishable by imprisonment for a term exceeding one year." *Id.* § 4B1.2(b). The presentence report determined that a 1998 Ames conviction for possession with intent to sell marijuana and a 2004 Ames conviction for possession with intent to sell cocaine qualified Duke for career-offender treatment.[1]

The career-offender enhancement triggered a criminal history category of VI, and a base offense level of 37. After applying a three-level reduction for acceptance of responsibility, Duke's offense level was 34. This yielded an advisory sentencing range of 262 to 327 months' imprisonment. It is undisputed that in the absence of the career-offender enhancement, Duke would have had a criminal history category of IV and an offense level of 31, producing a sentencing range of 151 to 188 months' imprisonment.

At sentencing, the District Court adopted the calculations in the presentence report and sentenced Duke to 262 months' imprisonment. Consistent with the waiver in the plea agreement,

[1] Because the government did not file an information notifying Duke of its intent to seek an enhanced penalty under 21 U.S.C. § 841 based on these prior convictions, no enhanced mandatory minimum sentence applied. *See* 21 U.S.C. § 851(a)(1).

Duke's counsel did not file an appeal—even though, as discussed in more detail below, Duke wished to do so. Duke's sentence became final on November 14, 2009.

At the time Duke was sentenced, this circuit had previously held in *United States v. Rice*, -- F.3d -- (Ames Cir. May 27, 2006), that to determine whether a prior conviction was "punishable by imprisonment for a term exceeding one year" under Ames law, courts should consider the maximum aggravated sentence that could be imposed for a defendant with the worst possible criminal history. But the year after Duke was sentenced, the Supreme Court cast doubt on *Rice* in *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010), which rejected a similar hypothetical-offender approach under the immigration laws. Accordingly, in *United States v. Sanchez*, -- F.3d -- (Ames Cir. Sept. 8, 2010), we reconsidered *Rice* and held that it was not good law. Under *Sanchez*, courts must look at the actual defendant's conviction, and not at a hypothetical offender, to determine whether a prior conviction was punishable by more than one year in prison. In light of *Sanchez*, the parties agree that Duke did not actually qualify as a career offender because his 1998 marijuana conviction did not expose him to a possible term of imprisonment exceeding one year under the Ames Structured Sentencing Act. In short, although the District Court faithfully applied *Rice* and cannot be faulted for failing to realize that our decision in that case was wrong, it is now clear that Duke was erroneously sentenced as a career offender.

On November 3, 2010, shortly after we handed down *Sanchez*, Duke filed a habeas petition under 28 U.S.C. § 2255. He raised two claims. First, he contended that he received ineffective assistance of counsel because he instructed his counsel to file a direct appeal but his attorney failed to do so. Second, he argued he was entitled to be resentenced without the erroneous career-offender enhancement.

The District Court held an evidentiary hearing on the ineffective-assistance claim. At the hearing, Duke testified that the day after he was sentenced, he spoke with his attorney, Milton Fountain, and instructed Fountain to file an appeal. Duke believed he had grounds to appeal because he contended he should have received a reduction under U.S.S.G. § 3B1.2 for playing a mitigating role in the offense. Fountain explained to Duke that he could not appeal his sentence because he had waived that right pursuant to his plea agreement. Duke responded that he still wanted to appeal, but Fountain refused.

Fountain also testified at the evidentiary hearing. He confirmed that Duke requested that he file an appeal. Fountain stated that he believed an appeal would be frivolous in light of the waiver in the plea agreement and Fountain's belief that the District Court had not committed any error at sentencing. Fountain told Duke that filing an appeal would breach the plea agreement and so permit the government to withdraw the concessions it had made—exposing Duke to additional charges and possible increased punishment. Duke nevertheless insisted that he wanted to appeal, but Fountain refused to file the papers.

The District Court found as factual matter that Duke had unequivocally asked Fountain to appeal and Fountain had failed to do so. But the District Court held that this did not constitute ineffective assistance because Duke had waived his right to appeal in the plea agreement. The District Court also denied Duke's request for resentencing in light of the erroneous career-offender enhancement, concluding that this type of sentencing error is not cognizable under § 2255. Recognizing that lower courts have divided on both issues, the District Court granted Duke a certificate of appealability.

This appeal followed.[2]

[2] The government has not suggested that the certificate of appealability was improperly issued, nor has the government raised any procedural bar to the § 2255 motion, beyond its claim that

II.

We first consider whether Duke received ineffective assistance of counsel based on Fountain's failure to file a notice of appeal. The government does not challenge the District Court's factual finding that Duke expressly asked Fountain to appeal, and Duke does not suggest that his plea was unknowing or involuntary. Thus, the issue before us is purely a legal question: Is counsel ineffective for failing to file a requested notice of appeal when the defendant has waived the right to appeal as part of a valid plea agreement?

Our sister circuits have split on this issue. The majority of circuits have held that "even when a defendant waives all or most of his right to appeal, an attorney who fails to file an appeal that a criminal defendant explicitly requests has, as a matter of law, provided ineffective assistance of counsel that entitles the defendant to relief in the form of a delayed appeal." *Campbell v. United States*, 686 F.3d 353, 360 (6th Cir. 2012). These courts rely heavily on the Supreme Court's decision in *Roe v. Flores-Ortega*, 528 U.S. 470 (2000). There, the Court held that "a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable" and that "when counsel's constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken, the defendant has made out a successful ineffective assistance of counsel claim entitling him to an appeal." *Id.* at 477, 484. Although the defendant in *Flores-Ortega* had not waived the right to appeal, many circuits have interpreted the decision to govern the appeal-waiver situation because the Court indicated that "a defendant is prejudiced by the forfeiture of an appeal regardless of its apparent merit." *Watson v. United States*, 493 F.3d 960, 964 (8th Cir. 2007).

Duke's challenge to the erroneous career-offender enhancement is not cognizable on collateral review. We accordingly deem any other possible procedural challenges waived.

Other circuits have disagreed with this reading of *Flores-Ortega*. As the Seventh Circuit has explained, the requested appeal in that case was "one where the defendant can gain but not lose"; in the appeal-waiver context, in contrast, the defendant can only "lose but not gain" because "an appeal in the teeth of a valid waiver is frivolous" and "when a defendant appeals despite agreeing not to do so, the prosecutor may withdraw concessions made as part of the bargain." *Nunez v. United States*, 546 F.3d 450, 455 (7th Cir. 2008); *see also United States v. Mabry*, 536 F.3d 231, 242 (3d Cir. 2008) ("Surely, the right to appeal that has been waived stands on a different footing from a preserved right to appeal, both conceptually and in relation to counsel's duty to his client with respect thereto."). Rather than apply *Flores-Ortega*, these courts analyze the ineffective-assistance claim under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984).

We believe that this latter approach is the correct one when a case involves a valid waiver of the right to appeal. *Flores-Ortega*, which characterized the filing of a notice of appeal as a "purely ministerial task" that involves no "strategic decision," 528 U.S. at 477, cannot be extended to this situation. Instead, the *Strickland* test—which requires a defendant to show deficient performance and prejudice—is the appropriate standard. Applying that standard here, Fountain did not render objectively deficient service when he refused to file an appeal given that Duke had waived that right. And Duke did not suffer prejudice because an appeal stood little chance of success in light of the waiver. We therefore hold that Duke did not receive ineffective assistance of counsel.

III.

We next consider whether a defendant may obtain relief under § 2255 when an intervening change in law demonstrates that he was incorrectly sentenced as a career offender.

Under § 2255(a), a federal prisoner may seek postconviction alteration of a sentence that "was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose," or that "was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." For non-constitutional errors, the Supreme Court has instructed that a claim is cognizable under § 2255 only when it involves "a fundamental defect which inherently results in a complete miscarriage of justice." *United States v. Addonizio*, 442 U.S. 178, 185 (1979).

Our sister circuits have disagreed whether the erroneous application of the career-offender guideline satisfies this miscarriage-of-justice exception. Several courts have declined to permit collateral review of such an error, holding that no miscarriage of justice has occurred when a defendant's sentence falls below the statutory maximum and the sentencing court could reimpose the identical sentence on remand under the advisory guidelines. *See Hawkins v. United States*, 706 F.3d 820, 825 (7th Cir. 2013), *supplemented*, 724 F.3d 915 (7th Cir. 2013); *Sun Bear v. United States*, 644 F.3d 700, 705 (8th Cir. 2011) (finding error not cognizable even under mandatory guidelines). These courts emphasize the importance of finality and the risk of opening the floodgates to collateral review of run-of-the-mill sentencing errors. *See Hawkins*, 706 F.3d at 823-24.

Other courts have held that the erroneous application of the career-offender enhancement constitutes a miscarriage of justice cognizable under § 2255. *See, e.g.*, *Whiteside v. United States*, 748 F.3d 541, 543 (4th Cir. 2014), *Spencer v. United States*, 727 F.3d 1076, 1080 (11th Cir. 2014), *vacated pending reh'g en banc* (11th Cir. Mar. 7, 2014); *see also Narvaez v. United States*, 674 F.3d 621, 623 (7th Cir. 2011) (finding error cognizable under mandatory guidelines). These courts emphasize that the career-offender enhancement dramatically impacts a defendant's

sentencing range, with the result that the sentencing court would be unlikely to reimpose the same sentence on remand even under an advisory guidelines regime. *See, e.g.*, *Whiteside*, 748 F.3d at 551-52. As the Fourth Circuit has reasoned, "[e]rroneous application of the career offender enhancement works . . . an injustice, and we will not turn a blind eye to so obvious an error simply for the sake of finality." *Id.* at 555.

We consider this a difficult and close question. On the one hand, it is undisputed that Duke was erroneously deemed a career offender under our incorrect precedent in *Rice*. That error caused his sentencing range to almost double. It is certainly possible, and perhaps likely, that Duke would have received a lower sentence than 262 months' imprisonment had the career-offender enhancement not been applied.

On the other hand, we do not see how career-offender errors can be distinguished from other guideline errors, which likewise alter a defendant's advisory sentencing range. Permitting collateral review of all these errors would strike a critical blow to finality. And because Duke was sentenced below the statutory maximum, the district court would retain discretion to impose the same sentence on remand. Ultimately, we do not think that this error rises to the level of a fundamental defect resulting in a complete miscarriage of justice. Accordingly, we hold that the error is not cognizable under § 2255.

IV.

For the foregoing reasons, the district court's judgment denying Duke's § 2255 motion is AFFIRMED.

FILED: APRIL 30, 2014

United States District Court
District of Ames
UNITED STATES OF AMERICA,
v.
Jaden Duke

No. CR _____
February 4, 2009

U.S. District Court
District of Ames
FILED
February 4, 2009

INDICTMENT

The Grand Jury in and for the District of Ames, sitting at Ames City, charges:

COUNT ONE

Possession With Intent To Distribute Cocaine Base

On or about January 3, 2009, in the District of Ames, defendant JADEN DUKE did knowingly and intentionally possess with intent to distribute a quantity of cocaine base, commonly known as crack cocaine, a Schedule II controlled substance, in violation of Title 21, United States Code, Section 841(a)(1).

COUNT TWO

Knowingly Possessing A Firearm
During And In Furtherance Of A Drug Trafficking Crime

On or about January 3, 2009, in the District of Ames, defendant JADEN DUKE did knowingly possess a firearm, that is, a loaded Ruger 9mm semi-automatic pistol, in furtherance of a drug trafficking crime for which he may be prosecuted in a court of the United States, that is, possession with intent to distribute a quantity of cocaine base, commonly known as crack cocaine in violation of Title 21, United States Code, Section 841(a)(1), in violation of Title 18, United States Code, Section 924(c)(1).

A TRUE BILL:

Kristen Dink
FOREPERSON

GERALD LANE
UNITED STATES ATTORNEY, District of Ames

By: *Michelle Brashear*
Michelle Brashear
Assistant United States Attorney

UNITED STATES DISTRICT COURT
DISTRICT OF AMES

UNITED STATES OF AMERICA	
v.	Docket No. 09-CR-13
JADEN DUKE	**PLEA AGREEMENT**

NOW COMES the UNITED STATES OF AMERICA, by and through Gerald Lane, United States Attorney for the District of Ames, and the defendant, JADEN DUKE, in person and through counsel, MILTON FOUNTAIN, and respectfully inform the Court that they have reached the following plea agreement pursuant to Federal Rule of Criminal Procedure 11:

1. The defendant agrees to enter a voluntary plea of guilty to Count ONE as set forth in the Bill of Indictment. The defendant admits that he is pleading guilty because he is in fact guilty as charged in this Count. The statutory sentence for Count ONE is not less than 10 years and not more than life imprisonment, and/or a $4,000,000 fine, and at least five years supervised release.

2. In return for the defendant entering the plea of guilty pursuant to this agreement, upon the Court's acceptance of that plea of guilty, and upon the defendant's compliance with the other terms and conditions of this agreement, the United States will move to dismiss the remaining count against the defendant in the indictment.

3. The defendant is aware that the court will consider the advisory United States Sentencing Guidelines ("U.S.S.G.") in determining the appropriate sentence. The defendant also is aware that the Court has not yet determined the sentence and that the Court has discretion to impose any sentence up to the statutory maximum. The defendant understands that any sentencing recommendations made by the United States are not binding on the Court. The defendant agrees and acknowledges that he may not withdraw the plea as a result of the sentence imposed.

4. The defendant and the United States agree that, although not binding on the Probation Office or the Court, they will jointly recommend that the court make the following findings and conclusions as to the sentence to be imposed:

a. The amount of cocaine base that was known to or reasonably foreseeable to the defendant was not more than 410 grams.

b. Provided that the defendant clearly demonstrates acceptance of responsibility for the defendant's offense, the United States will recommend a three-level reduction in offense level pursuant to U.S.S.G. § 3E1.1(a). However, the United States will not be required to make this recommendation if the defendant (1) fails to make a complete and accurate disclosure to the Probation Office of the circumstances surrounding the

relevant offense conduct; (2) is found to have misrepresented facts to the United States prior to entering this plea agreement; or (3) commits any misconduct after entering into this plea agreement.

c. If the Probation Office determines from the defendant's criminal history that U.S.S.G. § 4B1.1 applies because defendant qualifies as a career offender, such provision may be used in determining the sentence.

5. In exchange for the concessions made by the United States in this plea agreement, the defendant waives any and all rights to a direct appeal of his conviction or sentence, including all rights conferred by 18 U.S.C. § 3742, except that the defendant retains the right to appeal any sentence imposed in excess of the statutory maximum sentence.

6. The defendant understands and agrees that if the defendant should fail to specifically perform or to fulfill completely each and every one of the defendant's obligations under this Plea Agreement, then the United States will be relieved of its obligations under the agreement. In such event, the United States will be free to proceed on any properly filed pending, superseding, or additional charges, including any charges dismissed pursuant to this Plea Agreement.

7. The defendant stipulates that he is entering this guilty plea freely and voluntarily and with full knowledge of the consequences and without reliance on any discussions with representatives of the United States except as to those concessions contained in this Plea Agreement and without any threats, force, intimidation, or coercion of any kind.

8. This is the entire agreement between the parties. There are no agreements, representations, or understandings between the parties in this case, other than those explicitly set forth in this Plea Agreement.

SO AGREED:

Michelle Brashear DATED: March 3, 2009

MICHELLE BRASHEAR, Assistant United States Attorney

Milton Fountain DATED: March 3, 2009

MILTON FOUNTAIN, Attorney for Defendant

Jaden Duke DATED: March 3, 2009

JADEN DUKE, Defendant

TRANSCRIPT OF SENTENCING HEARING
BEFORE THE HONORABLE ELISE MOORE ON NOVEMBER 1, 2009

THE COURT: The next case is sentencing in the matter of United States against Duke, Number 09-13. I am sentencing the defendant pursuant to his guilty plea on possession with intent to distribute cocaine base under 21 U.S.C. § 841(a)(1). Are you ready Mr. Fountain?

MILTON FOUNTAIN, Federal Public Defender: Yes, your honor.

THE COURT: And Ms. Brashear?

MICHELLE BRASHEAR, Assistant U.S. Attorney: The government is ready, your honor.

THE COURT: Okay. In preparation for sentencing today, I have reviewed the presentence report that the Probation Office prepared. I note that there were no objections to the calculations in the report from either side. I was happy to see your agreement on those calculations.

Mr. Duke, I need you to stand, please. You have pleaded guilty in this case pursuant to a plea agreement. In the Rule 11 hearing, I found that your plea was knowing and voluntary and that you understood the potential charges, penalties, and consequences of your plea. I therefore accepted your plea.

In your plea agreement, you and the government agreed on certain facts for sentencing. But I am not required to accept those facts, even though both sides agreed to them. And if I

decline to accept any of those facts, you will not have a right to withdraw your plea. Do you understand?

JADEN DUKE, Defendant: Yes, your honor.

THE COURT: Okay. Now, there's a document that has been prepared called a presentence investigation report. Have you seen this document before today?

DUKE: Yes, your honor.

THE COURT: And have you had an opportunity to go over it with Mr. Fountain?

DUKE: Yes, I have.

THE COURT: Do you understand the contents of this report?

DUKE: Yes, I do.

THE COURT: Mr. Fountain, have you had a chance to review the presentence report with Mr. Duke?

FOUNTAIN: I have, your honor.

THE COURT: Are you satisfied that Mr. Duke understands the report?

FOUNTAIN: Yes.

THE COURT: Okay. Thank you. Now, neither side has objected to the calculations in the presentence report, which applies the 2008 sentencing guidelines. The report held Mr. Duke responsible for 410 grams of crack cocaine. It further found that Mr. Duke qualified as a career offender based on two prior state-law drug convictions, one in 1999 and one in 2004, both in Ames. Because Mr. Duke is a career offender, his criminal

history category is VI. And the career-offender guideline further specifies that his offense level is 37. The presentence report recommends giving Mr. Duke a three-level reduction for acceptance of responsibility, which the government supported pursuant to the terms of the plea agreement. That brings the offense level down to 34. So the guidelines range, based on an offense level of 34 and a criminal history category of VI is 262 to 327 months of imprisonment.

I will accept the presentence report as written. Based on a total offense level of 34 and a criminal history category of VI, I conclude that the advisory guidelines range applicable in this case is 262 to 327 months' imprisonment.

Now, Mr. Fountain, I'll hear from you with regard to what sentence I should impose.

FOUNTAIN: Thank you, your honor. I want to begin by talking about some factors that warrant a below-guidelines sentence in this case. That sentencing range is a high one, your honor. And it is high because Mr. Duke qualified as a career offender based on those drug convictions in Ames in 1999 and 2004. Those were relatively minor offenses. Under the Ames Structured Sentencing Act, Mr. Duke was only eligible for up to 8 months' community punishment on the 1999 conviction—no imprisonment. And for the 2004 offense, he served only ten months, released on February 2, 2006, and then two years of probation. But those convictions are game changers in this case. Without that

career-offender enhancement, Mr. Duke would have a criminal history category of IV and an offense level of 31, from a base offense level of 32, plus two levels for possessing a weapon, minus three levels for accepting responsibility. And running that through the table, we'd be looking at a guidelines range of 151 to 188 months of imprisonment. So I would ask the Court to consider the impact the career-offender enhancement has in this case. Mr. Duke does not have conviction after conviction after conviction. He is not like other offenders who are being sentenced for their tenth, or twentieth, or thirtieth offense. We don't dispute those minor drug offense convictions in 1999 and 2004, but to suggest that Mr. Duke should serve a decade more in prison because of them would, I submit, be greater than necessary to comply with the Section 3553(a) factors.

Now, I'd also like to point the Court to just a few facts about Mr. Duke's background. He lost his mom when he was only eight years old, and he never knew his dad. He didn't have any relative to take him in, so he was in foster care after his mom passed. He hasn't had an easy time, your honor. To lose your mom when you're only eight years old—just imagine that.

He has two young children of his own now. A boy and a girl. And he was trying to provide for them. He never had a dad himself, but he wanted to be a dad for those kids. He's made some mistakes for sure, but I submit that those children would be better off with their dad in their lives.

And then finally, I just want to emphasize that Mr. Duke has fully accepted responsibility in this case. He's not hiding from what he's done here. He's very sorry about it, your honor. I believe he wants to tell you that himself.

But as you are considering what sentence to impose, I ask for your leniency because this career-offender enhancement has so dramatically increased the sentencing range and because Mr. Duke, I believe, really will be able to achieve good in the world as a dad to his two children if he has a chance to raise them. Thank you, your honor.

THE COURT: Okay. I'll hear from the government now. Ms. Brashear?

BRASHEAR: Your honor, we believe the guidelines range provides an appropriate sentence in this case. This was a very serious crime. The defendant was possessing with the intent to distribute a substantial amount of crack cocaine. And as his career-offender status reflects, this wasn't the first time or even the second time he has committed a serious drug offense. His guidelines range reflects the reduction for acceptance of responsibility, so that is already accounted for. So the government submits that a within-guidelines sentence is the most appropriate punishment for this very serious offense.

THE COURT: Mr. Duke, at this time you have the opportunity to address the Court and say anything you think would be helpful for me to know before I impose your sentence.

DUKE: Thank you, your honor. I just want to say I'm sorry. I wish it hadn't come to this. I really wish that. I know it isn't an excuse, but I really was a minor participant. I took my orders from other people, but I've never hurt anyone.

I've tried to accept responsibility. I want to accept responsibility because I want to be a good role model for my kids. I've got two kids, your honor. Aubrey is three, she's the baby, and Damian is five. I love my kids. I don't want them to grow up without me.

So I would ask your honor to please give me a chance to be a dad to my kids. I'm sorry for what I've done, and I ask for your leniency.

THE COURT: Thank you. After having considered the advisory guidelines range, all of the arguments here today, and the factors in Section 3553(a), it is the judgment of this Court that the defendant, Jaden Duke, is hereby committed to the Bureau of Prisons to be imprisoned for a term of 262 months.

In this Court's judgment, that sentence appropriately balances the Section 3553(a) factors, including the seriousness of the offense, the need for deterrence, and the history and characteristics of the defendant. You said you've never hurt anyone, Mr. Duke, but the distribution of crack cocaine is a very serious offense that injures individuals and their communities. This is not a victimless crime. I also have to

think about deterrence, and that factor warrants a significant term of incarceration in this case.

Now, I recognize that the guidelines range has been substantially increased due to your status as a career offender. That enhancement has had a significant impact on your sentencing range, and that range has to guide my analysis here. Things would be different if you were not a career offender. But you are a recidivist, Mr. Duke. This is not an isolated incident. This is not a single mistake. You have made many mistakes. You did not learn your lesson. And I need to make sure that I am treating you similarly to other defendants who have committed multiple offenses like you.

I acknowledge that the career-offender enhancement has nearly doubled your sentencing range. I am quite troubled by that. But Congress has determined that career offenders should receive harsh sentences. That is Congress's judgment. And I cannot identify any factors in your case that warrant different treatment from other career offenders. Thus, I see no grounds to depart from the guidelines range.

At the same time, I think the very lowest end of the guidelines range provides adequate punishment in this case. I see no need to go higher. I find, based on all the 3553(a) factors, that a term of imprisonment of 262 months is appropriate in light of your status as a career offender and no

greater than necessary to comply with the purposes of sentencing.

Upon release from imprisonment, you will be placed on supervised release for a 10-year term. The Court further orders that you pay a special assessment in the amount of $100.

You have a right to appeal this sentence to the Ames Circuit on any grounds that you have not previously waived. You have pleaded guilty pursuant to a plea agreement and there are certain waivers that may substantially affect your appeal rights. You will need to consult with your attorney regarding what effect those waivers have. If you choose to appeal, you must file a written notice of appeal with the clerk of this court within 14 days following the entry of the final judgment in this case. If you wish to appeal but do not have the funds to appeal, you may file an affidavit of indigency, and if approved by the Court, you may appeal at government expense. Do you understand the right of appeal as I have explained it?

DUKE: Yes, your honor.

THE COURT: Are there any other matters we need to address?

FOUNTAIN: No, your honor.

BRASHEAR: No, your honor.

THE COURT: Very well. The defendant is remanded to the custody of the Marshal to start his sentence.

HEARING ADJOURNED

EXCERPT FROM JADEN DUKE'S TESTIMONY
AT EVIDENTIARY HEARING
BEFORE THE HONORABLE JULIAN EVANS ON OCTOBER 12, 2011

ALLISON DOVETAIL, Counsel for Duke: Mr. Duke, can you please describe what, if any, communications you had with your public defender, Milton Fountain, after you were sentenced for possession with intent to distribute cocaine base?

JADEN DUKE, Witness: Mr. Fountain and I talked the day after my sentencing. I told him I was very unhappy with the sentence. My kids would be grown when I finished serving that time. So I told him I wanted to appeal the sentence and see if I could get it reduced.

DOVETAIL: What did Mr. Fountain say after you told him that you wanted to appeal?

DUKE: He said that I could not appeal. He said that I had waived the right to a direct appeal as part of my plea agreement, with the only exception being if I was sentenced above the statutory max. He said my sentence was lower than the statutory max, so the plea agreement made it so that I couldn't appeal.

DOVETAIL: How did you respond?

DUKE: I told Mr. Fountain I didn't care about the plea agreement or that waiver. I said I had nothing to lose by appealing, my sentence was so long. So that plea agreement

didn’t mean anything to me any more. I said I didn’t think an appeals court would uphold such a long sentence and I wanted to try appealing.

DOVETAIL: And what did Mr. Fountain say to that?

DUKE: He said I had a lot to lose. He said if I didn’t follow the plea agreement, the government could go for a longer sentence or go after me on other charges, like that firearm charge. He said the appellate court wouldn’t even listen to my case because of the waiver, so there was no point in appealing.

DOVETAIL: What did you say in response?

DUKE: I said that I still wanted to try. I didn’t care if the government could go for a longer sentence. It doesn’t make any difference to me whether I’m in prison for 262 months or life. My kids will be grown up by the end either way. I wanted to do anything I could to at least try for a lower sentence, and that’s what I told Mr. Fountain.

DOVETAIL: How did Mr. Fountain respond to that?

DUKE: He said it didn’t matter that I felt that way. He said the plea agreement was valid, it waived my right to appeal, and so I couldn’t appeal, end of story.

DOVETAIL: How did you and Mr. Fountain leave things?

DUKE: I said I didn’t care about the waiver and I wanted to appeal no matter what. He said no appeal could be filed. That was the end of the conversation.

* * *

JENNIFER LONG, Assistant U.S. Attorney: Mr. Duke, did you tell Mr. Fountain what arguments you wanted to make on appeal?

DUKE: Not really. He's the lawyer, so I figured he should know.

LONG: So you did not have any specific arguments in mind for an appeal?

DUKE: Well, I thought I should have gotten a reduction in my guidelines calculation for playing a minor role in the offense. The judge that sentenced me said my range was too high. I tried to tell him that I was a minor participant, just following orders. But he didn't listen to me. So I wanted to appeal that, try to get a reduction on that basis.

LONG: Did you mention that possible ground for appeal to Mr. Fountain?

DUKE: Yes, I did. He said there wasn't any error on that ground, that I wasn't eligible or something. But he should have appealed that. And then as well, I shouldn't have been sentenced as a career offender.

LONG: Did you tell Mr. Fountain you wanted to appeal the career-offender issue?

DUKE: I don't remember. Probably not. At the time, he seemed to think it was clear that I was a career offender. But that was wrong. He should have appealed that, too.

LONG: You've mentioned that you wanted to appeal your sentence. Did you want to withdraw your guilty plea?

DUKE: No, I didn't. But my sentence was way too high. It was unfair. I wanted to appeal that.

LONG: So you only wanted to appeal your sentence?

DUKE: Yes.

LONG: And did you tell Mr. Fountain that you only wanted to appeal your sentence?

DUKE: Yes, but he refused.

END OF EXCERPT

EXCERPTS FROM MILTON FOUNTAIN'S TESTIMONY
AT EVIDENTIARY HEARING
BEFORE THE HONORABLE JULIAN EVANS ON OCTOBER 12, 2011

ALLISON DOVETAIL, Counsel for Duke: Mr. Fountain, what, if any, communications did you have with Mr. Duke after he was sentenced?

MILTON FOUNTAIN, Witness: We spoke the day after the sentencing. I wanted to make sure he understood the judgment.

DOVETAIL: And in that conversation, did Mr. Duke express a desire to appeal?

FOUNTAIN: Yes, he did. He told me that he wanted to appeal his sentence.

DOVETAIL: What did you say to that?

FOUNTAIN: I told him that he had waived his right to appeal and so an appeal wasn't an option. As I recall—and it was several years ago now—I went over the language of the plea agreement with him and explained what it meant. He had waived his right to file a direct appeal of his sentence as part of the bargain, and I told him that.

DOVETAIL: And what was his response?

FOUNTAIN: He insisted that he wanted to appeal anyway. He said he didn't care about the waiver.

DOVETAIL: And what did you say next?

FOUNTAIN: I explained to him that if he attempted to appeal, it would constitute a breach of the plea agreement and that would relieve the government of all the concessions it had made under the agreement. It was an incredibly favorable plea deal. There was substantial evidence of guilt on both the drug and the gun charge, and they were threatening to try to hold him accountable for over 600 grams of cocaine base. I had no doubt if he tried to appeal, the government would reinstate the gun charge and throw the book at him. And I explained that a court wouldn't permit the appeal because of the waiver.

DOVETAIL: So you refused to file an appeal?

FOUNTAIN: Yes. I was trying to help him. I was trying to fulfill my duty to act in his best interest.

* * *

JENNIFER LONG, Assistant U.S. Attorney: Mr. Fountain, did you believe there was any basis to appeal in Mr. Duke's case?

FOUNTAIN: No. I mean, obviously, now, there's the career-offender issue. He shouldn't have been sentenced as a career-offender, and I believe he should get relief now because of that error. But at the time, the law in this circuit was clear that he qualified as a career offender. So I did not think any error had been made at sentencing and there was no ground to appeal. And the waiver absolutely foreclosed an appeal. It would have been dismissed as frivolous, and, meanwhile, the government

would get to go back on the bargain. That was why I told Mr. Duke that he could not appeal. It just wasn't an option.

END OF EXCERPT

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF AMES

JADEN DUKE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Docket No. 10-CV-1888

MEMORANDUM DECISION AND ORDER

Pending before the Court is a motion by Petitioner filed under 28 U.S.C. § 2255. Petitioner asserts that he received ineffective assistance of counsel when his attorney failed to file a requested notice of appeal. He also requests resentencing based on his erroneous designation as a career offender. The Court held an evidentiary hearing on Petitioner's ineffective-assistance claim. For the reasons that follow, the § 2255 motion is denied.

FINDINGS OF FACT AND PROCEDURAL HISTORY

Petitioner Jaden Duke was charged with possession with intent to distribute cocaine base and possession of a firearm in furtherance of a drug trafficking offense. He subsequently pleaded guilty to the drug count in exchange for the government's dismissal of the firearm count. Pursuant to the plea agreement, Duke waived all rights to a direct appeal of his conviction or sentence, except for purposes of appealing any sentence above the statutory maximum term of imprisonment.

At sentencing, the district court concluded that Duke was a career offender under U.S.S.G. § 4B1.1 based on two prior state-law drug convictions. His status as a career offender yielded a sentencing range of 262-327 months of imprisonment. The court sentenced Duke to a 262-month term of incarceration. Duke did not appeal his conviction or sentence.

The next year, the Ames Circuit issued its decision in *United States v. Sanchez*, -- F.3d -- (Ames Cir. Oct. 8, 2010), which reversed existing circuit precedent defining which offenses qualify a defendant for career-offender treatment in light of the Supreme Court's decision in *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010). It is undisputed that, under *Sanchez*, Duke should not have been sentenced as a career offender—although at the time he was sentenced, existing Ames Circuit precedent foreclosed that claim.

Duke then filed this petition for relief under § 2255, asserting he received ineffective assistance of counsel when his attorney failed to file a requested appeal of his sentence and that he is entitled to resentencing in light of the erroneous career-offender designation.

This Court held an evidentiary hearing on October 12, 2011. Duke and his trial counsel, Milton Fountain, testified. Their stories aligned: After Duke was sentenced, he asked Fountain to appeal and Fountain refused because Duke had waived any right to appeal in the plea agreement. Duke wanted to appeal only his sentence. He believed the District Court had erred in failing to grant him a reduction in his offense level based on his purported minor role in the offense. He also testified that he should not have been sentenced as a career offender, although he could not recall whether he asked Fountain to appeal on this basis. Fountain told Duke that he could not appeal because he had waived that right in his plea agreement. Fountain explained that if Duke breached the plea agreement by appealing, the government would be relieved of its obligations under the agreement and could reinstate the dismissed firearm charge or seek a higher sentence on the drug conviction. Based on the testimony at the hearing, this Court finds that Duke unequivocally asked Fountain to appeal and that Fountain refused, believing that this was in his client's best interest because any appeal would be dismissed in light of the waiver and

would constitute a breach of the plea agreement, exposing Duke to possible additional charges or increased punishment.

DISCUSSION

A. The Ineffective-Assistance Claim

Duke maintains that he received ineffective assistance of counsel when Fountain refused to file an appeal even though Duke unequivocally asserted his desire to appeal. He cites a number of cases awarding relief in this circumstance even when a defendant waived the right to appeal in a plea agreement. The government responds that Fountain did not render deficient performance by failing to file an appeal that was frivolous in light of the waiver. The government also maintains that Duke cannot show prejudice because the appeal would have been dismissed on this procedural ground and because Duke did not identify any meritorious arguments that could have been raised on appeal.

Courts of appeals have divided on the question whether it is *per se* ineffective assistance of counsel to refuse to file an appeal at the defendant's request when the defendant has waived that right. *See Campbell v. United States*, 686 F.3d 353, 359 (6th Cir. 2012) (summarizing cases). The Ames Circuit has never considered this issue. Having weighed the arguments on both sides, this Court declines to adopt a *per se* rule. Instead, Duke must establish deficient performance and prejudice in accordance with *Strickland v. Washington*, 466 U.S. 668 (1984).

Duke cannot satisfy either prong of the *Strickland* test. Fountain did not render deficient performance by failing to file an appeal that had been waived. Indeed, Fountain's actions were in Duke's best interest, as the waiver would have barred the appeal while the act of filing an appeal would have permitted the government to withdraw its concessions in the plea agreement.

Nor did Duke suffer any prejudice. Although it is now clear that he was erroneously sentenced as a career offender, Ames Circuit precedent foreclosed that claim at the time an appeal would have been taken. And in light of the waiver, there were no valid grounds for appeal in any event.

For these reasons, the Court concludes that Duke cannot establish a claim for ineffective assistance of counsel based on Fountain's failure to file an appeal.

B. The Career Offender Claim

Duke also argues that he is entitled to resentencing without the career offender enhancement. It is undisputed that the enhancement was erroneously applied. But the Court concludes that § 2255 does not provide a remedy for advisory guidelines errors such as this one because the sentence imposed falls below the statutory maximum and so does not constitute a miscarriage of justice. *See, e.g.*, *Hawkins v. United States*, 706 F.3d 820, 825 (2013).

CONCLUSION

For the foregoing reasons, the Court denies the § 2255 motion. However, recognizing that the motion implicates two difficult issues that raise debatable claims of the denial of a constitutional right, the Court issues a certificate of appealability on both questions.

SO ORDERED.

Julian W. Evans
Signature of Judicial Officer

Julian W. Evans
United States District Judge

FILED: FEBRUARY 24, 2013

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF AMES

JADEN DUKE, Petitioner-Appellant, v. UNITED STATES OF AMERICA, Respondent-Appellee.	Docket No. 10-CV-1888

NOTICE OF APPEAL

Jaden Duke, by and through undersigned counsel, hereby gives notice of appeal to the United States Court of Appeals for the Ames Circuit from the Memorandum Decision, Order, and Judgment entered in the above-captioned matter by U.S. District Judge Julian Evans on February 24, 2013, denying Duke's motion under 28 U.S.C. § 2255.

Respectfully submitted,

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Dated: March 2, 2013