

1
2 UNITED STATES COURT OF APPEALS
3
4 FOR THE SECOND CIRCUIT
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7
8 August Term, 2012
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10 (Argued: December 13, 2012 Decided: January 30, 2012)

11
12 Docket No. 11-3457
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14
15 TRANELL MCCOY,
16

17 *Petitioner-Appellant,*
18

19 -v.-
20

21 UNITED STATES OF AMERICA,
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23 *Respondent-Appellee.*
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28 Before:

29 WESLEY, HALL, *Circuit Judges*, Goldberg, *Judge*.*
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31 Appeal from the district court's judgment of August 9,
32 2011, entered pursuant to its ruling and order of August 4,
33 2011, denying Petitioner-Appellant Tranell McCoy's petition
34 for writ of habeas corpus and issuing a certificate of
35 appealability as to McCoy's ineffective assistance of
36 counsel claim. In its ruling and order, the district court
37 held, *inter alia*, that McCoy's trial counsel was not
38 constitutionally defective for failing to challenge a second
39 offender notice filed by the government, see 21 U.S.C. §

* The Honorable Richard W. Goldberg, of the United States Court of International Trade, sitting by designation.

1 851, which caused the five year mandatory minimum sentence
2 for McCoy's convictions to increase to ten years, see 21
3 U.S.C. § 841(b)(1)(B). We affirm.

4
5 AFFIRMED.

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9 STEVEN B. RASILE, Law Offices of Mirto & Rasile,
10 LLC, West Haven, CT *for Petitioner-Appellant*.

11
12 ROBERT M. SPECTOR, Assistant United States
13 Attorney (Sandra S. Glover, Assistant United
14 States Attorney of Counsel, *on the brief*), *for*
15 David B. Fein, United States Attorney for the
16 District of Connecticut, New Haven, CT *for*
17 *Respondent-Appellee*.

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21 PER CURIAM:

22 Petitioner-Appellant Tranell McCoy appeals from the
23 district court's judgment of August 9, 2011, entered
24 pursuant to its ruling and order of August 4, 2011, denying
25 his petition for writ of habeas corpus and issuing a
26 certificate of appealability as to McCoy's ineffective
27 assistance of counsel claim. In its ruling and order, the
28 district court held, *inter alia*, that McCoy's trial counsel
29 was not constitutionally defective for failing to challenge
30 a second offender notice filed by the government, see 21
31 U.S.C. § 851, which caused the five year mandatory minimum
32 sentence for McCoy's convictions to increase to ten years,
33 see 21 U.S.C. § 841(b)(1)(B). *McCoy v. United States*, No.

1 3:09-cv-1960 (MRK), 2011 WL 3439529, at *1 (D. Conn. Aug. 4,
2 2011). For the following reasons, we affirm.

3 I.

4 In August 2006, a jury convicted McCoy on charges
5 contained in two separate indictments, including conspiracy
6 to possess with intent to distribute five grams or more of
7 cocaine base; possession with intent to distribute five
8 grams or more of cocaine base; possession with intent to
9 distribute marijuana; and possession of a firearm in
10 furtherance of a drug trafficking crime. *Id.*

11 Before trial, the government filed a second offender
12 notice pursuant to 21 U.S.C. § 851. In that notice, the
13 government indicated its intent to rely on a prior felony
14 drug conviction that would subject McCoy to a sentencing
15 enhancement under 21 U.S.C. § 841(b). The offense
16 identified by the government was McCoy's 1996 conviction for
17 the sale of narcotics in violation of Connecticut General
18 Statutes § 21a-277(a). In that 1996 case, McCoy entered an
19 *Alford* plea, *i.e.*, McCoy never admitted to the facts
20 underlying his conviction. *See North Carolina v. Alford*,
21 400 U.S. 25 (1970). McCoy's trial counsel did not object to
22 the second offender notice, which caused McCoy's five year
23 mandatory minimum sentence to increase to ten years. *See 21*

1 U.S.C. § 841(b)(1)(B). The district court ultimately
2 imposed a non-Guidelines sentence of 181 months'
3 imprisonment and eight years supervised release. On direct
4 appeal, McCoy's appellate counsel did not object to the
5 second offender enhancement or any other aspect of his
6 sentence. *McCoy*, 2011 WL 3439529, at *6.

7 On March 17, 2011, McCoy filed an amended petition for
8 writ of habeas corpus pursuant to 28 U.S.C. § 2255 alleging
9 that (1) his sentence was illegal insofar as it was based on
10 a second offender enhancement under § 851; and (2) his trial
11 counsel was ineffective for failing to object to the second
12 offender enhancement.¹ McCoy argued, and the government now
13 concedes, that because he entered an *Alford* plea, the plea
14 transcript and other court documents did not provide a
15 sufficient basis for finding a predicate "felony drug
16 offense." See 21 U.S.C. § 841(b)(1)(B).

17 The district court rejected both of McCoy's claims.
18 With respect to his claim that his sentence was illegal, the
19 district court concluded that McCoy failed to establish
20 either cause or prejudice to excuse his failure to object to

¹ McCoy filed his original § 2255 petition in December 2009. He amended his petition in January 2010. The claims raised in his original and January 2010 amended petition, as well as the district court's disposition of those claims, are not relevant to this appeal.

1 the second offender enhancement on direct appeal. *McCoy*,
2 2011 WL 3439529, at *6-7. It reasoned that the legal basis
3 for his claim was "reasonably available at the time of Mr.
4 McCoy's direct appeal," and that he was not prejudiced
5 because "whether or not the second offender enhancement
6 applied, Mr. McCoy's sentence was in fact far below the
7 applicable Guidelines range." *Id.* at *6-8. The district
8 court also rejected McCoy's ineffective assistance of
9 counsel claim, concluding that he did not meet the
10 requirements of the *Strickland* standard. *Id.* at *9-10; see
11 *Strickland v. Washington*, 466 U.S. 668 (1984).
12 Nevertheless, the district court issued a certificate of
13 appealability as to the ineffective assistance of counsel
14 claim. *McCoy*, 2011 WL 3439529, at *10. Although the court
15 was "confident that the performance of Mr. McCoy's trial
16 counsel was not constitutionally deficient," it concluded
17 that "reasonable jurists could debate the Court's
18 assessment" of this claim. *Id.*

19 **II.**²

20 To prevail on an ineffective assistance of counsel
21 claim, a habeas petitioner must demonstrate that: (1) his

² We review *de novo* a district court's denial of a § 2255 petition. *Fountain v. United States*, 357 F.3d 250, 254 (2d Cir. 2004).

1 counsel's representation fell below an objective standard of
2 reasonableness; and (2) there is a reasonable probability
3 that, but for counsel's unprofessional errors, the result of
4 the proceeding would have been different. *See Strickland*,
5 466 U.S. at 687-88, 694. McCoy's petition fails at both
6 steps.

7 McCoy bears a "heavy" burden to establish that trial
8 counsel's performance was unreasonable under "'prevailing
9 professional norms.'" *Harrington v. United States*, 689 F.3d
10 124, 129-30 (2d Cir. 2012) (quoting *Harrington v. Richter*,
11 131 S. Ct. 770, 788 (2011)). In this vein, he argues that
12 trial counsel's failure to object to the second offender
13 notice fell below prevailing professional norms and was
14 constitutionally deficient.

15 McCoy premises his claim on a discrepancy between the
16 Connecticut and federal drug schedules. When McCoy entered
17 an *Alford* plea in 1996, Connecticut General Statutes
18 § 21a-277(a) criminalized some conduct that did not fall
19 within the federal definition of a "felony drug offense."
20 Specifically, Connecticut criminalizes conduct involving two
21 obscure opiate derivatives, thenylfentanyl and
22 benzylfentanyl, that no longer fall within the federal
23 definition of a "felony drug offense." *Compare Conn.*

1 Agencies Regs. § 21a-243-7(a)(10), para. 52, with 21 U.S.C.
2 § 811(a)(1), (h)(2); 51 Fed. Reg. 43025 (Nov. 28, 1986); 50
3 Fed. Reg. 43698 (Oct. 29, 1985). Thus, to establish that
4 McCoy's state conviction qualified as a predicate offense
5 triggering a § 851 sentence enhancement, the government
6 concedes that it needed to rely on court documents "in which
7 the factual basis for [McCoy's] plea was confirmed by the
8 defendant." *Shepard v. United States*, 544 U.S. 13, 26
9 (2005). Instead, the government categorically relied on
10 McCoy's 1996 *Alford* plea.

11 We agree with the district court that trial counsel's
12 failure to object to the second offender enhancement does
13 not constitute constitutionally deficient performance. As
14 the court explained, at the time of McCoy's trial and
15 sentencing the District of Connecticut "had proceeded with
16 the long-held belief that prior Connecticut convictions for
17 sale of narcotics qualified categorically as . . . felony
18 drug offenses under 21 U.S.C. § 841(b)(1)." *McCoy*, 2011 WL
19 3439529, at *9 (internal quotation marks and citation
20 omitted); see also Sarah French Russell, *Rethinking*
21 *Recidivist Enhancements: The Role of Prior Drug Convictions*
22 *in Federal Sentencing*, 43 U.C. Davis L. Rev. 1135, 1199-1202
23 (2010) (same). Accordingly, the performance of McCoy's

1 trial counsel did not "amount[] to incompetence under
2 prevailing professional norms" as examined from counsel's
3 perspective at the time. *Harrington v. Richter*, 131 S. Ct.
4 at 788 (internal quotation marks and citation omitted).

5 McCoy does not contest that this was the prevailing
6 professional norm at the time of his trial and sentencing.
7 Instead, he argues that trial counsel should have objected
8 to the second offender enhancement based on developments in
9 the law that occurred **after** his trial. We disagree.

10 Several weeks after trial, a district court in
11 Connecticut held, for the first time, that a conviction
12 under Connecticut General Statute § 21a-277(a) was not
13 categorically a conviction for a "serious drug offense"
14 under 18 U.S.C. § 924(e) because of the criminalization in
15 Connecticut of benzylfentanyl and thenylfentanyl.³ *United*
16 *States v. Madera*, 521 F. Supp. 2d 149, 154-55 (D. Conn.
17 2007); see also *United States v. Lopez*, 536 F. Supp. 2d 218,
18 221-222 (D. Conn. 2008) (same); *United States v. Cohens*, No.
19 3:07-cr-195 (EBB), 2008 WL 3824758, at *4-5 (D. Conn. Aug.
20 13, 2008) (same). A year after *Madera*, we held that a

³ A "serious drug offense" under § 924 includes any offense that qualifies as a "felony drug offense" under § 841. See 18 U.S.C. § 924(e)(2); 21 U.S.C. § 802(44).

1 conviction under § 21a-277(b) was not categorically a
2 conviction for a "controlled substance offense" as that term
3 is defined in U.S.S.G. § 4B1.2(b), the career offender
4 guideline. *United States v. Savage*, 542 F.3d 959, 960 (2d
5 Cir. 2008).

6 But "[a]n attorney is not required to forecast changes
7 or advances in the law" in order to provide effective
8 assistance. *Sellan v. Kuhlman*, 261 F.3d 303, 315 (2d Cir.
9 2001) (internal quotation marks and citation omitted).
10 Rather "counsel's performance must be assessed . . . as of
11 the time of counsel's conduct without the benefit of
12 hindsight." *Id.* (internal quotation marks omitted).
13 Moreover, even after *Madera*, *Lopez*, *Cohens*, and *Savage*, it
14 was not immediately apparent to the defense bar that an
15 *Alford* plea to Connecticut's controlled substance laws could
16 not categorically serve as the basis to enhance a sentence
17 under 21 U.S.C. § 841(b). These cases did not address the
18 long-accepted use of the categorical approach to determine
19 whether a defendant has been convicted of a prior felony
20 drug offense under § 841(b). Indeed, it was not until June
21 29, 2009 that the government acknowledged § 21a-277(a)
22 criminalized conduct involving narcotic substances not
23 covered by the federal definition of a "felony drug offense"

1 used in 21 U.S.C. §§ 802(44) and 841(b)(1). See Sentencing
2 Mem. of United States at 6-8, *United States v. Jackson*, No.
3 3:06-cr-151 (MRK) (D. Conn. June 29, 2009) (ECF No. 96). We
4 should not fault trial counsel for failing to raise an
5 objection to the second offender enhancement the legal basis
6 for which was not sustained until almost three years after
7 trial. See *Sellan*, 261 F.3d at 315.

8 McCoy counters that the district court placed him in a
9 "Catch 22" by finding that his claim did not overcome the
10 "cause" portion of the procedural default standard, while
11 also concluding that counsel was not deficient because the
12 argument was novel at the time of the sentencing. But McCoy
13 ignores the differences between determining whether cause
14 exists to excuse a procedural default and whether counsel's
15 performance was constitutionally deficient. As the district
16 court carefully explained, the reason that McCoy failed to
17 establish cause for failing to raise the challenge below is
18 because the argument was "reasonably available" to McCoy and
19 nothing external prevented him from making it. *McCoy*, 2011
20 WL 3439529, at *6-7. But given the defense bar's long-held
21 position that Connecticut narcotics convictions
22 categorically qualified under § 851, it did not constitute
23 ineffective assistance for trial counsel to fail to
24 challenge the second offender notice. *Id.* at *9.

