No. _____

IN THE

Supreme Court of the United States

NEKEBWE SUPERVILLE,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

VINOO P. VARGHESE
Counsel of Record
VARGHESE & ASSOCIATES, P.C.
2 Wall Street
New York, New York 10005
(212) 430-6469
info@vargheselaw.com

Attorneys for Petitioner

QUESTION PRESENTED

In *Padilla v. Kentucky*, 559 U.S. 356 (2010), the Court held that when the immigration consequence of pleading guilty to a crime is "truly clear," an attorney's duty to correctly inform the defendant of that consequence is "equally clear." *Id.* at 369. Thus, an attorney's failure to advise a defendant that deportation is mandatory upon a plea to an aggravated felony is constitutionally ineffective assistance under *Strickland v. Washington*, 466 U.S. 668 (1984).

Circuit Courts have split on whether an attorney's affirmative misadvice about the mandatory nature of deportation upon pleading guilty to an aggravated felony can be cured by general warnings from a judge or the prosecution.

The question presented in this petition is the following: When conducting an analysis under 28 U.S.C. § 2255(f) and *Strickland v. Washington*, will equivocal warnings given by a judge pursuant to Fed. R. Crim. P. 11 and/or boilerplate language contained in a plea agreement cure an attorney's affirmative misadvice to a defendant about the mandatory nature of deportation upon a plea to an aggravated felony.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

RELATED CASES

Superville v. United States, No. 13 CR 302, 17 CV 5856, United States District Court for the Eastern District of New York. Memorandum and Order entered February 27, 2018.

Superville v. United States, No. 18-680-PR, United States Court of Appeals for the Second Circuit. Judgment entered May 9, 2019.

TABLE OF CONTENTS

APPENDIX TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE(S)

Cases

Rules

Statutes

Constitutional Provisions

PAGE(S)

Other Authorities

OPINIONS BELOW

The Memorandum and Order denying the 28 U.S.C. § 2255 petition, *Superville v. United States*, 284 F. Supp. 3d 364 (E.D.N.Y. 2018), was issued on February 27, 2018, and is reproduced as Appendix A.

The unpublished Summary Order of the United States Court of Appeals for the Second Circuit, *Superville v. United States*, 771 F. App'x 28 (2d Cir. 2019), was issued on May 9, 2019, and is reproduced as Appendix B.

The order denying a panel rehearing or rehearing en banc was issued on August 15, 2019, and is reproduced as Appendix C.

BASIS FOR JURISDICTION

The judgment of the Court of Appeals was entered on May 9, 2019. A timely petition for rehearing was denied on August 15, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS CITED

The Constitution of the United States, Amendment VI, requires:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

Rule 11 of the Federal Rules of Criminal Procedure specifies:

> (b)(1) Advising and Questioning the Defendant. Before the court accepts a plea of guilty . . . the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands . . .
>
> (O) that, if convicted, a defendant who is not a United States citizen may be removed from the United States, denied citizen-ship, and denied admission to the United States in the future.

STATEMENT OF THE CASE

Petitioner Nekebwe Superville is a 36-year-old United States permanent resident and citizen of Trinidad and Tobago who has lived in the United States with his mother since he was five years old. His father died when he was an infant, and he has a sister who lives in Florida. Mr. Superville is engaged to an American citizen with whom he has two daughters, ages nine and five. In May 2013, Petitioner was arrested for participating in a drug trafficking organization.

Two days after his arrest, while Petitioner was incarcerated, due to their concerns about immigration consequences, Petitioner's mother retained private counsel ("counsel") who advertised experience in criminal law and immigration issues. Counsel advised Petitioner's mother that Petitioner "should be ok," and did not need to worry about being deported if he kept "a low profile." Appendix A at 6a.

Counsel believed that Petitioner's case was "dead" and the evidence against him was overwhelming. Appendix A at 9a. He then advised Petitioner to plead guilty and cooperate with the government to minimize any term of incarceration.

Later, counsel presented Petitioner with a cooperation agreement which noted pleading guilty "*may* have consequences with respect to the defendant's immigration status if the defendant is not a citizen of the United States," and that "the defendant wants to plead guilty regardless of any immigration consequences,

even if the consequence is the defendant's automatic removal from the United States." Appendix A at 10a (emphasis added).

In February 2014, and pursuant to that agreement, Petitioner pleaded guilty to one count of conspiring to distribute 1,000 kilograms or more of marijuana, in violation of 21 U.S.C. §§ 846 and 841(b)(1)(A)(vii), and one count of conspiring to transfer and deliver United States currency involving the proceeds of narcotics trafficking, in violation of 18 U.S.C. §§ 1956(h) and 1956(a)(1)(B)(i).

Counsel admitted that he "never told [Petitioner] he *would* be deported as a result of the plea. I told him he *could* be deported as a result of the plea. And I say that because nobody can predict any such outcome." Appendix A at 7a (emphases added). Yet, both offenses that Petitioner pleaded guilty to were aggravated felonies, and just as in *Padilla*, these would clearly lead to mandatory deportation.

At the change of plea hearing, the magistrate judge advised Petitioner that "if you are not a United States Citizen, a conviction for the charges that you will be pleading guilty to carries heavy immigration consequences," and that "as a result of pleading guilty, you *could* be subject to removal from the United States . . . ." Appendix A at 11a (emphasis added).

Several months later, in October 2014, at the start of the sentencing hearing, the district court judge asked Petitioner "[d]o you understand that your plea in this case *may* result in your deportation?" Appendix A at 12a (emphasis added). Petitioner was then sentenced to a three-

year term of probation. In July 2017, Petitioner learned counsel had incorrectly advised him when immigration authorities detained him and placed him into removal proceedings.

Petitioner promptly filed a Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255. After a hearing at which Petitioner, his mother, and counsel testified, the district court concluded that Petitioner's motion was untimely and that he could not claim any prejudice under *Strickland*. Both of those findings were based on the language in the cooperation agreement and the warnings given by the judges in court.

The Second Circuit affirmed. Noting that Petitioner "received at least three warnings about his plea's immigration consequences" in the cooperation agreement and from both judges, the court agreed that Petitioner should have known he was subject to mandatory deportation no later than when he was sentenced, and could not show that his counsel's incorrect advice factored into his decision to plead guilty. Appendix B at 30a.

The Second Circuit denied a Petition for a Panel Rehearing or Rehearing En Banc on August 15, 2019.

REASONS FOR GRANTING THE PETITION

I. The Court Should Grant Review to Resolve a Circuit Split about Whether Rule 11 Warnings from a Judge Or Language in a Plea Agreement Can Cure an Attorney's Affirmative Misadvice about the Mandatory Nature of Deportation Upon a Plea to an Aggravated Felony

This Court's decision in *Padilla v. Kentucky* relied on the first prong of the *Strickland* analysis—holding that it was objectively unreasonable for an attorney to give incorrect advice about the immigration consequences of a guilty plea if that consequence was "truly clear."

Circuit Courts have split on whether an attorney's affirmative misadvice about the mandatory nature of deportation upon pleading guilty to an aggravated felony can be cured by general warnings from a judge or the prosecution. Those courts that allow such warnings and language to overcome any prejudice from an attorney's constitutionally deficient advice are undermining the very meaning of the right to effective assistance of counsel as described by this Court in *Padilla*.

A. Courts are divided about whether Rule 11 warnings from a judge and/or language in a plea agreement can cure an attorney's objectively unreasonable advice about the deportation consequences of pleading guilty to an aggravated felony

The Second Circuit and district court both held that even where a defendant is affirmatively

misled by his counsel about the immigration consequences of a plea, the boilerplate language in plea agreements and equivocal Rule 11 warnings given by judges are sufficient to cure any error. Specifically, the Second Circuit agreed with the district court that the § 2255 motion was untimely because Petitioner, at his plea and sentencing hearings, received the standard warnings under Fed. R. Crim. P. 11, such that "a reasonably diligent person would have discovered that he was subject to presumptively mandatory deportation" at that time. Appendix B at 31a. The court also agreed that even if counsel had provided objectively unreasonable advice about deportation, Petitioner could not establish prejudice particularly in light of the three other warnings [he] received." *Id.* at *3.

The Third Circuit has also found that a defendant who pleaded guilty to an aggravated felony could not show any prejudice where his attorney only advised him that there "could be immigration consequences." *United States v. Fazio*, 795 F.3d 421, 427 (3d Cir. 2015). While acknowledging that *Padilla* entitled Fazio to be advised that his conviction made him subject to automatic removal, his attorney's incorrect advice did not matter because "[t]his risk was made clear in both his plea agreement and during the plea colloquy. The plea agreement stated that Fazio wanted 'to plead guilty regardless of any immigration consequences that his plea may entail, even if the consequence is his automatic removal from the United States.'" *Id.* at 428. During the plea proceeding, Fazio confirmed that he wanted to plead guilty

"regardless of any immigration consequences that [his] plea of guilty may entail, even if the consequence [was] [his] automatic removal from the United States[.]" *Id.*

Nevertheless, shortly before the Second Circuit issued its decision in this case, the Eighth Circuit decided *Dat v. United States*, 920 F.3d 1192 (8th Cir. 2019). In remanding for further proceedings, the Eighth Circuit explained the following:

> [Dat] acknowledged in his plea agreement that "there are or may be collateral consequences to any conviction to include but not limited to immigration." In his Petition to Enter a Plea of Guilty, he acknowledged that a guilty plea in "most federal felony cases" results in permanent removal. And at his change-of-plea hearing, he affirmed he was aware his conviction "could affect" his immigration status and had discussed the matter with his attorney.

Id. at 1195. The Eighth Circuit, however, found that "his counsel's alleged misadvice specifically undermined these equivocal warnings. They informed Dat of a general possibility of immigration consequences. They d[id] not necessarily contradict or correct his counsel's alleged misadvice he would not suffer those consequences in his case." *Id.*

Moreover, the Fourth Circuit has held that "giving dispositive weight to boilerplate language from a plea agreement is at odds with *Strickland*'s fact-dependent prejudice analysis," and that

> plea agreement language and sworn statements must be considered in their context: When a defendant has been told–multiple times–that immigration consequences are not mandated but merely a "possibility," a willingness "to plead guilty regardless of any immigration consequences" does not mean that the defendant was willing to plead guilty if doing so meant mandatory deportation.

United States v. Murillo, 927 F.3d 808, 816-17 (4th Cir. 2019); *United States v. Akinsade*, 686 F.3d 248, 254 (4th Cir. 2012) ("General and equivocal" Rule 11 warnings do not cure counsel's affirmative misadvice because they don't properly inform defendant that the consequence of pleading guilty was "mandatory deportation").

And the Ninth Circuit has also found that, where an attorney fails to correctly inform a defendant that deportation is "virtually certain" after pleading guilty to an aggravated felony, Rule 11 warnings and statements in a plea agreement saying a defendant faced the possibility of removal "did not purge prejudice, if for no other reason than that they did not give [the defendant] adequate notice regarding the actual consequences of [the] plea." *United States v. Rodriguez-Vega*, 797 F.3d 781, 790 (9th Cir. 2015).

B. Allowing warnings from a judge or prosecutor to substitute for the effective assistance advice of counsel is not compatible with the Constitution or this Court's precedent

The Sixth Amendment right to the assistance of counsel is the right to the "effective assistance of counsel." *Strickland*, 466 U.S. at 686, quoting *McMann v. Richardson*, 397 U.S. 759, 771, n.14 (1970). The right to effective assistance of counsel extends to all critical stages of a criminal proceeding, including plea negotiations. *See Lafler v. Cooper*, 566 U.S. 156 (2012); *Hill v. Lockhart*, 474 U.S. 52 (1985). When defense counsel represents an immigrant in a criminal prosecution, "preserving the client's right to remain in the United States may be more important to the client than any potential jail sentence." *INS v. St. Cyr*, 533 U.S. 289, 322 (2001) (internal citations omitted).

The Immigration and Nationality Act (INA) authorizes the government to deport noncitizens who are convicted of certain crimes while in the United States. *See* 8 U.S.C. § 1227(a)(2). Ordinarily, the Attorney General has discretion to cancel the removal of a deportable noncitizen. *See* 8 U.S.C. § 1229b. A noncitizen, however, is ineligible for that discretionary relief if his conviction is for one of a subset of crimes classified as aggravated felonies. *See* 8 U.S.C. § 1229b(a)(3).

The result is so inevitable that courts have routinely described deportation as a mandatory consequence of a conviction for an aggravated felony. *See Lee v. United States*, 137 S.Ct. 1958,

1963 (2017) (a noncitizen convicted of an aggravated felony "is subject to mandatory deportation"). "It is thus only with some hyperbole that qualifying as an aggravated felon under the INA has been described as 'the immigration equivalent of the death penalty.'" *Shu Feng Xia v. United States*, 2015 WL 4486233, at *5 (S.D.N.Y. July 20, 2015), quoting R. McWhirter, ABA, The Criminal Lawyer's Guide to Immigration Law 146 (2d ed. 2006).

The mandatory nature of deportation in *Padilla* led to the Court's holding. Nonetheless, the Second and Third Circuits have created a situation where the effective assistance of counsel can be replaced by equivocal warnings pursuant to Fed. R. Crim. P. 11 and/or boilerplate language in a plea agreement. This Court should resolve the circuit split now and avoid any further dilution of the right to counsel as defined in *Padilla* and its progeny.

CONCLUSION

For the reasons set forth above, the Court should grant this writ of certiorari.

Respectfully submitted,

VINOO P. VARGHESE
Counsel of Record
VARGHESE & ASSOCIATES, P.C.
2 Wall Street
New York, New York 10005
(212) 430-6469
info@vargheselaw.com

Attorneys for Petitioner
Nekebwe Superville

Dated: November 12, 2019

APPENDIX

Appendix A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

13-CR-302
17-cv-5856

NEKEBWE SUPERVILLE,
Petitioner,

—v.—

UNITED STATES OF AMERICA,
Respondent.

MEMORANDUM AND ORDER

JACK B. WEINSTEIN, Senior United States District Judge

Vinoo P. Varghese, Varghese & Associates, 65 Broadway, 7th floor, New York, NY 10006, 212-430-6469, Fax: 646-292-5169, Email: info@vargheselaw.com, for **Nekebwe Superville**.

Marcia M. Henry, **Tiana A. Demas**, U.S. Attorney's Office, Eastern District Of New York, 271 Cadman Plaza East, Brooklyn, NY 11201, 718-254-6393, Fax: 718-254-6076, Email: marcia.henry@usdoj.gov, tiana.demas@usdoj.gov, for **United States of America**.

I. Introduction

Three years after a guilty plea and sentencing, Petitioner Nekebwe Superville moves for a writ of habeas corpus or writ of error *coram nobis*, and to vacate his conviction, claiming that his attorney misled him about the immigration consequences of his conviction. His application is denied on substantive and procedural grounds.

Relying on recent precedent from the United States Supreme Court, Superville argues that incorrect advice from his attorney led him to believe that he would probably not be deported if he pled guilty, and that this advice induced him to plead guilty rather than stand trial. *Padilla v. Kentucky*, 559 U.S. 356 (2010); *Lee v. United States*, 137 S.Ct. 1958 (2017). The record and contemporaneous documentation does not support this claim. Consistent with standard practice, a magistrate judge and a district judge warned Superville that he could face deportation if he were to plead guilty. The mandatory nature of his deportation appeared in the terms of his plea agreement, which the court finds was read by him.

Even if Superville's attorney advised him incorrectly, the immigration consequences of his plea were explained to him before he was sentenced on his plea of guilty. About his guilt of the crimes he was sentenced for, there is no doubt.

The court held an evidentiary hearing on this motion. *See* Mot. Hearing Tr. ("Hr'g Tr."), Feb. 14, 2018, Feb.16, 2018. Three witnesses testified: Howard Greenberg, Superville's former attorney, Phillis Superville, the petitioner's mother, and the petitioner, Nekebwe Superville. Superville and Greenberg gave conflicting accounts of the

immigration advice that Superville received before deciding to plead guilty.

The court does not credit Superville's testimony in light of the contemporaneous record. He did not demonstrate that he would have stood trial rather than plead guilty had he been more forcefully advised of the serious risk of deportation he faced. The evidence against him was overwhelming. If he was found guilty—as he almost certainly would have been—he faced a mandatory ten-year term of imprisonment.

In reaching its conclusion, the court did not take into account the change in Department of Justice administration to increase deportation of criminals that occurred long after Superville pled guilty and the reality that this may have increased Superville's prospects of deportation after he was convicted. Both counsel agreed this was appropriate. Hr'g Tr. 147:20-148:11.

II. Facts

A. Background of Crime

On February 18, 2014, Superville pled guilty to one count of conspiring to distribute 1,000 kilograms or more of marijuana, in violation of 21 U.S.C. § 846 and § 841(b)(1)(A)(vii); and one count of conspiring to the transfer and delivery of United States currency involving the proceeds of narcotics trafficking, in violation of 18 U.S.C. § 1956(h) and § 1956(a)(1)(B)(i). *See* Feb. 18, 2014 Transcript ("Plea Tr."), ECF No. 117.

In 2009, Superville began working for a drug trafficking organization as a minor participant. Presentence Investigative Report ("PSR") at ¶¶ 8-9.

He accepted a loan from one of the members of the organization to start a business. *Id.* at ¶ 12. The business failed and he was unable to repay his debts, which led him to his taking a bigger role in drug trafficking. *Id.*

His role in the drug conspiracy was significant. One of Superville's co-conspirators was arrested in September 2010 and Superville partially took over his role managing a FedEx account that the organization used to ship marijuana. *Id.* at ¶¶ 13-19. He traveled to Arizona several times in order to meet with suppliers on behalf of the organization and to facilitate its illegal activities. *Id.* Superville continued working with the drug trafficking organization for some years, taking a temporary absence in 2011 after a dispute with one of his co-conspirators. *Id.* He traveled to California in this time in search of new sources of supply. *Id.* at ¶ 17.

In early 2013, federal agents tracked Superville's co-conspirator during a trip to Arizona and observed him ship marijuana through FedEx. *Id.* at ¶¶ 20-21. Superville was arrested on May 8, 2013 at his home in Queens, New York and charged with intent to distribute 1,000 kilograms of marijuana and laundering $3,000,000 in drug proceeds. *Id.* at ¶¶ 28, 30.

Superville cooperated fully with the government following his arrest. *See* 5k.1 Letter, ECF No. 219. He testified at the trial of one of his co-conspirators, with whom he shared a close relationship. *Id.* at 3. The government wrote a 5k.1 letter for him, thus avoiding the ten-year minimum.

B. Immigration Advice

Superville retained a private defense attorney, Howard Greenberg, to represent him in his criminal case. Superville Aff. at ¶ 9, ECF No. 266, Ex. 7. He retained private counsel because he is not a United States citizen and feared deportation. *Id.* at ¶ 10.

According to an affirmation submitted prior to the hearing, Superville asked Greenberg whether a guilty plea would result in his deportation and Greenberg told him that "it would be something [they] would address if it came up later," and that Superville "should be 'okay' if [he] 'kept [his] head down' and 'stayed out of trouble.'" *Id.* at ¶ 13.

At the hearing, Superville testified that the warning given by Greenberg was stronger than that stated in his affirmation. Greenberg, Superville testified, told him that he "wouldn't get deported" if he did not spend time in prison and stayed out of future trouble. Hr'g. Tr. 97:2-22. This testimony is not believed by the court. His attorney was highly experienced and did not promise non-deportation. At the least, Superville was informed that he was eligible for deportation upon conviction.

Superville testified to having issues with Greenberg's representation apart from his immigration advice. Superville thought that Greenberg was "pushing [him] to cooperate"; apparently, the first time they discussed cooperation was after a court appearance with an Assistant United States Attorney present. *Id.* 93:12-94:16. Because of these concerns, Superville decided to meet with another criminal defense attorney for a second opinion on his case. *Id.* 103:5-14. Superville asked this attorney about the immigration consequences of

his case, and was counseled to seek the advice of an immigration attorney. *Id.* 104:5-10, 139:7-140:15.

Superville took this advice and sought the opinion of an immigration attorney. *Id.* He stated in his affirmation:

> As being deported was my greatest fear, I went to an immigration attorney on my own and met with my mother's immigration attorney, who she had retained to help file her United States citizenship papers. He told me that if I went to trial, got convicted, and got jail, I would definitely be deported. However, he said if I took a plea, I would very likely not get deported if I didn't go to jail and then stayed out of future trouble.

Superville Aff. at ¶ 16. Superville claims he recounted this advice to Greenberg, who "just nodded" as he listened. *Id.* at ¶ 17. Greenberg disputes hearing about the advice from Superville's immigration attorney. Hr'g Tr. 14:10-16.

Superville's mother, Phillis Superville, in part corroborated her son's account. She testified that while speaking to Greenberg before Superville's bond hearing he told her "not to worry about" immigration consequences because he was an immigration attorney as well. Hr'g. Tr. 72:15-20. They spoke about immigration consequences at another time:

> I was concerned about my son pleading guilty, and how it would affect his immigration status. And Mr. Greenberg said to me that he needs to—once my son stays out of trouble, he should be okay and told me not to worry again. And he said all he has to do is keep a low profile.

Id. 73:16-23.

Howard Greenberg, Esq. told a different story. Greenberg testified that he was retained by Superville's mother and immediately sought to get Superville bailed out of jail. Hr'g. Tr. 5:8-13. Superville was primarily concerned with getting out of jail. *Id.* 7:13-19. About the immigration advice he gave, Greenberg stated:

> I told him that—I never told him he would be deported as a result of the plea. I told him that he could be deported as a result of the plea. And I say that because nobody can predict any such outcome. I told him that if he was removed from the country, he might not be allowed to return. And I told him if he ever were able to return, he might well be denied naturalization.

Id. 12:22-13-3. Greenberg also testified:

> I told him if everything went the way we prayed and hoped, it might go that the best thing he can do is just live his life and keep his head down. And he asked me, what do you mean by keep my head down? And I said, For God's sake, don't get re-arrested for anything because I know that the immigration folks are in the habit of sticking their nose into the business of every new arrestee wherever they are incarcerated and try to determine what that person's status is in this country.

Id. 14:17-25.

Greenberg characterized Superville's claim in his affidavit as Greenberg having told him not to worry

about deportation as a "bald-faced lie." *Id.* 16:11-17. He claims he told Superville that they could discuss deportation if it ever arose, but this was in addition to telling Superville that he could be deported for the offense. *Id.* 16:18-18:4. Greenberg's testimony on these points suggests that Superville was in fact misled. The statute effectively provides for mandatory deportation because Superville pled guilty to an aggravated felony. *See* 8 U.S.C. § 1228(c) ("An alien convicted of an aggravated felony shall be conclusively presumed to be deportable from the United States."); *Lee v. United States*, 137 S.Ct. 1958, 1963 (2017) ("A noncitizen convicted of [an aggravated felony] is subject to mandatory deportation"). No apparent defense to deportation based on a plea existed.

C. Concern for Deportation

Superville had sound reason to fear deportation. He had not been to Trinidad and Tobago, his country of citizenship, since he was five years old. Superville Aff. at ¶ 5. He has lived in the United States for the entire time since he left Trinidad; his mother, fiancé, and two daughters live in the United States. *Id.* at ¶¶ 5-7. He showed concern for his deportation by deciding to seek the opinion of an independent defense counsel and an immigration attorney. Hr'g Tr. 99:16-18. "Avoiding deportation was the most important part of [the criminal] process to [Superville]." Superville Aff. at ¶ 22.

Superville says he "didn't believe that the evidence the government had against [him] was very strong," but his attorney "encouraged [him] to cooperate with the government and plead guilty to the charges." Superville Aff. at ¶¶ 11-12; *see also* Hr'g Tr. 92:22-

93:1. The case against him, in his opinion, was only "flights and some tape recordings." *Id.* 93:2-5. The tape recordings consisted of conversations between Superville and his co-conspirators discussing drug trafficking. *Id.* 133:12-14. The government also produced in discovery FedEx account records showing drug shipments between members of the conspiracy. *Id.* 133:21-23. The evidence of guilt was in fact overwhelming.

Pleading guilty, Superville believed, was his "best chance to remain in the United States" based on the advice of his criminal attorney. *Id.* at ¶ 23. He stated that if "there was a chance that [he] wouldn't be deported by going to trial, [he] would have taken it"; "had [he] known that pleading guilty to these charges would have automatically triggered [his] deportation, [he] would have absolutely chosen to have gone to trial instead of pleading guilty and cooperating with the government." *Id.* at ¶¶ 21-22.

Greenberg, however, described Superville's criminal case as "dead." Hr'g Tr. 9:18-20. Based on his experience as a criminal defense attorney, he believed the evidence against Superville was overwhelming. *Id.* 9:21-10:14. Superville and his family were also threatened by one of Superville's codefendants in the case, and this was a significant factor leading Superville to cooperate. *Id.* When Greenberg first met with Superville "[h]is number one concern, to the exclusion of everything else" was to be released from jail. *Id.* 7:13-19.

D. Deportation Warnings

On February 18, 2014, Superville pled guilty and signed a cooperation agreement. *See* Plea Tr. This agreement contained the following paragraph

outlining the immigration consequences of his guilty plea:

> The defendant recognizes that pleading guilty may have consequences with respect to the defendant's immigration status if the defendant is not a citizen of the United States. Under federal law, a broad range of crimes are removable offenses, including the offenses to which the defendant is pleading guilty. *Indeed*, *because the defendant is pleading guilty to 21 U.S.C. § 846 and 18 U.S.C. § 1956(h)*, *removal is presumptively mandatory*. Removal and other immigration consequences are the subject of a separate proceeding, however, and the defendant understands that no one, including the defendant's attorney or the District Court, can predict with certainty the effect of the defendant's conviction on the defendant's immigration status. *The defendant nevertheless affirms that the defendant wants to plead guilty* regardless of any immigration consequences that the defendant's plea may entail, *even if the consequence is the defendant's automatic removal from the United States.*

Cooperation Agreement ¶ 10 (emphasis supplied), ECF No. 270, Ex. 3. At the plea hearing while under oath, Superville acknowledged reading the cooperation agreement thoroughly and discussing it with his attorney. Plea Tr. 13:2-15.

Greenberg testified that he reviewed the entire agreement with Superville, including the paragraph about Superville's immigration consequences, Hr'g

Tr. 33:8-16; this testimony is credited as part of the routine of any experienced practicing attorney.

Superville claims that he never read the cooperation agreement. *Id.* 108:17-19. He testified that Greenberg explained the agreement to him at a high level, but that he did not explain the paragraph that outlined the immigration consequences of his plea. *Id.* 108:17-111:25. Superville signed the agreement, but claimed that he did not read the line directly above his signature affirming that he read and understood the agreement. *Id.* 112:22-24. This testimony of not reading the plea agreement is not credited. Petitioner was intelligent and concerned about the issue. His explanation about why he did not read it was not persuasive. *See* Hr'g Tr. 130:21-131:15.

Superville was advised by the magistrate judge at his plea hearing that he would face immigration consequences.

> Magistrate Judge: And last, as I have alluded to, if you are not a United States citizen, *a conviction for the charges that you will be pleading guilty to carries heavy immigration consequences.* Are you a United States citizen?
>
> Superville: No.
>
> Magistrate Judge: Now as a result of pleading guilty, you could be subject to *removal from the United States* and denied citizenship and denied permission to be re-admitted to the United States. Do you understand?
>
> Superville: Yes.

Plea Tr. 21:10-21 (Emphasis supplied).

Several months later Superville appeared before this court to be sentenced. Superville was again advised of the fact that he might suffer immigration consequences, including deportation, as a result of his plea.

> Court: Of what country are you a citizen?
>
> Superville: Trinidad and Tobago.
>
> Court: *Do you understand that your plea in this case may result in your deportation?*
>
> Superville: Yes.
>
> Court: Have you explained the collateral disabilities of a plea?
>
> Defense Counsel: We've gone over everything.
>
> Court: You understand how serious this is?
>
> Superville: Yes.
>
> Court: With respect to disabilities such as licensing, schooling and the like?
>
> Superville: Yes.
>
> Court: Are you satisfied with your attorney?
>
> Superville: Yes.

Sentencing Transcript ("Sentencing Tr.") 3:19-4:10, ECF No. 270, Ex. 6, Oct. 8, 2014 (emphasis supplied). Superville agreed with the court that he had testified at the trial of his codefendant and his testimony indicated guilt. *Id.* 6:2-10. He reaffirmed that he wished to plead guilty. *Id.*

Superville claims that he based his guilty plea on the advice given to him by his criminal defense

attorney despite the repeated warnings by the court. Superville Aff. at ¶ 19. He claims to have only become aware of the immigration consequences of his conviction after immigration officers arrested him on July 18, 2017 when he had only one month left on his term of supervised release. *Id.* at ¶¶ 26, 29. He filed this petition to vacate his conviction on October 5, 2017.

III. Law

Superville files this motion for a writ of habeas corpus under 28 U.S.C. § 2255, or, alternatively, for a writ of error *coram nobis*, to vacate his conviction on the grounds that his counsel was constitutionally ineffective.

A. Statute of Limitations Under 28 U.S.C. § 2255

The statute governing writs of habeas corpus stemming from federal criminal proceedings, codified at 28 U.S.C. § 2255, contains a one-year statute of limitations. The limitations period runs from the latest of:

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the

> Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (4) the date on which the facts supporting the claim or claims presented *could have* been discovered through the exercise of due diligence.

28 U.S.C. § 2255(f) (emphasis supplied). When no appeal is taken, under subsection (1) a "judgment becomes final when the time for filing a direct appeal expires." *Moshier v. United States*, 402 F.3d 116, 118 (2d Cir. 2005).

Superville filed this petition several years after the time for appeal expired. He relies on subsection (4). "Section 2255(4) is not a tolling provision . . . . Rather, it resets the limitations period's beginning date, moving it from the time when the conviction became final, *see* § 2255(1), to the later date on which the particular claim accrued." *Wims v. United States*, 225 F.3d 186, 190 (2d Cir. 2000). The relevant inquiry is whether "a duly diligent person in petitioner's circumstances would have discovered" the facts leading to the claim. *Id.*

Several district courts have considered the applicability of this section when criminal defendants claim that their convictions should be vacated because they were not adequately informed of the immigration consequences of a guilty plea. Most have held that a duly diligent petitioner would discover an ineffective claim if and when he was advised of possible deportation during a plea colloquy. *See*, *e.g.*, *Salama v. United States*, No. 05 CV 1257 (SJ), 2005 WL 1661830, at *4 (E.D.N.Y. July 15, 2005); *United States v. Deptula*, No. 5:10-CR-82-6, 2016 WL 7985815, at *7 (D. Vt. Oct. 13, 2016), *report and recommendation adopted*, No. 5:10-CR-82-6, 2017 WL

384681 (D. Vt. Jan. 26, 2017); *but see Bawaneh v. United States*, No. CR-04-1134 CAS, 2011 WL 1465775, at *4 (C D. Cal. Apr. 18, 2011).

B. Ineffective Assistance of Counsel

The Sixth Amendment guarantees the right to the effective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 686 (1984). *Strickland* announced the now-familiar two-part test for determining whether an attorney's performance is constitutionally adequate. To establish an ineffective assistance of counsel claim, a petitioner must show that (1) the attorney's performance "fell below an objective standard of reasonableness"; and (2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 688, 694.

Two recent Supreme Court cases have addressed both of Strickland's prongs in the immigration context. *Padilla v. Kentucky* spoke to the first prong holding that "[t]he weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation." 559 U.S. 356, 367, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010). To some individuals, "[preserving [their] right to remain in the United States may be more important . . . than any potential jail sentence." *Id.* (quoting *INS v. St. Cyr*, 533 U.S. 289, 323 (2001)). Although immigration law can be complex, "when the deportation consequence is truly clear, . . . the duty to give correct advice is equally clear." *Id.* at 369. *Padilla* left open how the second prong of Strickland applies to cases of this sort.

Last term, *Lee v. United States*, answered the question of how the *Strickland* prejudice prong

applies when a criminal defense attorney gives incorrect immigration advice. 137 S. Ct. 1958 (2017). In *Lee*, as in the instant case, the petitioner pled guilty ostensibly relying on incorrect immigration advice and had to show a "reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* at 1965 (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)). The Court declined to adopt a *per se* rule "that a defendant with no viable defense cannot show prejudice from the denial of his right to trial," because the proper focus of the inquiry is "on a defendant's decisionmaking, which may not turn solely on the likelihood of conviction after trial." *Id.* at 1966.

Applying the law to the "unusual circumstances" of Lee's case, the Court concluded, "that Lee ha[d] adequately demonstrated a reasonable probability that he would have rejected the plea had he known that it would lead to mandatory deportation." *Id.* at 1967. Several factors supported the Court's decision: (1) both Lee and his attorney testified in a hearing on the habeas petition that Lee would have faced trial had he known that he would have been deported; (2) Lee had strong family connections to the United States where he had lived for three decades; (3) when he was warned of potential immigration consequences by the district judge, he responded " 'I don't understand,' and turned to his attorney for advice ... [and] [o]nly when Lee's counsel assured him that the judge's statement was a 'standard warning' was Lee willing to proceed to plead guilty." *Id.* at 1968.

Based on these factors, the Court concluded:

> We cannot agree that it would be irrational for a defendant in Lee's position to reject the

> plea offer in favor of trial. But for his attorney's incompetence, Lee would have known that accepting the plea agreement would *certainly* lead to deportation. Going to trial? *Almost* certainly. If deportation were the "determinative issue" for an individual in plea discussions, as it was for Lee; if that individual had strong connections to this country and no other, as did Lee; and if the consequences of taking a chance at trial were not markedly harsher than pleading, as in this case, that "almost" could make all the difference. Balanced against holding on to some chance of avoiding deportation was a year or two more of prison time. Not everyone in Lee's position would make the choice to reject the plea. But we cannot say it would be irrational to do so.

Id. (emphasis in original).

The Supreme Court warned that courts "should not upset a plea solely because of *post hoc* assertions from a defendant about how he would have pleaded but for his attorney's deficiencies." *Id.* at 1967. "[C]ontemporaneous evidence to substantiate a defendant's expressed preferences" should instead be the touchstone. *Id.* A lack of contemporaneous evidence showing that the defendant would have rejected a plea if he misunderstood the immigration consequences of it is grounds for denying a motion under the *Strickland* prejudice prong. *See United States v. Seepersad*, 674 Fed.Appx. 69, 71 (2d Cir. 2017), *cert. denied*, No. 16-1445, 2017 WL 2444612 (U.S. Dec. 11, 2017) (denying a claim under *Strickland's* prejudice prong where "during the plea colloquy the district court told [the defendant] his

guilty plea would "provide the basis for the Immigration and Naturalization Service to deport you. You've got to understand that'" and the defendant "twice indicated that he understood").

C. Writ of Error *Coram Nobis*

A writ of error *coram nobis* may be "issued pursuant to the All Writs Act, 28 U.S.C. § 1651(a), where 'extraordinary circumstances are present.'" *Foont v. United States*, 93 F.3d 76, 78 (2d Cir. 1996) (quoting *Nicks v. United States*, 955 F.2d 161, 167 (2d Cir.1992)). To qualify for the writ, a petitioner "must demonstrate that 1) there are circumstances compelling such action to achieve justice, 2) sound reasons exist for failure to seek appropriate earlier relief, and 3) the petitioner continues to suffer legal consequences from his conviction that may be remedied by granting of the writ." *Id.* at 79 (internal citations omitted).

"[I]neffective assistance of counsel is one ground for granting a writ of *coram nobis*." *Kovacs v. United States*, 744 F.3d 44, 49 (2d Cir. 2014). Superville's request for this writ is based upon the ineffective assistance of his trial counsel, and is governed by the *Strickland* standard. *See supra* Section III(A).

Unlike the writ of habeas corpus, "[n]o statute of limitations governs the filing of a *coram nobis* petition." *Kovacs*, 744 F.3d at 54. But, a petitioner seeking the relief must "demonstrate 'sound reasons' for any delay in seeking relief." *Id.*; *cf. supra* Section III(A).

IV. Application of Facts to Law

A. Statute of Limitations Under 28 U.S.C. § 2255

Superville's habeas petition is barred by the statute of limitations. His timeliness argument relies on 28 U.S.C. § 2255(f)(4), which requires a petitioner to file one year from "the date on which the facts supporting the claim or claims presented *could have* been discovered through the exercise of due diligence." *Id.* Even if Superville actually discovered that he would be deported when he was detained by immigration officers on July 18, 2017, Superville Aff. at ¶¶ 26, 29, he *could have*, and would have, with minimal diligence, discovered the high probability of his deportation much earlier.

Superville's cooperation agreement states in relatively clear terms that he would almost certainly be deported if he pled guilty. It states that his deportation is "*presumptively mandatory*" and that he "affirms that the [he] wants to plead guilty regardless of any immigration consequences that [his] plea may entail, *even if the consequence is [his] automatic removal from the United States*" Cooperation Agreement at ¶ 10 (emphasis supplied). Even if Superville was relying on poor immigration advice from his attorneys, this agreement should have disabused him of his mistaken belief. Superville claims that he did not read this agreement, but his actual knowledge is not the relevant inquiry under 28 U.S.C. § 2255(f)(4). The effect of the word "presumptively" was either known to him or he should have asked to have it explained in view of his concern about deportability.

The magistrate judge, at his plea colloquy, and this court, at his sentencing hearing, further advised Superville that his guilty plea could lead to deportation. The magistrate judge told Superville that "*a conviction for the charges that you will be pleading guilty to carries heavy immigration consequences.*" Plea Tr. 21:10-21 (emphasis supplied). This court at sentencing, before accepting his plea, asked Superville whether he "underst[ood] that [his] plea in this case may result in [his] deportation." Sentencing Tr. 3:19-4:10. He responded, "yes." *Id.*

The only case this court is aware of to have reached a different conclusion under similar circumstances is *Bawaneh v. United States*, No. CR-04-1134 CAS, 2011 WL 1465775 (C.D. Cal. Apr. 18, 2011). This non-binding case is distinguishable. There the court's deportation warning was highly equivocal—"it is at least *conceivable* . . . that the guilty plea may lead to immediate deportation proceedings"—and the attorney's advice was clear—"his attorney informed him that even if he were deported, he would have a *strong argument* at canceling the deportation." *Id.* at *4 (emphasis added). Superville, by contrast, was given three objective warnings, two by the court and one in his cooperation agreement. The number and strength of the warnings he received would have caused a duly diligent person to make a further inquiry into the possibility of deportation. In fact, he consulted two other attorneys on this point before his guilty plea.

Because Superville could have discovered his claim at the latest at his sentencing in October 2014 and his petition is brought more than a year after that time, it is untimely.

B. Ineffective Assistance of Counsel

The court takes no position on whether the advice given by Superville's criminal defense attorney, Howard Greenberg, falls below an objective standard of reasonableness. Superville cannot claim prejudice under the second prong of *Strickland*. He cannot show a "reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Lee v. United States*, 137 S. Ct. 1958, 1965 (2017).

The court does not credit several aspects of Superville's testimony. *See supra* Part II. The contemporaneous evidence leads this court to conclude that he did in fact know that there was a strong possibility of deportation when he pled guilty and that he cannot show that a stronger warning would have led him to stand trial. Even if the court credited the entirety of Superville's testimony, the result would remain unchanged.

Two judges informed Superville that his conviction would carry immigration consequences. *See supra* Section IV(A). Both times he affirmed under oath that he understood this. It is this court's invariable practice, and the practice of magistrates in this district, to inform criminal defendants when pleading guilty that they could face deportation if they are not citizens. If this warning is to have meaning, courts must be able to rely on the fact that defendants take this warning seriously, and speak truthfully under oath when they acknowledge that they understand the immigration consequences of their plea.

That is not to say that these warnings will be sufficient in all cases. In *Lee*, for example, the defendant received a warning from the district court

prior to it accepting his plea. Upon receiving this warning, he responded "'I don't understand,' and turned to his attorney for advice . . . [and] [o]nly when Lee's counsel assured him that the judge's statement was a 'standard warning' was Lee willing to proceed to plead guilty." *Id.* at 1968. Contemporaneous evidence showing that the defendant did not understand the warning or was misled is necessary in most cases. *Id.* at 1967 ("Courts should not upset a plea solely because of *post hoc* assertions from a defendant about how he would have pleaded but for his attorney's deficiencies."); *cf. Kovacs v. United States*, 744 F.3d 44, 53 (2d Cir. 2014) ("It is apparent from the transcript of the Rule 11 hearing that Kovacs' single-minded focus in the plea negotiations was the risk of immigration consequences.").

In the instant case, there is no contemporaneous evidence that Superville did not understand that he was likely to face deportation. Unlike the petitioner in *Lee*, Superville affirmed under oath that he did understand consequences—without equivocation. The last time that Superville claims to have spoken to his attorney about immigration consequences is a few weeks before the plea hearing. Three times *after* that he learned that he could in fact be deported.

Superville was facing a ten-year mandatory minimum sentence if he did not cooperate with the government and had been threatened by a codefendant. It is undisputed that Superville understood that he "could" be deported as a result of his guilty plea. Hr'g Tr. 134:20-23. While the extent of his understanding is not clear, that he did not hesitate to plead guilty after receiving judicial warnings significantly undercuts his claim that he would have stood trial rather than plead guilty and

face a ten-year mandatory minimum and deportation. In *Lee*, by contrast, the Supreme Court characterized Lee's "consequences of taking a chance at trial [as] not markedly harsher than pleading" because it was only a "year or two more of prison time"; not a decade. *Id.* at 1968.

The court also notes, without deciding as an independent ground for denying the motion, that there is a significant causation issue in this case. Superville was separately advised, apparently incorrectly, by an attorney specializing in immigration law. To the extent that he relied on this advice, it undercuts his argument that it was Greenberg's advice that induced him to plead guilty. It does not seem that the conduct of an attorney who has no role in the criminal case, under such circumstances that exist in this case, is cognizable under the *Strickland* standard.

Superville cannot show a "reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Lee v. United States*, 137 S. Ct. 1958, 1965 (2017).

C. Writ of Error *Coram Nobis*

Because Superville cannot show that he was constitutionally deprived of the effective assistance of counsel, the writ of error *coram nobis* is denied. Superville cannot demonstrate sound reason for his delay in bringing this petition. *See supra* Section IV(A).

V. Conclusion

Superville's motion for a writ of habeas corpus or a writ of error *coram nobis* and to set aside his conviction is denied.

The court has changed the warning that it gives to non-citizen criminal defendants in a case such as this to "you should assume that you will be deported after conviction by plea or trial."

Superville shall remain in the United States until he has fully exhausted his right to appeal this order.

SO ORDERED.

/s/
Jack B. Weinstein
Senior United States District Judge

Date: February 27, 2018
Brooklyn, New York

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 9th day of May, two thousand nineteen.

PRESENT: AMALYA L. KEARSE,
RICHARD C. WESLEY,
DENNY CHIN,
Circuit Judges.

18-680-pr

NEKEBWE SUPERVILLE,

Petitioner-Appellant,

—v.—

UNITED STATES OF AMERICA,

Respondent-Appellee.

FOR PETITIONER-APPELLANT: VINOO P. VARGHESE, Varghese & Associates, P.C., New York, New York.

FOR RESPONDENT-APPELLEE: MARCIA M. HENRY, Assistant United States Attorney (Amy Busa, Assistant United States Attorney, *on the brief*), *for* Richard P. Donoghue, United States Attorney for the Eastern District of New York, New York, New York.

Appeal from the United States Court for the Eastern District of New York (Weinstein, *J.*)

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the order of the district court is **AFFIRMED**.

Petitioner-appellant Nekebwe Superville appeals pursuant to a certificate of appealability issued March 6, 2018, by the United States District Court for the Eastern District of New York (Weinstein, *J.*). The certificate of appealability certified two issues for appeal: (1) "[w]hether petitioner was denied the effective assistance of counsel under the Sixth Amendment"; and (2) "[w]hether petitioner's constitutional claim was timely under 28 U.S.C. §

2255." App'x at 360. We assume the parties' familiarity with the underlying facts, procedural history, and issues on appeal.

Superville is not a United States citizen. In May 2013, he was arrested for participating in a drug trafficking organization. He retained attorney Howard Greenberg and agreed to cooperate with the government. Before pleading guilty, Superville received warnings in the plea agreement and from the magistrate judge and district judge that his conviction would have immigration consequences. It is "undisputed that Superville understood that he 'could' be deported as a result of his guilty plea." S. App'x at 10. On February 18, 2014, Superville pled guilty to two aggravated felonies: one count of conspiring to distribute 1,000 kilograms or more of marijuana, in violation of 21 U.S.C. §§ 846 and 841(b)(1)(A)(vii), and one count of conspiring to transfer and deliver United States currency involving the proceeds of narcotics trafficking, in violation of 18 U.S.C. §§ 1956(h) and 1956(a)(1)(B)(i). Because of his assistance to the government, Superville was sentenced principally to three years' probation. Judgment was entered on November 14, 2014.

On July 18, 2017, Superville was detained by immigration officers pursuant to a Department of Homeland Security notice to appear for removal proceedings. On October 5, 2017, Superville, represented by new counsel, filed a motion under 28 U.S.C. § 2255, or for a writ of error *coram nobis*, to vacate his guilty plea and conviction, arguing that Greenberg's performance was constitutionally ineffective by failing to advise him that his plea subjected him to mandatory deportation.

The district court held an evidentiary hearing on February 14 and 16, 2018, and three witnesses testified: Superville, Superville's mother, and Greenberg. In its February 27, 2018 memorandum and order, the district court rejected several parts of Superville's testimony because it conflicted with the contemporaneous evidence that he knew there was a strong possibility of deportation and he still would have pled guilty even with a stronger warning. Greenberg testified that he told Superville that he "could be deported as a result of the plea," but disavowed telling Superville not to worry about deportation. The district court denied Superville's motion because it was untimely and, in the alternative, Superville was not prejudiced by his attorney's alleged ineffectiveness. On March 6, 2018, the district court issued its certificate of appealability. Superville filed a timely notice of appeal on March 9, 2018.

STANDARD OF REVIEW

"We review a district court's findings of fact for clear error, and its denial of a Section 2255 petition *de novo*." *Elfgeeh v. United States*, 681 F.3d 89, 91 (2d Cir. 2012). "[A] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985) (internal quotation marks omitted). "If the district court's account of the evidence is plausible in light of the record viewed in its entirety, [we] may not reverse it" even if we would have weighed the evidence differently. *Id.* at 573-74.

DISCUSSION

As certified by the district court, two issues are presented: (1) "[w]hether petitioner's constitutional claim was timely under 28 U.S.C. § 2255"; and (2) "[w]hether petitioner was denied the effective assistance of counsel under the Sixth Amendment of the United States Constitution." S. App'x at 13.

I. Timeliness of Superville's § 2255 Petition

A § 2255 petition is subject to a one-year period of limitation, which runs from the later of "the date on which the judgment of conviction becomes final" or "the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence." 28 U.S.C. § 2255(f)(1), (4). For the purposes of § 2255(f)(1), "an unappealed federal criminal judgment becomes final when the time for filing a direct appeal expires." *Moshier v. United States*, 402 F.3d 116, 118 (2d Cir. 2005) (per curiam). Section 2255(f)(4), moreover, "is not a tolling provision that extends the length of the available filing time"; rather, § 2255(f)(4) "resets the limitations period's beginning date, moving it from the time when the conviction became final [under § 2255(f)(1)] ... to the later date on which the particular claim accrued." *Wims v. United States*, 225 F.3d 186, 190 (2d Cir. 2000). The relevant inquiry is "when a duly diligent person in petitioner's circumstances would have discovered [facts supporting the claim]." *Id*. This "does not require the maximum feasible diligence, only 'due,' or reasonable, diligence." *Id.* at 190 n.4. The question of when the limitations period begins to run is a fact-specific issue, *see id.* at 190, and therefore we review the district court's

determination for clear error, *see Elfgeeh*, 681 F.3d at 91.

Here, the limitations period began to run from the date the judgment of conviction became final. Under § 2255(f)(1), the judgment became final on November 28, 2014, fourteen days after it was entered on November 14, 2014, as Superville did not appeal. *See* Fed. R. App. P. (4)(b) (requiring appeal in criminal case to be filed within fourteen days of judgment). Although the district court found that Superville could have discovered that he was subject to mandatory deportation no later than October 8, 2014, based in part on the court's statements in imposing sentence that day, the one-year limitations period began to run on November 28, 2014 — the later of the two dates — and Superville's § 2255 motion was time-barred because he did not file his motion until October 5, 2017.

Superville argues that under § 2255(f)(4) the limitations period actually began to run on July 18, 2017, when he was arrested by immigration officers and first learned he was subject to mandatory deportation, and therefore his motion is timely. The district court's finding that Superville's could, with due diligence, have discovered his deportation status in October 2014 at the latest, however, is supported by the record. Superville received at least three warnings about his plea's immigration consequences, including in the plea agreement he signed in February 2014 acknowledging that "because [of the offenses to which] the defendant is pleading guilty ... removal is presumptively mandatory." App'x at 48. Superville stated under oath that he read it thoroughly and discussed it with his attorney, and he told both the magistrate and district judges that he

understood the immigration consequences of his guilty plea. Based on these warnings, a reasonably diligent person would have discovered that he was subject to presumptively mandatory deportation in October 2014. Therefore, on this record, the district court did not err in finding that Superville could, with due diligence, have discovered that he was subject to mandatory deportation prior to November 2014, and in concluding that his § 2255 petition was time-barred.

II. Ineffective Assistance of Counsel

Even if the § 2255 petition had been timely filed, it would fail on the merits. The Sixth Amendment grants criminal defendants the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). In general, a defendant claiming ineffective assistance must show that (1) "counsel's performance was deficient" and (2) "the deficient performance prejudiced the defense." *Id.* at 687. When a defendant alleges that a counsel's deficient performance led him to accept a guilty plea rather than go to trial, we "consider whether the defendant was prejudiced by the denial of the entire judicial proceeding to which he had a right." *Jae Lee v. United States*, 137 S.Ct. 1958, 1965 (2017) (alteration and internal quotation marks omitted). To demonstrate prejudice, then, "the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985); *accord Kovacs v. United States*, 744 F.3d 44, 52 (2d Cir. 2014).

The district court did not reach the question of whether counsel's advice that Superville "could" be

deported was unreasonable, but held that even assuming Greenberg was ineffective (by saying "could" rather than "would"), Superville had failed to show prejudice. The court found that Superville failed to show "that a stronger warning would have led him to stand trial." S. App'x at 10. This finding was not clearly erroneous, particularly in light of the three other warnings Superville received, including one in the plea agreement, which he read and signed, that "removal is presumptively mandatory." App'x at 48. Much of the evidence that Superville relies on are *post hoc* assertions, and we will "not upset a plea solely because of *post hoc* assertions" about how a petitioner "would have pleaded but for his attorney's deficiencies." *Jae Lee*, 137 S.Ct. at 1967. The district court did not credit this aspect of Superville's testimony, and "clear error review mandates that we defer to the district court's factual findings, particularly those involving credibility determinations." *Phoenix Glob. Ventures, LLC v. Phoenix Hotel Assocs., Ltd.*, 422 F.3d 72, 76 (2d Cir. 2005) (per curiam). The district court, therefore, did not err in holding that Superville failed to show he was prejudiced by Greenberg's alleged ineffectiveness.

* * *

We have considered Superville's remaining arguments and conclude they are without merit. Accordingly, we **AFFIRM**.

FOR THE COURT:

/s/_____
Catherine O'Hagan Wolfe, Clerk

[SEAL]

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 15th day of August, two thousand nineteen.

Docket No: 18-680

NEKEBWE SUPERVILLE,

Petitioner-Appellant,

—v.—

UNITED STATES OF AMERICA,

Respondent-Appellee.

ORDER

Appellant, Nekebwe Superville, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

/s/
Catherine O'Hagan Wolfe, Clerk

[SEAL]