No. _____

In The
Supreme Court of the United States

NIGEL CHRISTOPHER PAUL MARTIN,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeal for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

Andrew B. Greenlee, Esq.*
Andrew B. Greenlee, P.A.
Attorney for Petitioner
401 E. 1st Street, Unit 261
Sanford, Florida 32772
407-808-6411
andrew@andrewgreenleelaw.com
**Counsel of Record for Petitioner*

July 2, 2020

QUESTION PRESENTED

Petitioner, a non-citizen, pled guilty to access device fraud. The plea agreement warned him that he *might be* subject to removal and other immigration consequences, though it cautioned that "no one, including the defendant's attorney or the Court, can predict to a certainty the effect of the defendant's conviction on the defendant's immigration status." The district court also informed him that his guilty plea "*may*" subject him to "deportation, exclusion or voluntary departure." Mr. Martin affirmed he wished to plead guilty "regardless of any immigration consequences."

The factual proffer filed in connection with the plea agreement asserted that the fraud loss resulting from the overall scheme was in excess of $200,000, which surpassed the threshold loss amount of $10,000 under immigration law for the access device fraud to count as an aggravated felony. Thus, although Mr. Martin was only informed on the record of the *possibility* of deportation, his conviction triggered mandatory deportation. Mr. Martin brought an ineffective assistance of counsel claim under 28 U.S.C. § 2255, but the district court denied it without conducting an evidentiary hearing, finding that the plea agreement and colloquy precluded a showing of prejudice. The Eleventh Circuit affirmed.

The question presented is:

Is a defendant categorically prohibited from establishing an ineffective assistance of counsel claim under *Padilla v. Kentucky*, 559 U.S. 356 (2010), where he is advised in the plea agreement and during the plea colloquy that he faces the

possibility of mandatory removal and states that he seeks to enter a guilty plea regardless of the immigration consequences?

PARTIES TO THE PROCEEDING

There are no parties to the proceeding other than those named in the caption of the case.

STATEMENT OF RELATED PROCEEDINGS

- *United States v. Isaacs et al*, Case No. 0:16-cr-60239-BB (S.D. Fla. 2016) (judgment issued as to Petitioner on March 10, 2017)
- *United States v. Martin*, Case No. 17-11905 (11th Cir. 2017) (appeal dismissed sua sponte for lack of jurisdiction on July 6, 2017)
- *Martin v. United States*, Case No. 0:18-cv-60138-BB (S.D. Fla. 2018) (order denying certificate of appealability issued on June 22, 2018)
- *Martin v. United States*, 949 F. 3d 662 (11th Cir. 2020) (opinion and judgment affirming conviction issued February 4, 2020; mandate issued March 30, 2020)

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Nigel Christopher Paul Martin, respectfully petitions the Court for a writ of certiorari to review the opinion of the Eleventh Circuit Court of Appeal affirming the denial of his Motion to Vacate under 28 U.S.C. § 2255.

DECISIONS BELOW

The unpublished district court order denying Petitioner's Motion to Vacate filed pursuant to 28 U.S.C. § 2255 is reproduced in the appendix at App. 16.

The Eleventh Circuit issued a published opinion affirming the denial of Mr. Martin's Motion to Vacate. *Martin v. United States*, 949 F.3d 662 (11th Cir. 2020). That order is reproduced in the appendix at App. 1.

STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction over this federal habeas petition under 28 U.S.C. § 2255. The Eleventh Circuit issued its opinion and judgment on February 4, 2020. App. 1.

Pursuant to this Court's March 19, 2020 Order relating to filing deadlines and the ongoing public health concerns relating to COVID-19, this Petition is timely, as it is filed within 150 days of the order denying Petitioner's Motion for Certificate of Appealability. This Court has jurisdiction. 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the Constitution states that in "all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

STATEMENT OF THE CASE

A. The Criminal Case.

In December 2016, a federal grand jury charged Mr. Martin with conspiracy to commit access device fraud, 18 U.S.C. § 1029(b)(2) ("Count One"), access device fraud, 18 U.S.C. § 1029(a)(2) ("Count Two"), and aggravated identity theft, 18 U.S.C. § 1028A(a)(1) ("Count Nine"). App. 2. The superseding indictment alleged that Mr. Martin and his co-defendants were involved in a scheme to make unauthorized credit card purchases at retail stores using credit card accounts issued to other individuals. App. 2.

Mr. Martin pled guilty to Counts Two and Nine pursuant to a plea agreement. His plea agreement included a provision explaining the potential immigration consequences of the plea. App. 2. Mr. Martin acknowledged that "[r]emoval and other immigration consequences are the subject of a separate proceeding" and that "no one, including the defendant's attorney or the Court, can predict to a certainty the effect of the defendant's conviction on the defendant's immigration status." App. 2. Mr. Martin also affirmed in the plea agreement that he wished to plead guilty "regardless of any immigration consequences," including "automatic removal from the United States." App. 2-3.

During the plea colloquy, the district court asked Mr. Martin about his understanding of the immigration consequences of his plea:

> THE COURT: Have you and [your attorney] discussed the immigration consequences of your guilty plea?
>
> THE DEFENDANT: Yes, Your Honor.
>
> THE COURT: And you understand, sir, that if you are not a citizen of the United States, in addition to the other possible penalties you are facing, a plea of guilty may subject you to deportation, exclusion, or voluntary departure and prevent you from obtaining United States citizenship?
>
> THE DEFENDANT: Yes, Your Honor.

App. 3.

At the time he executed the plea agreement and pled guilty, Martin also signed a factual proffer that listed the facts the Government would have proven beyond a reasonable doubt had the case gone to trial. App. 3. The proffer stated that, on March 21, 2016, Mr. Martin made an unauthorized purchase of $782 from Home Depot using a Capital One credit card. App. 3. On March 29, 2016, Mr. Martin completed an unauthorized telephone payment transaction for $369.94 from Home Depot. App. 3-4. And on April 18, 2016, Martin assisted co-defendants in loading fraudulently purchased items into a vehicle. App. 4.

The proffer additionally asserted that the fraud loss resulting from the overall scheme was in excess of $200,000. App. 4. During his allocution, Martin confirmed that the proffer was correct. App. 4.

The Pre-Sentence Investigation Report ("PSR") calculated Mr. Martin's total offense level for access device fraud to be 13. App. 4. The 10-level enhancement for a loss of more than $150,000 but less than $250,000 pursuant to U.S.S.G. § 2B1.1(b)(1)(F) was based on a finding that the aggregate loss attributable to all of the co-conspirators was "approximately $200,000" in a scheme running from November 2015 to August 2016. App. 4.

Mr. Martin's counsel objected to the loss amount calculation and the 10-level enhancement. He argued that Martin was only responsible for approximately $1,000 because he did not plead guilty to the conspiracy charge. App. 4.

At sentencing, the Government contended that the PSR properly calculated the fraud loss amount at approximately $200,000 because Mr. Martin was jointly and severally liable as an aider and abettor. App. 4. The district court agreed with the Government, overruled Mr. Martin's objection, and determined that his guideline range was 12 to 18 months' imprisonment on the access device fraud charge, followed by a mandatory consecutive term of 24 months' imprisonment on the aggravated identity theft charge. App. 4-5.

B. The Post-Conviction Proceedings.

In January 2018, Mr. Martin moved to vacate his sentence under 28 U.S.C. § 2255. He alleged that his attorney provided ineffective assistance of counsel because he (1) failed to advise Mr. Martin that deportation was mandatory for an aggravated felony conviction, (2) advised him that the loss amount would be less than $10,000, and (3) assured him that his sentence would be less than one year of imprisonment.

App. 5. Mr. Martin further claimed that he would not have pled guilty had he known that he would be subject to mandatory deportation. App. 5.

The district court denied Mr. Martin's habeas petition without holding an evidentiary hearing. It found that Mr. Martin's claims of deficient performance were contradicted by his "statements under oath at the plea colloquy." App. 5. The district court additionally held that, "even assuming, without deciding," that erroneous representations were made to Mr. Martin, he could not establish prejudice. App. 4. It reasoned that, by signing the plea agreement and confirming his statements under oath during the allocution, Mr. Martin "understood that his guilty plea could subject him to immigration consequences, including removal, and that no one, including his attorney, could predict exactly the loss amount or the sentence to be imposed at the time of the plea." App. 6.

On appeal, the Eleventh Circuit granted a certificate of appeal on the issue of whether the court abused its discretion in denying—without an evidentiary hearing—Mr. Martin's claim that, but for his counsel's erroneous advice concerning the deportation consequences of his guilty plea, he would not have pled guilty. App. 6.

In his appellate briefing, Mr. Martin likened his case to *Padilla v. Kentucky*, 559 U.S. 356, 359 (2010), because the crime of conviction rendered his removal "practically inevitable" and "virtually mandatory." He also relied on a post-*Padilla* Ninth Circuit decision, *United States v. Rodriguez-Vega*, 797 F. 3d 781 (9th Cir. 2015), where that court held that virtually identical statements in the plea agreement,

during the plea colloquy, and at sentencing did not conclusively refute the movant's allegation of prejudice, and therefore required an evidentiary hearing.

The Ninth Circuit observed that the statements only reflected that the defendant was advised of the *possibility* of deportation, instead of warning him that deportation was a virtual certainty: "While warning of a dire consequence, the plea agreement characterizes its likelihood only as something that 'may' happen. Warning of the possibility of a dire consequence is no substitute for warning of its virtual certainty." *Rodriguez-Vega*, 797 F. 3d 790. Mr. Martin argued that the Eleventh Circuit should follow *Rodriguez-Vega* and remand for an evidentiary hearing.

In a notice of supplemental authority, Mr. Martin also drew the Eleventh Circuit's attention to a case from the Fourth Circuit, *United States v. Murillo*, 927 F. 3d 808 (4th Cir. 2019). In *Murillo*, as in *Rodriguez-Vega*, the defendant was advised in the plea colloquy that deportation was a "possibility," when in fact the charged offense ultimately subjected him to mandatory deportation. *Murillo*, 927 F. 3d at 812. The Fourth Circuit, like the Ninth Circuit, held that the district court erred in giving "dispositive weight" to language in the plea agreement, language that mirrored the language in the plea agreement in Mr. Martin's case. *Id.* at 812, 816.

Despite the similarity in circumstances between Mr. Martin's case and the cases from the Fourth and Ninth circuits, the Eleventh Circuit affirmed the denial of the motion to vacate. The Eleventh Circuit reasoned that Mr. Martin "did not conclusively plead to an aggravated felony." App. 8.

Although his factual proffer stated that the amount of the fraud loss was "in excess of $200,000," and contained facts that showing that he assisted other members of the conspiracy, the Eleventh Circuit concluded that his total fraud loss could have been less because Martin did not plead guilty to the conspiracy count. App. 10. According to the Eleventh Circuit, defense counsel did not provide deficient performance because he "did not have a crystal ball when Martin entered his plea" and "could not have predicted the district court's fraud loss findings." App. 11.

The Eleventh Circuit acknowledged that, under U.S.S.G. § 1B1.3(a)(1), the district court was required to hold Mr. Martin responsible for the "relevant conduct" of others in calculating the fraud loss, but it declined to consider that argument, finding that it fell outside the scope of the certificate of appealability. App. 10-11. The Eleventh Circuit also affirmed the district court's finding that the provisions of the plea agreement, coupled with Mr. Martin's statements on record during the plea colloquy, refuted his claim of prejudice because he "had sufficient notice of the possibility of removal." App. 12 n.4.

With regard to his request for an evidentiary hearing, the Eleventh Circuit held that Mr. Martin's "allegations of ineffective assistance of contradicted by the record." App. 13. The Eleventh Circuit observed that Mr. Martin stated he wished to plead guilty "regardless of any immigration consequences," including "automatic removal from the United States." App. 13. The Eleventh Circuit also noted that Mr. Martin acknowledged that "no one, including his attorney, could predict his final sentence." App. 13. The Eleventh Circuit held that those statements were "afforded

great weight" and affirmed the district court's denial of Martin's motion to vacate without an evidentiary hearing. App. 14.

This timely petition for writ of certiorari follows.

REASONS FOR GRANTING THE WRIT

This case poses a question of great importance: whether a defendant can establish an ineffective assistance of counsel claim under *Padilla* where he is advised in the plea agreement and during the plea colloquy that he faces the *possibility* of mandatory removal and affirms that he seeks to enter a guilty plea regardless of the immigration consequences. Some circuit courts of appeal, like the Eleventh Circuit below, have adopted a categorical rule that prohibits a defendant from even receiving an evidentiary hearing under these circumstances, regardless of what defense counsel said during attorney-client consultations. Other circuit courts of appeal have rejected such an inflexible rule. This Court should resolve the divergence in the circuit courts on the question presented and hold that the boilerplate language in plea agreement and colloquy at issue here does not categorically prohibit defendants from raising ineffective assistance of counsel claims.

The Sixth Amendment guarantees criminal defendants effective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 685-86 (1984). That guarantee extends to the plea-bargaining process. *See Missouri v. Frye*, 566 U.S. 134, 140-44 (2012); *see also Lafler v. Cooper*, 566 U.S. 156, 162 (2012). Under *Strickland*, a defendant who claims ineffective assistance of counsel must prove (1) "that counsel's

representation fell below an objective standard of reasonableness," *id.* at 687-688, and (2) that any such deficiency was "prejudicial to the defense," *id.* at 692.

This Court recognized in *Padilla* that the "weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation." *Padilla*, 559 U.S. at 367. Given that immigration law can be complex, an attorney need only advise a non-citizen client that "pending criminal charges may carry a risk of adverse immigration consequences" when "the law is not succinct and straightforward." *Id.* at 369. "But when the deportation consequence is truly clear . . . , the duty to give correct advice is equally clear." *Id.* Hence, an attorney fails the first part of the *Strickland* test when he neglects to advise a defendant that pleading guilty to an aggravated-felony conviction—making an alien ineligible for discretionary relief from removal—would render an alien's removal "practically inevitable" and "virtually mandatory." *Id.*

In order to satisfy the second part of the test for ineffective assistance, that the defendant suffered prejudice from counsel's errors, "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). Courts must consider how counsel's provision of inaccurate information affected the "defendant's decisionmaking, which may not turn solely on the likelihood of conviction after trial." *Jae Lee v. United States*, 137 S. Ct. 1958, 1966 (2017).

The lower courts are divided on whether a defendant can bring an ineffective assistance of counsel claim under *Padilla* when a "defendant has been told—multiple

times—that immigration consequences are not mandated but merely a 'possibility,'" and a defendant states he agrees to plead guilty even "if doing so meant mandatory deportation." *See Murillo*, 927 F.3d at 817 n.4. ("Views may diverge among the circuit courts as to the weight to accord these plea provisions.").

The Ninth Circuit held in *Rodriguez-Vega* that such provisions are owed "little weight." *Rodriguez-Vega*, 797 F.3d at 790 n.9. There, as here, the defendant affirmed that she wanted to plead guilty "regardless of any immigration consequences," even if even if the consequence is "automatic removal." *Id.* In the view of the Ninth Circuit, this "hypothetical" statement," which "lacked any reference to the specifics" of the defendant's case, did not cure the prejudice that the defendant suffered when she was told she only faced the "possibility of removal." *Id.*

Similarly, the Eighth Circuit found a defendant's affirmations, made in his plea agreement and at his plea hearing, that he understood his plea "could affect" his immigration status did not conclusively indicate that the defendant would not have pled guilty but for his counsel's incorrect immigration advice. *See Dat v. United States*, 920 F.3d 1192, 1195-96 (8th Cir. 2019).

The Fourth Circuit followed suit in *Murillo*. The plea agreement in *Murillo*, as in this case, "acknowledged that deportation was a possibility and provided that [the defendant] wanted to plead guilty regardless." *Murillo*, 927 F.3d at 812. Throughout the plea colloquy, the defendant was advised that mandatory deportation was a "possibility." *Id.* at 812-13. Notwithstanding these admonitions, the Fourth

Circuit remanded the case for a determination of whether defense counsel provided deficient performance. *Id.* at 815.

In this case, the Eleventh Circuit affirmed the district court's ruling that nearly identical statements conclusively foreclosed Mr. Martin's entitlement to even an evidentiary hearing. App. 13. Specifically, the Eleventh Circuit observed that Mr. Martin "confirmed that he wished to plead guilty 'regardless of any immigration consequences,' including 'automatic removal from the United States.'" App. 13. The Eleventh Circuit also noted that Mr. Martin (1) "fully discussed the charges with his attorney and was satisfied with his counsel's representation"; and (2) "acknowledged signing the factual proffer and confirmed that no one, including his attorney, could predict his final sentence." App. 13-14. In contrast to the Ninth Circuit, which held that such statements should be given "*little weight*," *Rodriguez-Vega*, 797 F.3d at 790 n.9, the Eleventh Circuit opined that they were "afforded *great weight*." App. 14 (citing *Blackledge v. Allison*, 431 U.S. 63, 74 (1977)) (emphasis added).

In doing so, the Eleventh Circuit aligned itself with the Third Circuit, which held in *United States v. Fazio*, 795 F.3d 421, 428-29 (3d Cir. 2015) that a defendant could not establish prejudice because he affirmed in his plea agreement and during the plea colloquy his wish "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." According to the Third Circuit, "any possible error in plea counsel's advice" was "cured by the plea agreement and at the plea colloquy." *Id.* at 428; *see also Williams v. United States*, 858 F.3d 708, 717-18 (1st Cir. 2017)

(affirming the denial of petition for writ of error coram nobis, in part, because plea colloquy informed petitioner that he faced "possibility" of deportation).

This Court should resolve this split in authority and adopt the rule of the Fourth, Eighth and Ninth circuits. Advising a defendant that his guilty plea *may* lead to removal is not the same as advising him of its virtual certainty. As one federal judge put it, "Well, I know every time that I get on an airplane that it could crash, but if you tell me it's going to crash, I'm not getting on." *United States v. Choi*, Case No. 4:08-CV-00386-RH, Transcript, Docket No. 96, at 52 (D.Fla. Sept. 30, 2008) (Hinkle, J.) (quoted in *Rodriguez-Vega*, 797 F.3d at 790).

Furthermore, as the Fourth Circuit recognized in *Murillo*, giving "dispositive weight to boilerplate language from a plea agreement is at odds with *Strickland*'s fact-dependent prejudice analysis." *Murillo,* 927 F.3d at 816 *(citing* Strickland, 466 U.S. at 691-96). Under *Strickland*, courts should "undertake an individualized examination of the proceedings in which the error is alleged." *Id.* "The prejudice analysis in the context of the plea-bargaining process requires a fact-based evaluation of the weight of the evidence," and so a "categorical rule affording dispositive weight to a prior statement is 'ill suited to an inquiry that . . . demands a case-by-case analysis.'" *Id.* (quoting *Jae Lee*, 137 S. Ct. at 1966).

In the view of the Fourth Circuit, 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." *Murillo,* 927 F.3d at 817 (citing *Rodriguez-Vega*, 797 F.3d at 790 n.9). This Court should adopt flexible approach taken by the *Murillo* Court and reject the categorical bar to establishing *Strickland* prejudice that is binding in the Third and Eleventh circuits.

As for the deficient performance prong of *Strickland*, it did not take a "crystal ball" to see that Mr. Martin's guilty plea to the access device fraud count would trigger mandatory deportation. Under § 1101(a)(43)(M)(i), an offense that "involves fraud or deceit in which the loss to the victim or victims exceeds $10,000" is an aggravated felony. In the factual proffer, Mr. Martin stipulated that the victim's "fraud loss related to the scheme was in excess of $200,000." App. 18.

While it is true that the loss amount for purposes of § 1101(a)(43)(M)(i) must be tied to the specific counts covered by the conviction, *Nijhawan v. Holder*, 557 U.S. 29, 35 (2009), the access device fraud count charged Mr. Martin *and three other co-defendants* with using "*one or more*" credit card account numbers over the same time period alleged in the dismissed conspiracy count, *i.e.*, beginning around November 2015 and continuing through August 2016.

The Government's agreement to dismiss the conspiracy count is beside the point. The scheme to defraud alleged in the access device fraud count was co-extensive with the conspiracy count. Mr. Martin could hardly disavow his own statement in the factual proffer that the fraud loss related to that scheme exceeded $200,000. And, given his admission in the factual proffer that he assisted his co-defendants by loading fraudulently purchased items into a vehicle and gave the same

phone number to cashiers that his co-defendants used, it could have hardly come as a surprise that Mr. Martin would be held jointly and severally liable for the actions of his co-defendants under an aiding and abetting theory. App. 4.

Under the plain language of § 1101(a)(43)(M)(i), Mr. Martin's guilty plea, coupled with his factual proffer, made mandatory removal virtually inevitable. By the time of sentencing Mr. Martin's own attorney recognized this fact and acknowledged as much to district court: "We know that he's subject to removal. . . . although I'm not an immigration attorney, the Defendant will be removed after his term of imprisonment." App. 19-20.

If, as defense counsel advised the district court at sentencing, he *knew* that Mr. Martin would be subject to automatic deportation, he should have advised Mr. Martin of this fact *before* counselling him to accept to the guilty plea and agree to the factual proffer.

The Eleventh Circuit's finding that defense counsel provided effective assistance of counsel is irreconcilable with *Padilla*, where this Court held that, "when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear." *Padilla*, 559 U.S. at 369. According to Petitioner's sworn Motion to Vacate, his attorney failed to advise him that deportation was mandatory. Under *Padilla*, that constitutes deficient performance.

This Court need not decide the issue of deficient performance, though, as that question is better resolved with the benefit of an evidentiary hearing. Instead, this Court should resolve the question presented, hold that Mr. Martin's claim of prejudice

was not conclusively refuted by the plea agreement and colloquy, and remand this matter for an evidentiary hearing.

CONCLUSION

This Court grant this petition, issue a writ of certiorari to the Eleventh Circuit Court of Appeals, and remand this matter for further proceedings.

Respectfully submitted on this 2nd day of July, 2020.

s/ Andrew B. Greenlee
Andrew B. Greenlee, Esq.*
Andrew B. Greenlee, P.A.
Attorney for Petitioner
401 E. 1st Street, Unit 261
Sanford, Florida 32772
407-808-6411
andrew@andrewgreenleelaw.com
* *Counsel of Record for Petitioner*