APPENDIX

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[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-12643

D.C. Docket Nos. 0:18-cv-60138-BB; 0:16-cr-60239-BB-4

NIGEL CHRISTOPHER PAUL MARTIN,

Petitioner - Appellant,

versus

UNITED STATES OF AMERICA,

Respondent - Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(February 4, 2020)

Before ROSENBAUM and TJOFLAT, Circuit Judges, and PAULEY,* District Judge.

PAULEY, District Judge:

* Honorable William H. Pauley III, Senior United States District Judge for the Southern District of New York, sitting by designation.

Nigel Christopher Paul Martin, a citizen of Jamaica, appeals from the district court's denial of his habeas petition. On appeal, Martin argues that the district court abused its discretion in denying his claim without holding an evidentiary hearing. Specifically, Martin claims that he would not have pled guilty to access device fraud and aggravated identity theft but for his counsel's erroneous advice concerning the deportation consequences of his plea. We affirm the ruling of the district court.

I. FACTUAL BACKGROUND

In December 2016, a federal grand jury charged 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"). The superseding indictment alleged that 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.

Martin pled guilty to Counts Two and Nine pursuant to a plea agreement. As relevant here, that plea agreement included a provision explaining the potential immigration consequences of the plea. 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." 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."

During his allocution, the district court asked Martin whether he fully discussed the charges with his attorney, whether he was satisfied with his attorney's representation of him, and whether he had read and understood the plea agreement. Martin answered each inquiry in the affirmative. Three times he confirmed that no one made any promises or assurances of any kind, other than what was set forth in the plea agreement. The district court then asked 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.

At the time he executed the plea agreement and pled guilty, Martin also signed a factual proffer. That proffer summarized facts the government would have proven beyond a reasonable doubt had the case gone to trial. Specifically, on March 21, 2016, Martin made an unauthorized purchase of $782 from Home Depot using a Capital One credit card. On March 29, 2016, Martin completed an unauthorized

telephone payment transaction for $369.94 from Home Depot. And on April 18, 2016, Martin assisted co-defendants in loading fraudulently purchased items into a vehicle. The proffer also asserted that the fraud loss resulting from the overall scheme was in excess of $200,000. During his allocution, Martin confirmed that the proffer was correct.

The Pre-Sentence Investigation Report ("PSR") calculated Martin's total offense level for access device fraud to be 13. 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.

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.

At sentencing, the government contended that the PSR properly calculated the fraud loss amount at approximately $200,000 because Martin was jointly and severally liable as an aider and abettor. The district court agreed with the government, overruled Martin's objection, and determined that Martin's 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. Accordingly, Martin's exposure under the Sentencing Guidelines was 36 to 42 months' imprisonment.

The government moved for a downward departure under U.S.S.G. § 5K1.1 because of Martin's substantial assistance. The government also argued that Martin was "the least culpable" in the scheme. The district court granted a downward departure and sentenced Martin principally to 12 months' imprisonment on each count to be served concurrently. The district court deferred fixing the amount of restitution pending a "final determination of the victims' losses." Later, the district court issued an amended judgment of conviction, ordering restitution in the amount of $153,419.13 joint and several with Martin's co-defendants.

In January 2018, 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 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. Martin now claims that he would not have pled guilty had he known that he would be subject to mandatory deportation.

The district court denied Martin's habeas petition without holding an evidentiary hearing. The district court found that Martin's claims of deficient performance were contradicted by his "statements under oath at the plea colloquy."

Further, the district court noted, "even assuming, without deciding," that erroneous representations were made to Martin, he could not establish prejudice. By signing the plea agreement and confirming his statements under oath during the allocution, 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."

We granted a certificate of appeal on the issue of whether the district court abused its discretion in denying—without an evidentiary hearing—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.

II. DISCUSSION

A. Ineffective Assistance of Counsel

We review legal conclusions *de novo* and factual findings for clear error in a § 2255 proceeding. *Osley v. United States*, 751 F.3d 1214, 1222 (11th Cir. 2014). A claim of ineffective assistance of counsel is a mixed question of law and fact reviewed *de novo*. *Id.* We can affirm on any basis supported by the record, regardless of whether the district court decided the case on that basis. *Lucas v. W.W. Grainger, Inc.*, 257 F.3d 1249, 1256 (11th Cir. 2001).

To prevail on an ineffective assistance of counsel claim, a petitioner must show (1) his counsel's performance was deficient and (2) the deficient performance

prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). For deficient performance, a petitioner must demonstrate that his counsel's representation "fell below an objective standard of reasonableness." *Id.* at 688. And for prejudice, a petitioner must establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010) (quoting *Strickland*, 466 U.S. at 694). In the context of a guilty plea, a petitioner must demonstrate 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). "Surmounting *Strickland*'s high bar is never an easy task, and the strong societal interest in finality has special force with respect to convictions based on guilty pleas." *Lee v. United States*, 137 S. Ct. 1958, 1967 (2017) (citations and quotation marks omitted).

Here, the district court assumed, without deciding, that Martin's attorney's performance was deficient. The district court then concluded that Martin could not demonstrate prejudice under the second prong of the *Strickland* test. As discussed below, we decline to assume that counsel's performance was deficient.

In *Padilla*, the Supreme Court held that the Sixth Amendment right to effective assistance of counsel requires counsel to "inform her client whether his plea carries a risk of deportation." *Padilla*, 559 U.S. at 374. Immigration law is

complex, and "[w]hen the law is not succinct and straightforward . . . , a criminal defense attorney need do no more than advise a noncitizen that pending criminal charges may carry a risk of adverse immigration consequences." *Id.* at 369. "But when the deportation consequence is truly clear," counsel has a "duty to give correct advice." *Id.*

The Immigration and Nationality Act provides that "[a]ny alien who is convicted of an aggravated felony at any time after admission is deportable." 8 U.S.C. § 1227(a)(2)(A)(iii). An "aggravated felony" includes "an offense that–involves fraud or deceit in which the loss to the victim or victims exceeds $10,000." 8 U.S.C. § 1101(a)(43)(M)(i). Martin argues that his counsel failed to advise him that deportation was mandatory for an aggravated felony conviction. He also claims that his counsel informed him that the loss amount would be less than $10,000, the threshold under § 1101(a)(43)(M)(i).[1] Therefore, Martin alleges that his counsel performed deficiently.

We disagree. In pleading to access device fraud and aggravated identity theft, Martin did not conclusively plead to an aggravated felony. In contrast to offenses like trafficking in a controlled substance, these convictions, on their face, do not make deportation "presumptively mandatory." *Padilla*, 559 U.S. at 369; *see also* 8

[1] Martin's claim that his counsel assured him that his term of imprisonment would be less than a year does not bear on the aggravated felony question and we need not address it.

U.S.C. § 1227(a)(2)(B)(i) ("Any alien who at any time after admission has been convicted of a violation of . . . any law . . . relating to a controlled substance . . . is deportable."); *Hernandez v. United States*, 778 F.3d 1230, 1233 (11th Cir. 2015). This is not an instance in which "the terms of the relevant immigration statute are succinct, clear, and explicit in defining the removal consequence" for Martin's conviction. *Padilla*, 559 U.S. at 368.

Because of the uncertainty, Martin's counsel was required to advise him only that his pending criminal charges may carry a risk of adverse immigration consequences. Determining what constitutes an aggravated felony can be a difficult task. *See id.* at 378 (Alito, J., concurring) ("Defense counsel who consults a guidebook on whether a particular crime is an 'aggravated felony' will often find that the answer is not 'easily ascertained.'"). This is normally an inquiry reserved for immigration proceedings. In *Nijhawan v. Holder*, the Supreme Court held that immigration courts must apply a "circumstance-specific approach" to determine if a fraud offense involves loss to victims in excess of the $10,000 threshold under § 1101(a)(43)(M)(i). 557 U.S. 29, 38-40 (2009). Such an approach requires immigration courts to "look to the facts and circumstances underlying an offender's conviction." *Id.* at 34. The Supreme Court also indicated that the fraud loss must be "tied to the specific counts covered by the conviction," meaning that it could not be based on dismissed counts or general conduct. *Id.* at 42 (quotation marks

omitted). Accordingly, access device fraud and aggravated identity theft *may* be predicate offenses for aggravated felonies—but they *may not*, depending on the amount of fraud loss and the underlying factual circumstances.

Martin's plea agreement noted 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." At his allocution, Martin acknowledged that he understood the consequences of his plea and the facts set forth in the proffer. Although the proffer noted that the fraud loss related to the overall conspiracy was "in excess of $200,000," Martin did not plead to the conspiracy charge in Count One. Thus, the total fraud loss was not tethered to the conduct Martin took responsibility for at his plea. Rather, the proffer indicated that Martin made unauthorized purchases totaling $1,151.94 in March 2016 and assisted his co-defendants in April 2016.

At sentencing, the district court considered relevant conduct[2] from jointly undertaken criminal activity and found Martin jointly and severally responsible for a loss in excess of $200,000. The government asserted that the fraud loss stemmed

[2] Under the Sentencing Guidelines, relevant conduct includes "all acts and omissions committed [or] aided [and] abetted . . . by the defendant . . . that occurred during the commission of the offense of conviction . . . ," as well as, "in the case of a jointly undertaken criminal activity[,] . . . all acts and omissions of others that were– (i) within the scope of the jointly undertaken criminal activity, (ii) in furtherance of that criminal activity, and (iii) reasonably foreseeable in connection with that criminal activity . . . ." U.S.S.G. § 1B1.3(a)(1)(A), (B).

from conduct between January and June 2016. This was considerably longer than the time frame Martin acknowledged at his plea. The essence of Martin's argument in this respect is that his plea was involuntary because had he known that the district court would consider other relevant conduct in calculating the fraud loss, thus, in his view, making it more likely his conviction would ultimately be found to be an aggravated felony, he would not have pled guilty. But the scope of our review is limited to the issue specified in the certificate of appeal—that is, whether the district court abused its discretion in denying 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. *Murray v. United States*, 145 F.3d 1249, 1250-51 (11th Cir. 1998).

We cannot say that Martin's counsel's conduct "falls below the wide range of competence demanded of lawyers in criminal cases." *Osley*, 751 F.3d at 1222. Martin's counsel did not have a crystal ball when Martin entered his plea. *See Payne v. United States*, 566 F.3d 1276, 1277 (11th Cir. 2009) ("In evaluating an attorney's conduct, a court must avoid 'the distorting effects of hindsight' and must 'evaluate the conduct from counsel's perspective at the time.'" (quoting *Strickland*, 466 U.S. at 689)). Martin's counsel could not have predicted the district court's fraud loss findings. He objected to the findings in the PSR and contested the loss amount at sentencing. Martin may also have had another opportunity "to contest the amount

of loss . . . at the deportation hearing itself." *Nijhawan*, 557 U.S. at 42.[3] His counsel could not have predicted how the immigration court would treat that question.

Therefore, we find that Martin's counsel's performance was not deficient. And because we find that Martin has not shown deficient performance, we need not analyze the prejudice prong of the *Strickland* test. *Strickland*, 466 U.S. at 697 ("[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one.").[4] Consequently, Martin has failed to satisfy his claim for ineffective assistance of counsel.

B. Request for an Evidentiary Hearing

We review the district court's denial of an evidentiary hearing in a § 2255 proceeding for abuse of discretion. *Winthrop-Redin v. United States*, 767 F.3d 1210, 1215 (11th Cir. 2014). "A district court abuses its discretion if it applies an incorrect

[3] We also note that Martin could have timely appealed from the initial judgment of conviction or the amended judgment fixing the amount of restitution. *See United States v. Muzio*, 757 F.3d 1243, 1250 n.9 (11th Cir. 2014). He did neither. A direct appeal—while not guaranteed success—would have been a way to challenge the district court's restitution determination.

[4] Nevertheless, we agree with the district court that Martin has not shown prejudice by demonstrating a "reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill*, 474 U.S. at 59. Martin's plea agreement and sworn statements at his allocution establish that he understood pleading guilty to the charged offenses carried a possibility of deportation. And he affirmatively represented that he wished to plead guilty "regardless of any immigration consequences." Thus, Martin had sufficient notice of the possibility of removal. Moreover, the government's application for a downward departure under U.S.S.G. § 5K1.1 speaks to the efforts by Martin and his attorney to minimize Martin's sentencing exposure. Without "contemporaneous evidence to substantiate" Martin's claims, we will 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." *Lee*, 137 S. Ct. at 1967.

legal standard, applies the law in an unreasonable or incorrect manner, follows improper procedures in making a determination, or makes findings of fact that are clearly erroneous." *Citizens for Police Accountability Political Comm. v. Browning*, 572 F.3d 1213, 1216-17 (11th Cir. 2009). When a petitioner files a § 2255 motion, "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall . . . grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto." 28 U.S.C. § 2255(b).

"A petitioner is entitled to an evidentiary hearing if he 'alleges facts that, if true, would entitle him to relief.'" *Winthrop-Redin*, 767 F.3d at 1216 (quoting *Aron v. United States*, 291 F.3d 708, 715 (11th Cir. 2002)). However, an evidentiary hearing is not required "if the allegations are 'patently frivolous,' 'based upon unsupported generalizations,' or 'affirmatively contradicted by the record.'" *Id.* (quoting *Holmes v. United States*, 876 F.2d 1545, 1553 (11th Cir. 1989)).

Here, Martin's allegations of ineffective assistance are contradicted by the record. In his plea agreement, Martin confirmed that he wished to plead guilty "regardless of any immigration consequences," including "automatic removal from the United States." At his plea, he affirmed that he fully discussed the charges with his attorney and was satisfied with his counsel's representation. He also acknowledged signing the factual proffer and confirmed that no one, including his

attorney, could predict his final sentence. These statements, under oath, are afforded great weight. *See Blackledge v. Allison*, 431 U.S. 63, 74 (1977) ("Solemn declarations in open court carry a strong presumption of verity."). Thus, the district court did not abuse its discretion in denying Martin's request for an evidentiary hearing.

III. CONCLUSION

We affirm the district court's dismissal of Martin's petition.

AFFIRMED.

UNITED STATES COURT OF APPEALS
For the Eleventh Circuit

No. 18-12643

District Court Docket Nos.
0:18-cv-60138-BB; 0:16-cr-60239-BB-4

NIGEL CHRISTOPHER PAUL MARTIN,

Petitioner - Appellant,

versus

UNITED STATES OF AMERICA,

Respondent - Appellee.

Appeal from the United States District Court for the
Southern District of Florida

JUDGMENT

It is hereby ordered, adjudged, and decreed that the opinion issued on this date in this appeal is entered as the judgment of this Court.

Entered: February 04, 2020
For the Court: DAVID J. SMITH, Clerk of Court
By: Jeff R. Patch

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 18-cv-60138-BLOOM/Valle

NIGEL CHRISTOPHER MARTIN,

Movant,

v.

UNITED STATES OF AMERICA,

Respondent.

_____/

ORDER

THIS CAUSE is before the Court upon the Motion to Vacate Pursuant to 28 U.S.C. Section 2255, ECF No. [1] ("Motion"), filed on January 23, 2018 by Movant Nigel Christopher Martin ("Movant"). On February 28, 2018, the Court entered an order requiring the Government to show cause why the Motion should not be granted. ECF No. [6]. The Government filed its response, ECF NO. [7] ("Response"), on March 28, 2018, and Movant filed a reply on April 6, 2018, ECF No. [9] ("Reply"). On April 20, 2018, Movant filed a Motion for Expedited Ruling on Post-Conviction Motion, ECF No. [10], advising the Court that Movant is "days away from being deported to his native Jamaica" and "request[ing] that the Court make an expedited ruling on his case before his actual deportation to Jamaica." *Id.* ¶¶ 4–5. The Court has reviewed the Motion, the memoranda in support and opposition, the record, and is otherwise fully advised. For the reasons set forth below, the Motion is denied.

I. FACTUAL BACKGROUND

Movant is a 26 year old native of Jamaica who engaged in a scheme to make unauthorized credit card purchases at Home Depot through the store's telephone transaction system. ECF No. [1] ¶ 8; *see also* Case No. 16-cr-60238, ECF No. [68] ("Factual Proffer").

Based on this conduct, on December 6, 2017, Movant was charged, along with three other co-defendants, by a superseding indictment on three counts: Count 1, Conspiracy to Commit Device Fraud under 18 U.S.C. § 1029(b)(2); Count 2, Access Device Fraud under 18 U.S.C. 1029(a)(2); and Count 9, Aggravated Identify Theft under 18, U.S.C. § 1028(A)(a)(l). ECF No. [1] ¶ 1; *see also* Case No. 16-cr-60238, ECF No. [37] ("Superseding Indictment").

On January 1, 2017, Movant entered into a plea agreement, Case No. 16-cr-60238, ECF No. [69] ("Plea Agreement"). Pursuant to the Plea Agreement, Movant agreed to plead guilty to Counts 2 and 9, and the Government agreed to seek dismissal of Count 1 after sentencing. *Id.* ¶¶ 1–2. Paragraph 10 of the Plea Agreement stated as follows:

> The defendant is aware that the sentence has not yet been determined by the Court. The defendant also is aware that any estimate of the probable sentencing range or sentence that the defendant may receive, whether that estimate comes from the defendant's attorney, this Office, or the probation office, is ***a prediction, not a promise,*** and is not binding on this Office, the probation office or the Court.

Id. ¶ 10 (emphasis added). Regarding the potential immigration consequences of Movant's plea, Paragraph 16 of the Plea Agreement states:

> 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 defendant is pleading guilty.*** Removal and other immigration consequences are the subject of a separate proceeding, however, and ***defendant understands 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.*** 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.***

Id. at ¶ 16 (emphasis added). At the plea hearing, Movant confirmed under oath that he had read and understood the Plea Agreement, and that his attorney, Mr. Gibson, had answered all of his questions regarding the Plea Agreement. *See* Case No. 16-cr-60238, ECF No. [101] ("Plea Tr.") at 4, 21–22. Movant also confirmed under oath that he had read and understood the Factual Proffer, and he admitted that the facts contained in the Factual Proffer were true, including that Capital One's fraud loss related to the scheme was in excess of $200,000. *See* Case No. 16-cr-60238, ECF No. [68] at 2–3; [101] at 21–22; [185] at 19.

During the plea colloquy the Court confirmed that Movant had received no assurances related to his plea beyond what was set forth in the Plea Agreement:

> THE COURT: Has anyone made any promises or assurances of any kind, other than what is set forth in the Plea Agreement, to persuade you to enter into it?
>
> THE DEFENDANT: No, Your Honor.

Id. at 4–5. Upon entry of his guilty plea as to Count 2, the Court a second time asked Movant: "Has anyone made any promises or assurances to you, other than what's set forth in the Plea Agreement, to persuade you to plead guilty?" *Id.* at 6. Movant responded "No, Your Honor." Again, upon entry of his guilty plea as to Count 9, the Court for a third time asked Movant: "Has anyone made any promises or assurances to you, other than what's set forth in the Plea Agreement, to persuade you to plead guilty?" *Id.* at 8. Movant again replied in the negative. *Id.*

The Court then conducted a colloquy with Movant about the potential immigration consequences of his plea:

> THE COURT: Have you and Mr. Gibson 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.

Plea Tr. at 9–10. At the conclusion of the plea hearing, the Court deferred sentencing until March 9, 2018. *Id.* at 24.

The United States Probation Office issued a pre-sentence report on February 9, 2017. Case No. 16-cr-60238, ECF No. [74] ("PSR"). On March 2, 2017, Movant, through counsel, objected to the loss amounts contained in the PSR at paragraphs 26 and 34, stating that "Defendant is responsible for $1,000.00 not $210,676.69." Case No. 16-cr-60238, ECF No. [100]. Prior to sentencing, both the Government and Movant moved the Court for a downward departure. Case No. 16-cr-60238, ECF Nos. [99] and [102].

On March 9, 2017, the Court conducted Movant's sentencing hearing. Movant, through counsel, made several arguments in mitigation of his sentence, including Movant's strong family ties and personal difficulties related to his physical disability as a child, as well as Movant's minor role compared to his co-defendants in the scheme. Case No. 16-cr-60238, ECF No. [185] ("Sentencing Tr."). Counsel also argued that the loss amount should only reflect transactions that Movant directly took part in, not the loss amount for the overall scheme. *Id.*

During sentencing, there were several references to Movant's immigration status and likely removal after serving his sentence. First, while making arguments in mitigation of his sentence, counsel for Movant acknowledged that "[w]e know that he's subject to removal." Sentencing Tr. at 10. Counsel further stated when advocating for a sentence lower than eighteen months as recommended by the Government that: "It's not a life-ending – certainly the message

has been received loud and clear. You can give him six minutes. He's not coming back." *Id.* at 39. During argument prior to the Court's denial of Movant's request for self-surrender, the Government noted "although I'm not an immigration attorney, the Defendant will be removed after his term of imprisonment . . . [and] has every incentive to just leave now." *Id.* at 46. Movant's father also spoke on his behalf at sentencing, asking the Court to "send him home" to Jamaica. *Id.* at 30. At the conclusion of the sentencing hearing, the Court varied downward and imposed a term of incarceration of twelve months. *Id.* at 42.

II. THE MOTION TO VACATE

Movant now moves to vacate his sentence pursuant to 28 U.S.C. § 2255. In his motion, Movant argues that Mr. Gibson provided ineffective assistance of counsel because "he failed to advise Movant that he faced mandatory deportation in entering a guilty plea to an aggravated felony." ECF No. [1] at 3. Movant claims that he would have never pleaded guilty had he known he would be subject to mandatory deportation. *Id.* Specifically, Movant argues that Mr. Gibson provided three assurances to Movant that convinced him to plead guilty. First Movant argues that "Attorney Gibson assured the defendant that the dollar amount that he would be held responsible for was for his personal conduct which was far less than $10,000.00." Second, Movant argues that Mr. Gibson told him that he would not be subject to deportation as a result of his guilty plea. *Id.* at 4, 5–6. Third, Movant argues that Mr. Gibson also "assured" Movant that he would be sentenced to less than one year of incarceration. *Id.* at 5, 9. The Government opposes the Motion, arguing principally that Movant's arguments in his Motion contradict the record, including the Plea Agreement, the Factual Proffer, and the plea colloquy. *See* ECF No. [7] at 5–7.

III. LEGAL STANDARD

A prisoner is entitled to relief under 28 U.S.C. § 2255 if the court imposed a sentence that (1) violated the Constitution or laws of the United States, (2) exceeded its jurisdiction, (3) exceeded the maximum authorized by law, or (4) is otherwise subject to collateral attack. *See* 28 U.S.C. § 2255(a); *McKay v. United States*, 657 F.3d 1190, 1194 n.8 (11th Cir. 2011). "Relief under 28 U.S.C. § 2255 is reserved for transgressions of constitutional rights and for that narrow compass of other injury that could not have been raised in direct appeal and would, if condoned, result in a complete miscarriage of justice." *Lynn v. United States*, 365 F.3d 1225, 1232 (11th Cir. 2004) (citations and internal quotation marks omitted).

Ineffective assistance of counsel claims are generally not cognizable on direct appeal and are properly raised by a § 2255 motion, even if they may have been brought on direct appeal. *Massaro v. United States*, 538 U.S. 500, 503 (2003); *see also United States v. Franklin*, 694 F.3d 1, 8 (11th Cir. 2012); *United States v. Campo*, 840 F.3d 1249, 1257 n.5 (11th Cir. 2016). To demonstrate ineffective assistance of counsel, a § 2255 movant must show that (1) counsel's performance was deficient, falling below an objective standard of reasonableness, and (2) the movant suffered prejudice as a result of the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984). *Strickland*'s two part test also applies to guilty pleas. *Lafler v. Cooper*, 566 U.S. 156, 162–63 (2012) (citing *Hill v. Lockhart*, 474 U.S. 52, 58 (1985)).

On the first prong of the *Strickland* test, the movant must demonstrate that "counsel's representation fell below an objective standard of reasonableness." *Stickland*, 466 U.S. at 688–89. Thus, to be entitled to relief, a movant must "prove serious derelictions on the part of counsel sufficient to show that his plea was not, after all, a knowing and intelligent act." *Downs-Morgan v. United States*, 765 F.2d 1534, 1539 (11th Cir. 1985) (quoting *McMann v. Richardson*,

397 U.S. 759 (1970)). On the second prong, a movant "can show prejudice by demonstrating 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); *see also Carver v. United States*, No. 14-15769, 2018 WL 388620, at *3 (11th Cir. Jan. 12, 2018). If a defendant fails to show either deficient performance or prejudice, the Court need not address the other prong. *Strickland*, 466 U.S. at 697.

A defendant's statements under oath at a plea hearing give rise to a presumption that the plea is constitutionally adequate. *Downs-Morgan*, 765 F.2d at 1541 n.14 (citing *Blackledge v. Allison*, 431 U.S. 63, 74–75 (1977)). Thus, even when a defendant argues that he received promises or assurances from an attorney which induced him to plead guilty and later proved to be erroneous, a defendant's statements under oath at a plea colloquy that he received no such promises or assurances cures the potential prejudice. *Stillwell v. United States*, 709 F. App'x 585, 590 (11th Cir. 2017); *see also Lee*, 137 S. Ct. 1698 n.4 (noting that "[s]everal courts have noted that a judge's warnings at a plea colloquy may undermine a claim that the defendant was prejudiced by his attorney's misadvice").

On a motion under § 2255, the Court may hold an evidentiary hearing, but need not do so if "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255(b); *see also Rosin v. United States*, 786 F.3d 873, 879 (11th Cir. 2015) (finding no abuse of discretion when district court declined to hold a hearing when movant's allegations of prejudice were affirmatively contradicted by the record); *Stillwell*, 709 F. App'x at 590 ("[T]he district court did not abuse its discretion by declining to hold an evidentiary hearing because . . . Stillwell's contention that he would not have pled guilty but for

his counsel's advice is contradicted by the record, namely the plea agreement and the plea colloquy.").

IV. ANALYSIS

Movant claims that he received three false assurances from Mr. Gibson which were not contained in the Plea Agreement that convinced him to plead guilty. First, Movant argues that Mr. Gibson assured him that the loss amount to was less than $10,000.00. Second, Movant claims that Mr. Gibson assured him that Movant would not be subject to removal. And third, Movant claims that Mr. Gibson assured him that he would not be sentenced to more than a year of incarceration. These claims are directly contradicted by Movant's statements under oath at the plea colloquy. At the plea hearing, Movant stated three times that he did not receive any assurances beyond what was contained in the Plea Agreement. Moreover, Movant averred that he read and understood the Plea Agreement and Factual Proffer, documents which specifically stated that Capital One had produced records demonstrating that the loss amount was over $200,000.00, that Movant could be subject to removal based on his plea, and that no one, including his attorney, could predict the exact sentence he would receive. *See* Case No. 16-cr-60238, ECF No. [68] at 2–3; [101] at 21–22; [185] at 19.

The Court credits Movant's statements under oath at the plea hearing as true. *See Blackledge v. Allison*, 431 U.S. 63, 74 (1977) ("Solemn declarations in open court carry a strong presumption of verity."); *United States v. Medlock*, 12 F.3d 185, 187 (11th Cir. 1994) ("There is a strong presumption that the statements made during the colloquy are true."). Thus, even assuming, without deciding, that Mr. Gibson did make these three assurances, Movant cannot establish prejudice because he confirmed, by signing the Plea Agreement and during the colloquy with the Court, that he 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. *Stillwell*, 709 F. App'x at 590 (11th Cir. 2017) ("Stillwell cannot establish prejudice because both the plea agreement and the district court informed him that he could not rely on counsel's estimated sentence, that the court retained all sentencing discretion, and that the conduct in Counts 2 and 3 would be considered at sentencing."). Because the record conclusively shows the Movant cannot demonstrate prejudice, the Court finds that no hearing is required and the Motion must be denied.

Movant cites to the Supreme Court's decision in *Lee v. United States*, 137 S. Ct. 1958 (2017), in support of his Motion. But the "unusual circumstances" (*id.* at 1967) of *Lee* are distinguishable. In contrast to Movant's responses during his plea hearing, in *Lee* the defendant stated on the record that any immigration consequences *would* affect his decision to plead guilty. *Id.* at 1968. Specifically,

> [w]hen the judge warned him that a conviction "could result in your being deported," and asked "[d]oes that at all affect your decision about whether you want to plead guilty or not," Lee answered "Yes, Your Honor." When the judge inquired "[h]ow does it affect your decision," Lee responded "I don't understand," and turned to his attorney for advice. Only when Lee's counsel assured him that the judge's statement was a "standard warning" was Lee willing to proceed to plead guilty.

Id. (internal record citations omitted). As noted above, Movant here made no such statement on the record. Unlike in *Lee*, there is no contemporaneous, "substantial[,] and uncontroverted" evidence that Movant would not have entered his guilty plea but for the claimed assurances. The Court " 'should not upset a plea solely because of *post hoc* assertions from a defendant,' " *Dodd v. United States*, 709 F. App'x 593, 595 (11th Cir. 2017) (quoting *Lee*, 137 S. Ct. at 1967), and the Court declines to do so here.

V. CONCLUSION

Accordingly it is **ORDERED AND ADJUDGED** as follows:

1. Defendant's Motion, **ECF No. [1]**, is **DENIED WITHOUT PREJUDICE;**
2. All pending motions are **DENIED AS MOOT**; and
3. The Clerk shall **CLOSE** this case.

DONE AND ORDERED in Chambers at Miami, Florida, this 23rd day of April, 2018.

BETH BLOOM
UNITED STATES DISTRICT JUDGE

Copies to:

Counsel of Record