No. _____

SUPREME COURT OF THE UNITED STATES

DILANG DAT,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI
FROM THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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I. Question Presented

Does trial counsel advising a criminal defendant that he "could" be deported for entering a guilty plea breach trial counsel's duty to give "clear and correct" advice to a criminal defendant regarding deportation consequences of conviction as outlined in *Padilla v. United States*, and therefore place counsel's performance below the standard of reasonableness as laid out in the *Strickland* test?

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IV. Petition for Writ of Certiorari

Dilang Dat, by and through Terrance O. Waite, counsel of record appointed under the Criminal Justice Act, U.S.C. §3006A, respectfully petitions this Court for a writ of certiorari to review the judgment of the Eighth Circuit Court of Appeals.

V. Opinions Below

The decision by the Eighth Circuit Court of Appeals denying Mr. Dat's direct appeal is reported as Dat v. United States 983 F.3d 1045 (8th Cir. 2020). The Eighth Circuit denied Mr. Dat's petition for rehearing on March 15, 2021. That order is attached at the Appendix ("App.").

VI. Jurisdiction

Mr. Dat's petition for rehearing to the Eighth Circuit Court of Appeals was denied on March 15, 2021. Mr. Dat invokes this Court's jurisdiction under 28 U.S.C. §1257, having timely filed this petition under the temporarily extended time of one hundred fifty days of the Eighth Circuit's judgment.

VII. Constitutional Provisions Involved

United States Constitution, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation to be confronted with the witnesses against him; to have the compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

VIII. Statement of the Case

In evaluating whether a claim of ineffective assistance of counsel in a *habeas corpus* proceeding under U.S.C. § 2255 may be proven, this Court has held that a petitioner must show (1) that counsel's performance fell below an objective standard of reasonableness, and (2) a reasonable probability that, but for that deficient performance, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984).

The right to effective assistance of counsel extends to plea negotiations. *Allen v. United States*, 854 F.3d 428, 432 (8th Cir. 2017). This Court has held that in criminal defense cases, "when the deportation consequence is clear, the duty to give correct advice is equally clear." *Padilla v. United States*, 559 U.S. 356, 369 (2010).

This case presents the question of whether the guidance laid out by this Court in *Padilla* is being adhered to by lower courts, specifically the Eighth Circuit Court of Appeals, and whether this Court should clarify its meaning of "correct advice" under *Padilla* as applies to meeting the objective standard of reasonableness set by the *Strickland* test.

1. The plea deal

In March 2016, trial counsel entered her appearance on behalf of Mr. Dat, who was facing charges following alleged involvement in the armed robberies of a GameStop and a Kentucky Fried Chicken in Omaha, Nebraska, in July 2014, along with three other men. Trial counsel stated in testimony that this was her first federal court appearance and she planned to have her mentor, Steve Lefler, join her on the

case. However, Mr. Lefler never met Mr. Dat nor entered an appearance on his behalf at any time.

Five days after entering her appearance, trial counsel appeared with Mr. Dat on a motion which the trial Court summarily denied because it was in direct violation of both the local rules and the Progression Order and contained no brief in support of the motion. Later that same day, Mr. Dat took the advice of trial counsel and accepted a plea agreement, pleading guilty to a single count of violating the Hobbs Act for the Kentucky Fried Chicken robbery and was sentenced to 78 months of incarceration.

Mr. Dat had continually maintained his innocence throughout the proceedings, and had rejected two prior plea agreements because they contained language specifying his imminent deportation back to South Sudan. It was only later, when Mr. Dat's Lawful Permanent Resident Renewal application was denied, that he first realized the plea deal he had accepted upon advice of trial counsel was preventing him from completing the renewal. Upon this realization, Mr. Dat filed a Motion to Vacate under 28 U.S.C. § 2255, which was summarily denied by the District Court. Mr. Dat is gravely worried about the loss of his Legal Permanent Resident status, as well as the potential of future removal and deportation back to South Sudan, where, because of his tribal affiliation, he faces an almost certain death upon return.

2. Direct appeal

On direct appeal, Mr. Dat renewed his argument that his Sixth Amendment rights had been violated due to ineffective assistance of his Criminal Justice Act-appointed trial counsel. He argued that this ineffectiveness was demonstrated in part by

counsel advising him to take a plea deal without clearly enumerating to him the immigration consequences of such an action, despite her knowledge that Mr. Dat sought desperately to avoid removal and deportation, and the fact that such consequences should have been clear to her or any other attorney.

In a published opinion, the Eighth Circuit Court of Appeals reasoned that Mr. Dat could not demonstrate that his trial counsel acted unreasonably as she was "not required to tell Dat that his deportation was virtually certain." The Court found that because Mr. Dat's trial counsel told him that immigration consequences were possible, and "could" take place, the Court could not find that counsel acted unreasonably. Because of this finding, the Court declined to further continue with the *Strickland* test and did not address the issue of prejudice.

IX. Reasons for Granting the Writ

1. To uphold this Court's precedent that clear and correct advice must be given by a defense attorney to a criminal defendant regarding immigration consequences of his conviction for an attorney's performance to not fall below the *Strickland* standard of reasonableness

The right to counsel is guaranteed by the Sixth Amendment. *Steele v. United States*, 518 F.3d 986, 988 (2008). This right ensures the fairness and legitimacy of the American adversarial process. *Kimmelman v. Morrison*, 477 U.S. 365, 374, 206 S.Ct. 2674 (1986).

Strickland v. Washington laid out a two-pronged test that a defendant must satisfy in order to show ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052 (1984). To satisfy the *Strickland* test, the defendant must show that counsel made errors so serious that counsel was not functioning as

the "counsel" guaranteed the defendant by the Sixth Amendment, thus rendering counsel's performance deficient, and that this deficient performance by counsel prejudiced the defendant by being so serious as to deprive the defendant of a fair trial with a reliable result. *Driscoll v. Delo*, 71 F.3d 701, 706 (8th Cir. 1995) (quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984)).

Courts have found that under the Sixth Amendment's right to counsel, "criminal defense attorneys *have a duty to inform clients* about the possible immigration consequences of pleading guilty." *Barajas v. United States*, 877 F.3d 378, 380 (8th Cir. 2017) (citing *Padilla v. United States*, 559 U.S. 356, 374 (2010) (emphasis added)). More importantly, "*When the deportation consequence is clear, the duty to give correct advice is equally clear*." *Padilla*, 559 U.S. at 369 (emphasis added).

At trial, Mr. Dat testified that trial counsel told him that he would not be deported because of his status as a Legal Permanent Resident in the United States. However, Mr. Dat was charged with and pleaded guilty to an aggravated felony, which is defined as a crime of violence. 8 U.S.C. § 1101(43)(F); *United States v. House*, 825 F.3d 381, 387 (8th Cir. 2016). Aggravated felony convictions *require mandatory deportation*. 8 U.S.C. § 1229b(a)(3) (emphasis not in original).

Mandatory deportation for defendants convicted of aggravated felonies are "succinct, clear, and explicit" under the Immigration and Nationality Act. *Padilla*, 559 U.S. at 368. "Any alien who is convicted of an aggravated felony at any time after admission is deportable." 8 U.S.C. § 1227(a)(2)(A)(iii). A defendant "convicted of any aggravated felony" is *not eligible for cancellation of removal*. 8 U.S.C. § 1229b(a)(3)

(emphasis added). This type of conviction subjects *any* non-citizen immigrant, including Lawful Permanent Residents such as Mr. Dat, to *mandatory* removal. *Chaidez v. United States*, 568 U.S. 342, 345 (2013).

In Mr. Dat's case, as in *Padilla*, trial counsel provided "false assurances that his conviction would not result in his removal from this country." *Padilla*, 559 U.S. at 368. During the evidentiary hearing, trial counsel stated herself that her advice to Mr. Dat was that he "*could* face immigration ramifications which *could* result in deportation." *Padilla* lays out that "*when the deportation consequence is clear, the duty to give correct advice is equally clear*." *Id.* at 369.

This Court has held that "it is quintessentially the duty of counsel to provide her client with available advice about an issue like deportation and the failure to do so 'clearly satisfies the first prong of the *Strickland* analysis.'" *Id.* at 371 (quoting *Hill v. Lockhart*, 474 U.S. 52, 62 (1985)). As in *Padilla*, "[t]his is not a hard case in which to find deficiency: The consequences of [Mr. Dat's] plea could easily be determined from reading the removal statute, his deportation was presumptively mandatory, and his counsel's advice was incorrect." *Padilla* at 368-69.

"A criminal defendant who faces almost certain deportation is entitled to know more than [that] it is possible that a guilty plea could [result in his] removal; he is entitled to know that it is a virtual certainty." *United States v. Bonilla*, 637 F.3d 980, 984 (9th Cir. 2011). In a case similar to Mr. Dat's, in which a defendant's conviction rendered her removal "practically inevitable," the Ninth Circuit found that counsel

was required to not only advise the defendant that removal was possible, but that it was virtually certain. *Id.*

This Court has found that a clear enumeration of a defendant's rights is required in order to avoid violating those rights. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). The equivocal statements that trial counsel made – that Mr. Dat "could" face deportation consequences – show that trial counsel was not competent in providing what should have been clear and easily accessible evidence regarding Mr. Dat's mandatory removal, satisfying the first prong of *Strickland*. It is not enough for Mr. Dat to have been informed of a mere *possibility* of deportation or other immigration consequences stemming from a plea agreement. "It is counsel's duty, not the court's, to warn of certain immigration consequences, and counsel's failure [to do so] cannot be saved by a plea colloquy." *United States v. Urias Marrufo*, 744 F.3d 361, 369 (5th Cir. 2014).

Trial counsel had a duty to warn Mr. Dat that his deportation was mandatory, not merely possible. To quote Judge Robert L. Hinkle, "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*, 4:08-CV-00386-RH, Transcript, Docket No. 96, at 52 (D. Fla. Sept. 30, 2008). There is a difference between "will" and "could," and trial counsel did not warn Mr. Dat clearly of the imminence of such consequences.

In order to satisfy the second prong of the *Strickland* test, a defendant must show "that there is 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 "look to contemporaneous evidence to substantiate a defendant's expressed preferences." *Jae Lee v. United States*, 137 S.Ct. 1958, 1967 (2017). This prong is satisfied by the contemporaneous evidence that Mr. Dat earlier refused two prior plea offers because they featured explicit language about imminent deportation, showing his clear intent to avoid removal.

"[P]reserving 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). "It is often reasonable for a non-citizen facing nearly automatic removal to turn down a plea and go to trial risking a longer prison term, rather than to plead guilty to an offense rendering her removal virtually certain." *United States v. Rodriguez-Vega*, 797 F.3d 781, 788-89 (9th Cir. 2015). The Ninth Circuit held that prejudice exists where a non-citizen placed a "particular emphasis" on the immigration consequences when deciding whether or not to plead guilty. *United States v. Kwan*, 407 F.3d 1005, 1017-18 (9th Cir. 2005). Mr. Dat prioritized remaining in the United States throughout his proceedings, and testified that he only entered into the final plea agreement because it contained "no stipulated removal." All family members of Mr. Dat's who remained in South Sudan or the surrounding region are either dead or presumed dead as a result of ongoing tribal conflict and genocide. Trial counsel allowed Mr. Dat to think that it was possible for him to plead guilty and avoid removal, when it is clear that it was not. This prejudiced Mr. Dat, who has since lost his Legal Permanent Resident Status, and who insists that he

would have rejected the plea offer and continued to trial were it not for trial counsel's advice.

X. Conclusion

For the foregoing reasons, Mr. Dat respectfully requests that this Court issue a writ of certiorari to review the judgment of the Eighth Circuit Court of Appeals.

Respectfully submitted,

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