

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

ANTONIO RENE MARTINEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**On Petition For A Writ of *Certiorari* To The United States Court of Appeals
for the Ninth Circuit**

**APPENDIX (VOLUME II) – PRESENTED SEPARATELY UNDER S. CT.
R. 14.1(i)**

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FILED

SEP 11 2017

CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY
DEPUTY CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

-oOo-

UNITED STATES OF AMERICA

Plaintiff/Respondent,

v.

RENE ANTONIO MARTINEZ

Defendant/Petitioner.

Case No. 1:14-CR-158-LJO-SKO-1

MOTION TO VACATE, SET ASIDE, OR
CORRECT SENTENCE PURSUANT TO
28 U.S.C. § 2255, AND FOR THE
APPOINTMENT OF COUNSEL PURSUANT
TO THE CRIMINAL JUSTICE ACT,
18 U.S.C. § 3006A, et seq.

CERTIFICATION: this motion is timely filed.

COMES NOW, the defendant, RENE ANTONIO MARTINEZ, proceeding pro se, and moves the Honorable Court for an Order pursuant to 28 U.S.C. § 2255, vacating the Judgment of Conviction and Sentence entered in the above captioned matter.

The interest of justice so requiring, the Defendant also prays that the court appoint him learned counsel pursuant to the Criminal Justice Act, 18 U.S.C. § 3006A, et seq. to further further develop and perfect the issues raised herein, and to supplement this motion accordingly.

This motion is based on the following Memorandum of Law and Facts, the papers and records on file in this matter, and on any additional briefing, argument, or evidence the court entertains.

DATED: September 1, 2017.

Respectfully Submitted,

Rene Martinez
Rene Antonio Martinez
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MEMORANDUM OF LAW & FACTS

I. FACTS

Defendant Rene Antonio Martinez pled guilty without the benefit of a plea agreement to one count of Illegal Reentry after Deportation, in violation of 8 U.S.C. § 1326(a). On September 2, 2016 this court sentenced him to 41 months imprisonment. (Doc. #24). In a letter to the court which was filed in October 2016, and a "Motion for Reconsideration" filed March 2, 2017, Defendant proffered that he was offered a fast-track plea agreement for a term of 24 months imprisonment, (Doc. ## 29 & 30), and that his attorney was ineffective for not allowing him to accept that plea agreement- despite his repeated request to do so. Id. Accordingly, in his March 2, 2017 motion for reconsideration, the defendant requested that the court reconsider his 41 months sentence and sentence him in accordance with the plea agreement offer of 24 months (Doc. #30 at 1).

This court construed Defendant's filings as a § 2255 motion attacking his sentence. Accordingly, in an Order entered on April 24, 2017, the court cautioned defendant that it would construe his filings as a § 2255 motion attacking his sentence, and dangers involved if the court construed them as such. The court provided the defendant with the opportunity to withdraw his filings, and gave him until May 26, 2017 to do so. See April 24, 2017 Order of the court (Exhibit 1). In a "Motion to Withdraw" filed May 16, 2017, defendant subsequently withdrew his prior filings, (Exhibit 2). He now files this instant motion to vacate his conviction and sentence pursuant to 28 U.S.C. § 2255. And request the appointment of counsel to assist him in perfecting the numerous issues raised herein. He also request that the court grant him leave to supplement this motion accordingly.

II. APPLICABLE LAW

A prisoner may test the legality of his conviction and/or sentence by filing a petition pursuant to 28 U.S.C. § 2255 in the district court which sentenced him. *United States v. Condit*, 612 F.2d 1096, 1097 (10th Cir. 1980). The purpose of Section 2255 is to provide a method for determining the validity of a judgment by the court which imposed the sentence. *Johnson v. Taylor*, 347 F.2d 365, 366 (10th Cir. 1965). See also *Lorentsen v. Hood*, 233 F.3d 950, 953 (9th Cir. 2000); *Harrison v. Ollison*, 519 F.3d. 952, 958 (9th Cir.), cert. denied 129 S. Ct. 254, 172 L.Ed. 2d. 192 (2008). Section 2255 remains "the exclusive remedy for testing the validity of a judgment and sentence, unless it is inadequate or ineffective." *Id.* Section 2255 authorize the court to vacate, set aside, or correct a sentence if it is unconstitutional, illegal, in excess of the maximum authorized by law, or otherwise subjected to collateral attack. Motions under § 2255 are subjected to a one-year statute of limitation. As applicable here, that period began to run after September 2, 2016, the date on which the defendant's sentence became final.

III. ARGUMENTS

The Defendant, hereinafter referred to as "Mr. Martinez", does not read, write or speak English. He is currently housed at Taft Correctional Institution in Taft, California, and is being assisted in this matter by a fellow inmate. However, because that inmate is not a party to this case, and because Mr. Martinez lacks the transcripts of the proceedings in this matter, properly framing the numerous issues in this motion is difficult. Nonetheless, he advances the following arguments and humbly request leave of the court to supplement them after transcripts of the relevant pre-sentence proceedings are obtained, and/or the court appoints counsel to represent him as requested.

- A. **Mr. Martinez was denied effective assistance of counsel as guaranteed by the United States Constitution, which warrants reversal of his conviction and sentence.**
- I) **Mr. Martinez rejected a favorable plea offer of 24-months base on the erroneous advice of his attorney.**

It is well settled that "the decision to reject a plea bargain offer and plead not guilty is a vitally important decision and a critical stage at which the right to effective assistance of counsel attaches." *Turner v. Calderon*, 281 F.3d 851, 879 (9th Cir. 2002)(quoting *United States v. Zelinsky*, 689 F.2d 435, 438 (1982)). To establish a constitutional violation based on ineffective assistance of counsel, a petitioner must show that (1) that counsel's representation fell below and objective standar of reasonableness, and (2) that counsel's deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 692, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1981). Counsel's failure to communicate a favorable plea offer or unreasonable advice that causes a favorable offer to be rejected constitutes unreasonable performance within the meaning of *Strickland*, and also violates the Sixth Amendment. *Lafler v. Cooper*, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012); *Missouri v. Frye*, 132 S. Ct. 1399, 1408, 182 L. Ed. 2d 379 (2012); and *United States v. Rivera-Sanchez*, 222 F.3d 1057, 1060 (9th Cir. 2000).

Here, the government offered Mr. Martinez a plea deal of 24-months. While not binding on the court, that deal would have bound the government from arguing for a sentence greater than 24-months. The deal would have also prohibited the government for discussing any facts outside of the charges which would adversely influence the court's decision at sentencing. Nonetheless, Mr. Martinez's counsel advised him to reject the government's plea offer because "24 months is the maximum [he] would receive if [he] make an open plea, because 24 months is [his] guideline maximum". Counsel further advised

him that "because 24-months is the guidelines maximum", he would be able to argue for "a lower sentence at sentencing if he rejected the government's plea offer". And that the "worst case scenario" would be that the government oppose that argument and gets the "24-months they are asking for"; since that is the maximum end of his guidelines. However, that if he were to accept the government's plea offer he would be prohibited from arguing for lower than 24-months at sentencing without "breaching the plea deal". This advice by his attorney was clearly erroneous, prejudicial, and well below the standard or reasonableness expected of competent counsel.

First, Mr. Martinez's attorney incorrectly and knowingly misadvised him that the applicable Sentencing Guidelines range for his offense called for a maximum of 24-months imprisonment. Counsel's failure to understand and appreciate the basic structure and mechanics of the Sentencing Guidelines applicability to his/her client is nothing short of incompetence and is certainly unreasonable under prevailing norms. *United States v. Washington*, 619 F.3d 1252, 1259-60 (10th Cir. 2010); *Blair v. Mcharty*, 896 F.2d 436 (9th Cir. 1989); *United States v. Vasques-Navarro*, 902 F.2d 1391 (9th Cir. 1990); and *Baumann v. United States*, 692 F.2d 565, 581-81 (9th Cir. 1982). Counsel's advices that Mr. Martinez was facing a maximum of 24-months was a "gross miscalculation" of the facts and the law which warrants reversal. See *Bedolla Garcia v. Rummels*, 2004 WL 1465696 (N.D. Cal., June 24, 2004), *aff'd*, 143 F. App'x 38 (9th Cir. 2005).

Second, Mr. Martinez was prejudiced by his by his attorney's deficient performance. Had he known that he could be sentence to more than 24-months, and indeed was more than likely to so be without the benefit of a plea agreement, he would have accepted the plea offer. However, resting on his attorney's advice that his maximum sentence was the 24-months offered by the government, Mr. Martinez rejected that plea offer and instead entered an

open plea of guilty. In response the government argued at sentencing for a higher sentence than that offered in the plea offer, and introduced facts to support its request for a higher sentence. Had he accepted the plea offer, the government would have been prohibited from making those arguments and would have been bound to recommending the agreed upon sentence of 24-months. As this court is aware from its day to day observations in the courtroom, unless exceptional circumstances so compellin, courts generally honor the terms of plea agreements in the spirit of the law. Indeed the court encourages the resolution of criminal matters via plea agreements.

II) Mr. Martinez's counsel deficient performance deprived him of an understanding of the law in relation to the facts which renders his guilty plea, at minimum, unknowing and involuntary

It is also well settled that for a guilty plea to be constitutionally valid a defendant must possess and understanding of "the law in relation to the facts" to which he is pleading guilty. *Boykin v. Alabama*, 395 U.S. 238, 243 n.5, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969). A guilty plea is only valid if it "represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *North Carolina v. Alford*, 400 U.S. 25, 31, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970). This includes the defendant being accurately informed of the potential sentences he faces. *Id.* "Because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts. *Id.* "[T]he Constitution insists, among other things, that the defendant enter a guilty plea [with] sufficient awareness of the relevant circumstances and likely consequences." *United States v. Ruiz*, 536 U.S. 622, 629, 122 S. Ct. 2450, 153 L. Ed. 2d 586 (2002).

In addition to improperly misadvising Mr. Martinez about the Sentencing Guidelines range applicable to him, and the maximum sentence he could receive if convicted, Mr. Martinez's counsel failed to investigate and properly advise him regarding his ability to challenge the deportation order as a defense to his criminal prosecution. Counsel had been made aware that the deportation order was being challenged in independent proceedings as being constitutionally infirm. However, counsel failed to investigate that matter, or even as much as inform Mr. Martinez that he could mount a collateral attack on that Order should he proceed to trial. Had he been aware that he could attack the deportation order if he proceeded to trial, in light of his attorney's advice that he was facing 24-months maximum, Mr. Martinez would have proceeded to trial. Moreover, given the fact that he is currently attacking that deportation order in separate proceedings, and is highly likely to succeed, it is clear that at minimum, at the time he plea guilty he did not possess of understanding of the law in relation to the facts.

Indeed it goes without repeating that it is the duty of every lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leadings to facts relevant to the merits of the case and the penalty in the even of conviction. That duty exist regardless of the accused's admission or statements to the lawyer of facts consistuting guilt or the accused's stated desire to plead guilty. American Bar Association, Standards for Criminal Justice 4-4.1 (2d ed. 1982 Supp.). Mr. Martinez's counsel failure to investigate the underlying removal order, Mr. Martinez's repeated claims that he was wrongfully deported, and/or to inform him that such a collateral attack is a viable defense, deprived him of an understanding of the law in relation to the facts and renders his guilty plea involuntary, in addition

to making it abundantly clear that he was - at minimum - denied the assistance of counsel guaranteed by the U.S. Constitution. Reversal of the conviction is therefore warranted.

B. The Court should appoint counsel for Mr. Martinez and allow supplemental briefing of this matter.

A district court must grant a hearing to determine the validity of a petition brought under Section 2255, "[u]nless the motions and the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255, see *United States v. Blaylock*, 20 F.3d 1458, 1465 (9th Cir. 1994). In other words, an evidentiary hearing is required if (1) a petitioner alleges facts, which, if true would entitle him to relief; and (2) the petition, files, and records of the case cannot conclusively show that the petitioner is entitled to no relief. *United States v. Howard*, 381 F.3d 873, 877 (9th Cir. 2004).

Here, Mr. Martinez has stated claims which, when proven, would entitle him to relief pursuant to the teachings of *Frye* and *Laffie*, supra. However, Mr. Martinez is currently incarcerated, lacks the transcripts of the relevant proceedings necessary to further prove his claims (eg. the transcript of the sentencing proceedings in this matter), does not speak, write or read English, and is currently being assisted by a fellow inmate who is not a party to this case, and who lacks sufficient information to properly frame the legal and factual arguments sufficient to ensure that Mr. Martinez's claims and rights are protected. At minimum, because there is a dispute regarding what Mr. Martinez's counsel told him, and why he/she did not file a direct appeal as requested by Mr. Martinez, as well as about the other issues raised herein, an evidentiary hearing - or

a limited one - is necessary to resolve these questions. See United States v. Burrows, 872 F.2d 915, 917 (9th Cir. 1989). Rule 8(c), Fed. R. Governing § 2255 cases, provides that the court must appoint counsel to represent petitioner for evidentiary hearing purposes. Accordingly, Mr. Martinez humbly prays that the court appoint him counsel to represent him in this matter.

III. Conclusion

Mr. Martinez is before the court pro se. He does not speak, read, or write English, and is being assisted in this instant motion by a fellow inmate at the facility where he is detained. He has no other remedy for correcting his sentence other than this petition for writ of habeas corpus. He has made no other application for writ of habeas corpus to any other court or judge. He has made many colorable arguments which, if ruled in his favor will result in his conviction and sentence being vacated. Including specific instances of his attorney's ineffectiveness. These facts will further be developed by counsel for the defendant in supplemental briefing - when appointed by the court.

WHEREFORE, in the interest of justice, and good cause being shown, Mr. Martinez humbly prays that this court, at minimum, appoint him learned counsel to aid him in developing his arguments and factual allegations. Permit supplemental briefing by said counsel, and conduct an appropriate hearing thereafter - should the court determine that one is so necessary.

At the conclusion thereof, that the court issue an Order vacating

his guilty plea and sentence, and permit him to either accept the government's plea offer or proceed to trial in this matter.

DATED: September 1, 2017

Humbly Submitted,

Rene Martinez
Rene Antonio Martinez
Reg. No. 20735-111
Taft Correctional Inst.
P.O. Box 7001
Taft, California 93268

VERIFICATION

State of CALIFORNIA)

) ss

County of KERN)

I, RENE ANTONIO MARTINEZ, Defendant/Petitioner in the foregoing matter, hereby certify that I have requested the preparation of the foregoing by a fellow inmate. I do not read, write or speak ENGLISH, but believe this motion to be expressing all that I have conveyed to that inmate.

Signed this 1 day of ~~August~~ ^{September} 2017.

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8 IN THE UNITED STATES DISTRICT COURT
9 EASTERN DISTRICT OF CALIFORNIA

10 UNITED STATES OF AMERICA,
11
12 Plaintiff,
13 v.
14 ANTONIO RENEE MARTINEZ,
15 Defendants.

CASE NO. 1:14-CR-158-LJO

GOVERNMENT'S OPPOSITION TO
DEFENDANT RENEE-MARTINEZ'S 28 U.S.C.
§2255 MOTION

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20 GOVERNMENT'S OPPOSITION TO DEFENDANT RENEE MARTINEZ'S 28 U.S.C. §2255
21 MOTION
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1 in violation of California Penal Code ("CPC") § 288(a). (PSR p. 5). On September 9, 1992, Petitioner
2 pled no contest to the charge. (*Id.*) He was sentenced to six months' imprisonment and three years'
3 probation. (*Id.*)

4 In November 2000, Petitioner was arrested and charged with aggravated assault with a deadly
5 weapon (a baseball bat) in violation of CPC § 245(a)(1). (PSR p. 6) On May 16, 2001 he was convicted
6 of this offense and, when considered with his previous § 288(a) conviction, sentenced to serve a total of
7 seven years in prison by the criminal court. (*Id.*)

8 The Department of Homeland Security charged defendant with being a deportable alien, citing
9 both of the above convictions. (Exh. C¹) On March 29, 2005, an immigration judge found the defendant
10 deportable as charged by "clear, unequivocal, and convincing evidence." (See Exh. D²)

11 On April 2, 2015, defendant filed a motion in California state court seeking to vacate his §
12 288(a) conviction. The gravamen of the motion was that defendant was not advised by his counsel of
13 any immigration consequences of a guilty plea as required by CPC § 1016.5. (See Exh. E) On May 18,
14 2015, the California court granted the motion and vacated the § 288(a) conviction. (See Exh. F)
15 However, there is no indication in the record that defendant has ever attempted to vacate his § 245(a)(1)
16 conviction. Accordingly, that conviction remains valid.

17 On October 23, 2015, the immigration judge issued a decision denying defendant's motion to
18 reopen his immigration proceedings. (See Exh. G³) The immigration judge ultimately determined that
19 Petitioner failed to set forth a prima facie case of eligibility for underlying immigration relief, because
20 Petitioner's § 245(a)(1) conviction was still valid. (*Id.*) Defendant appealed to the Board of Immigration
21 Appeals ("BIA"), and on December 30, 2015, the BIA dismissed defendant's appeal. (See Exh. H⁴)

22
23 ¹ Counsel for the government is informed and believes that this document is considered
"Restricted" by the Immigration Courts. Accordingly, this document will be provided separately to the
court and counsel but will not be included in the public filing.

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"Restricted" by the Immigration Courts. Accordingly, this document will be provided separately to the

1 Defendant then filed an appeal of BIA's decision before the Ninth Circuit, which is still pending.
2 (*Antonio Rene Martinez v. Jeffrey B. Sessions*, Case No. 16-70247.)

3 Defendant's argument that he could have collaterally attacked his underlying order fails to
4 satisfy both the second and third prongs of 8 U.S.C. 1326(d). As to the second prong, defendant has
5 failed to show that he has been improperly deprived of the opportunity for judicial review. As to the
6 third prong, the defendant has failed to show the fundamental unfairness of the underlying removal order
7 because it was based on both the vacated §288(a) conviction and the §245(a)(1) conviction.

8 Accordingly, defendant would have failed the threshold test to collaterally attack his removal order.

9 Because the defendant would not have been able to present the defense that he claims his
10 attorney failed to advise him of, and that defense would have been ultimately unsuccessful, defendant
11 has suffered no prejudice.

12 **IV. CONCLUSION**

13 For the reasons stated above and in the record, the Court should deny defendant Mr. Renee
14 Martinez's 28 U.S.C. § 2255 motion.

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16 Dated: November 24, 2017

PHILLIP A. TALBERT
United States Attorney

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19 By: /s/ VINCENZA RABENN
VINCENZA RABENN
Assistant United States Attorney

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28 court and counsel but will not be included in the public filing.

The undersigned, Kevin G. Little, hereby declares as follows:

1. I am an attorney admitted to practice in the State of California since December 4, 1990.
2. I am a 1990 honors graduate of Harvard Law School. I have been self-employed as an attorney since 1993. Prior to starting my own practice, I was an associate at O'Melveny & Myers in Los Angeles, clerked for the Hon. Consuelo B. Marshall of the Central District of California, and also clerked for the Hon. Cecil F. Poole of the Ninth Circuit Court of Appeals.
3. I have practiced criminal defense, including federal criminal defense, since 1993. I have never been found to have been ineffective in my representation of any criminal defendant.
4. I am fluent in the Spanish language, and I have represented numerous Spanish speaking only defendants over the years without any problem making myself understood or understanding them.
5. In connection with preparing this declaration, I have refreshed my memory of petitioner Antonio Rene Martinez's case by reviewing my electronic file, my paper file, and my electronic mail directories pertaining to him.
6. On September 10, 2015, I was contacted by the Federal Defender's Office regarding accepting an appointment to handle Mr. Martinez's case. Mr. Martinez was charged via a July 2014 indictment with a violation of 8 U.S.C. § 1326, for being a deported alien found within the United States. It was also alleged that Mr. Martinez was deported after having been convicted of one or more aggravated felonies. Mr. Martinez was arrested in the Northern District in August 2015 and was order transported to this District pursuant to F.R.Cr.P. 5 on August 31, 2015.
7. As part of the initial information I received from the Federal Defender's Office, I learned that Mr. Martinez's family had already hired state court criminal and immigration attorneys to represent him. I was further informed that his criminal attorney, Tom DeRemegio, Esq., had already succeeded in having one of Mr. Martinez's two state felony convictions set aside, and was actively working on getting the other one set aside. Attached are two emails I received from the Federal Defender's Office on September 11, 2015 informing me of those facts. See Attachment, pp. 1-5.
8. As part of my initial efforts to represent Mr. Martinez, I contacted and conferred with both Mr. DeRemegio and the immigration attorney, Frank P. Sprouls, about what specifically they were doing for Mr. Martinez. Mr. DeRemegio was attempting to have Mr. Martinez's sole remaining felony conviction set aside on the basis that Mr. Martinez was not advised of the immigration consequences of his guilty plea, and Mr. Sprouls was appealing a denial of a petition for waiver of deportation, and was also hoping to file a new immigration petition seeking to set aside Mr. Martinez's original order of deportation if Mr. DeRemegio succeeded in setting aside Mr. Martinez's sole remaining felony conviction, which was a crime involving moral turpitude and was the apparent basis for his original deportation.
9. While I practice many types of law, I certainly do not hold myself out to be an expert in immigration law. I have never had an immigration client, and I have never appeared in an immigration forum. Mr. Sprouls, however, did represent that he was an immigration specialist and further represented that he had a plan to obtain an order or other relief that would allow Mr. Martinez to remain lawfully in the United States.
10. I spoke with Mr. Martinez and several members of his family frequently about his case, both in person and by phone. I visited Mr. Martinez at least three times in the Lerdo Jail and Fresno

County Jail and I also spoke with before or after most, if not all, court appearances in the United States Marshal's Office. Mr. Martinez's family members would speak with me by phone, and they would also attend court appearances and speak further with me before and afterwards.

11. I can state without a doubt that Mr. Martinez and his family were uniform in their desire to reject the fast track plea agreement and instead delay the federal criminal proceedings so that Mr. Martinez would have a chance to obtain positive results in his related state court criminal and immigration proceedings. My understanding was that Mr. Martinez made this decision both because his other attorneys' success could give him a chance to remain lawfully in the United States and also because the setting aside of his sole remaining felony conviction could have a positive impact on his federal criminal case.
12. In connection with my initial court appearance on Mr. Martinez's behalf on September 14, 2015, I received a "fast track" plea offer, which I went over with him in detail. At that time, Mr. Martinez's "fast track" presentence report was still pending, but I went over that with him in detail as well after it became available to me. I also relayed my in-person and email communications with the then-assigned prosecutor, Mia Giacomazzi, to Mr. Martinez during our meetings. Based on all those communications, there is no doubt in my mind that Mr. Martinez well understood that he could possibly receive as low as a 24-month sentence if he accepted the "fast track" plea offer. It should be noted, however, and I so advised Mr. Martinez, that a "fast track" plea agreement in no way guarantees that a defendant will receive 24 months, only that the government will make a "fast track motion" that could potentially result in a sentence as low as 24 months. In my experience, many "fast track" defendants receive sentences greater than 24 months. A copy of the fast track plea agreement is attached. Attachment, pp. 6-18.
13. Given Mr. Martinez's very close bond with his family, I understood very well that Mr. Martinez's highest priority was to maintain a chance to remain lawfully in the United States. That was more important to him, far more, than obtaining the lowest possible federal sentence, or resolving his federal case quickly. Mr. Martinez did not accept the "fast track" plea offer because he was hoping to obtain positive results from Mr. DeRemegio's and/or Mr. Sproul's efforts that would not only benefit him potentially in his federal criminal case, but, more important, permit him potentially to remain lawfully in the United States. Mr. Martinez expressed this aspiration numerous times in clear and unequivocal terms. I have no doubt that Mr. Martinez knew what he was turning down, and made his decision knowingly and intelligently. Because Mr. Martinez's criminal and immigration attorneys indicated that they needed time to accomplish their efforts, particularly Mr. DeRemegio, Mr. Martinez was content to delay his federal criminal case as long as possible. I attach email correspondence with Mr. DeRemegio confirming the reason for the postponement of Mr. Martinez's federal criminal case. Attachment, p. 27-28.
14. I am attaching an electronic mail string that I had with Ms. Giacomazzi in the fall of 2015, in which I explained that it was my client's wish to continue his federal criminal case and not accept the fast track offer by the deadline imposed because of the possible results of his then-pending state court and immigration proceedings. This postponement and non-acceptance were with Mr. Martinez's full knowledge and consent. Attachment, pp. 19-26.
15. The pattern of continuing Mr. Martinez's federal criminal case continued into the spring of 2016, for the same reasons expressed above. Attachment, pp. 29-30, 34-35. In May 2016, Mr. DeRemegio's motion to set aside Mr. Martinez's remaining state felony conviction was denied,

and at that point it became obvious that those efforts were not going to be successful, at least at the trial level. It then became infeasible to try to continue Mr. Martinez's federal case further, and we had to decide how to resolve it. See Attachment, pp. 36-40.

16. Even at this point, Mr. Martinez remained adamant that he did not want to waive his appeals and was still hopeful that he might receive relief in his state court criminal proceedings that might enable him to remain in the United States lawfully and perhaps also positively impact his federal criminal proceedings and afford him a basis for post-conviction relief. During these conversations, I related to Mr. Martinez that it was possible to attack the deportation at trial, and we discussed the feasibility of such a defense to the 1326 charge. Mr. Martinez also wanted to pursue an argument that he should receive a downward departure based on having served approximately three years in custody on his overturned state court conviction. I had numerous discussions with Mr. Martinez about this issue, and he made a knowing and intelligent decision to reject then-proposed plea offer and instead retain his right to appeal, or collaterally attack, or seek judgment relief of his federal conviction and sentence. E-mail correspondence consistent with my recollection is attached. Attachment, pp. 31-34, 41-47.
 17. It is also worth noting that when Mr. Martinez was looking at either pleading to the count of the indictment without an agreement (a "straight up" plea) or pursuant to the "non-fast track" agreement offered by the government in July 2016, the probable sentencing range was 33 to 41 months. Email correspondence reflecting the parties' understanding of that range is attached. Attachment, pp. 61-70. The "non-fast track" plea agreement is also attached. Attachment, pp. 48-60.
 18. Mr. Martinez also contends that I misadvised him as to the applicable Sentencing Guideline range, and that I told him the maximum he could receive was 24 months. This is simply not so. I explained to Mr. Martinez numerous times that he could be facing a much higher sentence based on a "straight up" plea. Attached is a provisional sentencing calculation I went over with Mr. Martinez in May 2016, which indicated that he was facing as much as 57 months imprisonment. Attachment, pp. 71-72. I also attach a summary of the metadata of that document showing that it was created on May 2, 2016. Attachment, p. 73. I simply never told Mr. Martinez that his maximum exposure was 24 months.
 19. If called as a witness, I could truthfully and competently testify to the foregoing based on my own personal knowledge. I also verify that the documents included in the accompanying attachment are true and correct copies of the originals.
- Stated under penalty of perjury in Fresno, California this 19th day of October, 2017.

Kevin G. Little

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United States of America

7
8 IN THE UNITED STATES DISTRICT COURT
9 EASTERN DISTRICT OF CALIFORNIA

10 UNITED STATES OF AMERICA,) CASE NO.1:14-CR-158 LJO SKO
11 Plaintiff,)
12 v.) MEMORANDUM OF PLEA AGREEMENT
13 ANTONIO RENE MARTINEZ,) PURSUANT TO RULE 11(c) OF THE
14 Defendant.) FEDERAL RULES OF CRIMINAL
15) PROCEDURE
16)

17 Pursuant to Rule 11(c) of the Federal Rules of Criminal
18 Procedure, the United States of America, by and through Benjamin B.
19 Wagner, the United States Attorney for the Eastern District of
20 California, and Assistant United States Attorney Mia A. Giacomazzi,
21 and defendant, Antonio Rene Martinez, and his attorney have agreed as
22 follows:

23 1. Scope of Agreement

24 This document contains the complete Memorandum of Plea Agreement
25 ("Plea Agreement") between the United States Attorney's Office for
26 the Eastern District of California ("Government") and the defendant
27 regarding this case. This Plea Agreement is limited to the United
28 States Attorney's Office for the Eastern District of California and

1 (j) The defendant recognizes that pleading guilty may have
2 consequences with respect to his immigration status because he is not
3 a citizen of the United States. The defendant's plea to the
4 violation herein may subject him to automatic deportation and removal
5 from the United States. See 8 U.S.C. § 1227(a)(1) et seq. Defendant
6 may also be denied citizenship and denied admission to the United
7 States in the future. Defendant affirms that he has been advised of
8 the immigration consequences of pleading guilty and wants to plead
9 guilty regardless of any immigration consequences that may result
10 from his plea, even if such consequence includes his automatic
11 deportation and removal from the United States after completing any
12 sentence of incarceration due to his plea, denial of citizenship, and
13 denial of admission to the United States in the future.

14 (k) Defendant agrees to waive all rights under the "Hyde
15 Amendment," Section 617, P.L. 105-119 (Nov. 26, 1997), to recover
16 attorneys' fees or other litigation expenses in connection with the
17 investigation and prosecution of all charges in the above-captioned
18 matter and of any related allegations (including without limitation
19 any charges to be dismissed pursuant to this Agreement and any
20 charges previously dismissed).

21 5. Agreements by the Government

22 (a) The Government will recommend a two-level reduction (if the
23 offense level is less than 16) or a three-level reduction (if the
24 offense level reaches 16) in the computation of the defendant's
25 offense level if the defendant clearly demonstrates acceptance of
26 responsibility for his conduct as defined in Section 3E1.1 of the
27 Sentencing Guidelines.

28 (b) The Government will recommend that the defendant's offense

1 level be adjusted downward an additional two levels if he agrees to
2 an early disposition of this case under U.S.S.G. § 5K3.1 without a
3 trial and without filing or presenting any pretrial motions or
4 objections to the PSR, and if he is sentenced the same day he pleads
5 guilty.

6 (c) The Government will recommend that defendant be sentenced
7 at the low end of the applicable U.S. Sentencing Guidelines range.

8 (d) The defendant acknowledges and understands that the
9 Government makes no other representations to him regarding
10 sentencing, including regarding fines, his criminal history or his
11 criminal history points under Chapter Four of the Sentencing
12 Guidelines. Defendant understands that the Government may comment
13 and make recommendations to the Court and Probation Office regarding
14 those matters.

15 5. Factual Basis

16 The defendant concedes that he will plead, and is pleading,
17 guilty to the crime set forth in the Indictment, because he is, in
18 fact, guilty of that offense. The defendant also agrees that the
19 following are the true and correct facts of this case:

20 Defendant is a native and citizen of El Salvador and is
21 not a citizen of the United States of America. On or
22 about June 22, 2005, the defendant was removed from the
23 United States. The defendant was found in the Eastern
24 District of California on or about June 15, 2014 after
25 voluntarily and knowingly re-entering the United States.
The defendant's re-entry into the United States was
without the express consent of the United States Attorney
General or the Secretary of the Department of Homeland
Security for a reapplication for admission.

26 On or about December 7, 2001, the defendant was convicted
27 of Assault with a Deadly Weapon, in violation of
28 California Penal Code section 245(a)(1), in the Superior
Court of California, County of Santa Clara and the
defendant was sentenced to 7 years imprisonment (Case No.
BB051340).

1 have been charged in the Indictment. If the Court should impose any
2 sentence up to the statutory maximum, the defendant understands that
3 he cannot for that reason withdraw his guilty plea, and he will
4 remain bound to fulfill all of the obligations under this Plea
5 Agreement. The defendant understands that neither the prosecutor,
6 defense counsel, nor the Court can make or have made any promise
7 regarding the sentence the defendant will receive.

8 13. Presentence Report

9 The defendant understands that the United States Probation
10 Office is not a party to this agreement and will conduct an
11 independent investigation of the defendant's activities and his
12 background. It will then prepare a presentence report which it will
13 submit to the Court as its independent sentencing recommendation. In
14 addition, the Government will fully apprise the Probation Office, as
15 well as the Court, of the full and true nature, scope and extent of
16 the defendant's criminal activities, including information on his
17 background and criminal history.

18 BENJAMIN B. WAGNER
19 United States Attorney

20 Dated: _____ By: _____
21 MIA A. GIACOMAZZI
22 Assistant U.S. Attorney

23 Dated: _____ By: _____
24 ANTONIO RENE MARTINEZ
25 Defendant

26 Dated: _____ By: _____
27 _____
28 (print name)
Attorney for Defendant

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
HON. LAWRENCE J. O'NEILL

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ANTONIO RENE MARTINEZ,

Defendant.

1:14-cr-158 LJO-SKO

EVIDENTIARY HEARING RE 2255

Vol. 1, pgs. 1 To 77,
inclusive.

Fresno, California

Monday, October 15, 2018

REPORTER'S TRANSCRIPT OF PROCEEDINGS

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ERIN SNIDER
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REPORTED BY: PEGGY J. CRAWFORD, RDR, CRR, Official Reporter

Proceedings recorded by mechanical stenography, transcript
produced by computer-aided transcription.

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1 Monday, October 15, 2018 Fresno, California

2 8:30 a.m.

3 (The following proceedings were had with the aid of
4 Certified Spanish Court Interpreter REBECCA RUBENSTEIN,
5 oath on file.)

6 THE COURT: Thanks, everyone. Please be seated.

7 Let's call the case of United States versus Antonio
8 Martinez, Action Number 158.

9 Could I have your appearances, please.

10 MS. RABENN: Good afternoon, your Honor. Vincenza
11 Rabenn for the United States.

12 MR. LEE: And thank you. Good afternoon. Charles
13 Lee and Erin Snider on behalf of Mr. Martinez.

14 THE COURT: All right. This is on this afternoon for
15 a motion, evidentiary hearing, actually, under 2255.

16 And procedurally, so we can maybe distill this a bit,
17 on July 31, 2014, Mr. Martinez was indicted on charges under
18 18 United States Code 1326(a) and (b).

19 On September 10 of 2015, he was arraigned and pled
20 not guilty.

21 On August 29, 2016, he entered into an open plea of
22 guilty, with no plea agreement, wanting to preserve his right
23 to appeal, which he did.

24 On September 1, 2017, Mr. Martinez, in pro se,
25 brought a motion to vacate, set aside, or to correct the

1 should the government make that request, I would grant that.

2 Is there a reason I should not grant that, not on the
3 representation that he probably will not be called back, but,
4 rather, because he is the chief investigator?

5 MS. RABENN: No, your Honor. Now I understand.

6 THE COURT: Okay. That's fine. He can stay.

7 MR. LEE: Thank you, your Honor.

8 THE COURT: Direct exam.

9 I'm sorry. What is your name?

10 THE WITNESS: Irma Carolina Estevez Martinez.

11 THE COURT: Can we call you "Ms. Martinez" without
12 insulting you?

13 THE WITNESS: No, that's fine.

14 THE COURT: Okay. Direct?

15 MR. LEE: Thank you, your Honor.

16 DIRECT EXAMINATION

17 BY MR. LEE:

18 Q. What is the name of your brother?

19 A. Rene Antonio Martinez Estevez.

20 Q. What do you call him?

21 A. "Rene."

22 MR. LEE: Your Honor, with the Court's permission, I
23 would like to refer to him as "Rene," for ease.

24 THE COURT: Any objection?

25 MS. RABENN: No, your Honor.

1 THE COURT: That's fine. We all know who he is.

2 BY MR. LEE:

3 Q. Ms. Martinez, you have been -- you are close with your
4 brother, correct?

5 A. Yes.

6 Q. And you were here in support of him in this very courtroom
7 on August 29th, 2016?

8 A. Yes. Yes.

9 Q. And you know who Rene's attorney was at that time, right?

10 A. Yes.

11 Q. Who was his attorney?

12 A. Kevin Little.

13 Q. Okay. And you had contact with Mr. Little, correct?

14 A. Yes, when we would come to the court dates.

15 Q. Did you have other types of communication with him?

16 A. Yes. We would call him on the telephone.

17 Q. And do you remember which number you used?

18 THE COURT: You mean which number she used?

19 MR. LEE: Correct.

20 BY MR. LEE:

21 Q. Which number -- specifically, did you call him at his
22 office or elsewhere?

23 A. We would call him at his office, and when we would call
24 him at the office and the secretary would say that he was not
25 there, we would call him on his cell phone.

1 A. Yes.

2 Q. And do you remember what you discussed on those calls?

3 THE COURT: Yes or no?

4 THE WITNESS: The call I made him?

5 BY MR. LEE:

6 Q. Yes, in September of 2016.

7 A. Yes.

8 THE COURT: May I ask a quick question? When you
9 say, "the call I made to him," are you saying you only made
10 one call in September of 2016?

11 THE WITNESS: No.

12 THE COURT: Okay. Thanks.

13 BY MR. LEE:

14 Q. Just to clarify also, that you were not the only person
15 who used that phone number, correct?

16 A. No.

17 Q. Who else used that phone number?

18 A. My mom.

19 Q. So I have your glasses.

20 If I could approach?

21 A. Yes. Those are they.

22 Q. And so you remember making some of those calls?

23 A. Yes.

24 Q. And do you remember talking to the office about an appeal
25 of your brother's case?

1 THE COURT: Thank you very much. You may step down.
2 Are we ready for the next witness?

3 MR. LEE: Yes.

4 THE COURT: Who are you calling?

5 MR. LEE: This is Alicia Estevez Martinez.

6 THE COURT: Ma'am, please raise your right hand and
7 be sworn.

8 ALICIA ESTEVEZ MARTINEZ,
9 called as a witness on behalf of the Defendant, having been
10 first duly sworn, testified through the Court Certified
11 Interpreter as follows:

12 THE COURT: Please take the witness stand and tell us
13 who you are.

14 THE WITNESS: Do you want my name?

15 THE COURT: I do.

16 THE WITNESS: Alicia Del Carmen Estevez, Viuda de
17 Martinez.

18 THE COURT: We need to be very direct.

19 MR. LEE: Yes.

20 DIRECT EXAMINATION

21 BY MR. LEE:

22 Q. Ms. Martinez, who is your son?

23 A. Rene Antonio Martinez.

24 Q. And, Ms. Martinez, you are aware your son was sentenced on
25 August 29, 2016, correct?

1 argument in his petition, but no declaration.

2 MR. LEE: Right, your Honor. And I think that's just
3 because we looked at a pro per prison filing, and it didn't
4 perhaps conform to the legalese, but we took his statements as
5 his statements, but in any event, your Honor --

6 THE COURT: But that wasn't under penalty of perjury.

7 MR. LEE: That's correct. And at this time, I have
8 provided the government an English translation of a
9 declaration that Mr. Martinez has now executed under penalty
10 of perjury.

11 Given the circumstances that the government deported
12 this individual, who ordinarily would be here and have a right
13 to testify on his own behalf, I would ask the Court to accept
14 our declaration on behalf of Mr. Martinez.

15 MS. RABENN: The government is objecting to the
16 declaration on the grounds that it is hearsay. The
17 defendant-petitioner was removed pursuant to law in July of
18 2018, before the government was aware that his presence in the
19 U.S. would be necessary for this evidentiary hearing.

20 I misspoke, not "necessary."

21 But the government, I contacted the counsel for
22 petitioner a month ago, and asked whether he was, you know,
23 would need to make special arrangements, if he would testify
24 via VTC, or there was something we could do to facilitate this
25 evidentiary hearing. And no request for VTC was made at that

1 THE COURT: Thank you.

2 Direct, Mr. Lee.

3 MR. LEE: Thank you, your Honor. And in the spirit
4 of expediency, if I might lead on a few items.

5 THE COURT: Are you calling him as an adverse
6 witness?

7 MR. LEE: That too.

8 THE COURT: You have the right.

9 DIRECT EXAMINATION

10 BY MR. LEE:

11 Q. Mr. Little, you are a member of the CJA panel; is that
12 correct?

13 A. Yes.

14 Q. And you were so appointed to Antonio Rene Martinez's case,
15 case number 1:14-cr-158?

16 A. I was.

17 Q. And in your representation -- subsequent to your
18 representation on the matter before the matter before the
19 District Court, you wrote a declaration in this case, correct?

20 A. I did.

21 Q. And before your testimony today, you reviewed, I assume,
22 your case file and the filings on the docket?

23 A. I have.

24 Q. And in the government's opposition to Mr. Martinez's 2255
25 motion, your declaration is attached on pages looks like 14

1 if he managed to obtain some success through some other avenue
2 in overturning his assault with a deadly weapon conviction, or
3 in obtaining success in what was by then his reopened case
4 before BIA, where I believe he was trying to -- he had a
5 petition then pending for cancellation of removal.

6 Success through a direct appeal wasn't considered,
7 discussed, or, in my understanding, an option.

8 Q. Hmm. And just, I guess, backtrack a little bit,

9 Your understanding, Mr. Martinez had a 1992
10 conviction, section 288(a)?

11 A. That's correct.

12 Q. And then he had a -- his original deport was from 1996,
13 correct?

14 A. That's correct.

15 Q. And that was based on the 288(a)?

16 A. That was based on the San Mateo County 288(a), yes.

17 Q. And in '01, that's when he picked up the 245(a)(1)
18 conviction?

19 A. That's correct. That was out of Santa Clara County, I
20 believe.

21 Q. And then --

22 Your Honor, if I may approach, I'm showing Mr. Little
23 what has been marked as Defendant's Exhibit C.

24 And just for clarification, that's also what's been
25 Bates-marked as Government 20.

1 A. I have seen this document before. It was part of the
2 discovery in Mr. Martinez's case.

3 Q. Right. And this is from the INS, or Immigration and
4 Naturalization Services. And on item 6, they say, in support
5 of an additional charge, they are submitting this following
6 factual allegation.

7 And essentially, they are trying to add a second
8 ground for deportability, credibility?

9 A. Well, as I said in my declaration, I don't profess to be
10 an expert in the ins and outs of immigration law. I believe I
11 have a very good understanding of it as it relates to criminal
12 cases, but that's what it appears to say, yes.

13 Q. Right. Because initially, he was just deported on the
14 basis of the 288, and then, you know, in '05, they were trying
15 to add the 245; is that a fair summary?

16 A. I understood this as something tantamount to an amended
17 petition, whereby they were alleging an additional ground upon
18 which he was deportable, yes.

19 Q. Very good. I'm now handing you what's been marked as
20 Exhibit D. This is Government Bates 22. Do you recognize
21 this item?

22 A. Yes, I do. This was also part of the discovery.

23 Q. What is this?

24 A. This is an order from one of his immigration proceedings.
25 And it looks like this was a hearing that he had before the

1 BIA, at which he decided to withdraw his application for
2 adjustment of status.

3 Q. Right. And it also -- at the top, it says, "This is a
4 summary of the oral decision of March 29, 2005"?

5 A. Well, it says that, yes.

6 Q. And the next line is, "This memorandum is solely for the
7 convenience of the parties"?

8 A. I'm not sure what that means.

9 Q. Right, but --

10 A. It is an order. It is not for the convenience of the
11 parties. I don't know what that means.

12 Q. Okay. But that's literally what's on the document?

13 A. I agree, but I just don't know what that means.

14 Q. And the first box checked is the respondent was ordered
15 deported to El Salvador?

16 A. He was. That's what it says.

17 Q. And the next box checked, the application for asylum was
18 barred?

19 A. That's correct, and that was on the basis of the 288 that
20 he already had.

21 Q. Okay. And then the application for withholding of
22 deportation was also barred?

23 A. Yes, again, on the basis of his 288. If you have a crime
24 involving moral turpitude within a certain time period of your
25 asylum petition, it is my understanding you are not eligible

1 for that relief.

2 Q. Right. And in his application for CAT relief, Convention
3 Against Torture?

4 A. Was also denied.

5 Q. Uh-huh. And then his adjustment of status claim was
6 withdrawn?

7 A. And that was withdrawn, yes.

8 Q. Okay. Very good. And --

9 A. I just wanted to, if I may, correct one of my initial
10 answers. I gave some September 1st and 2nd dates, and that
11 was based on my recollection, now proved erroneous, that the
12 plea and sentencing was on the 2nd.

13 Obviously, the plea and sentencing were on the 29th
14 of August.

15 Q. Thank you. I'm approaching with what has been marked as
16 Defendant's Exhibit E, as in "Edward." Do you recognize this
17 item?

18 A. I do.

19 Q. What is this item?

20 A. This is the order from the San Mateo County Superior Court
21 granting Mr. Martinez's petition under Penal Code 1016.5, to
22 have his plea set aside on the basis of his not having been
23 advised of his immigration consequences in connection with his
24 288 plea.

25 Q. So it is your understanding the '92 288 offense, if

1 vacated, is gone as of this order?

2 A. Yes. If it is vacated, it is as if it didn't happen
3 legally, yes.

4 Q. So when you became aware that the 288 was vacated, did you
5 ever consider going to trial at that point?

6 A. No.

7 Q. So there was no discussion about trial once this 288
8 conviction was vacated?

9 A. No.

10 Q. Okay. And understanding you made the statement you don't
11 purport to be an immigration expert, you do know some
12 immigration law in connection with criminal defense?

13 A. I believe that I am more than competent in my knowledge of
14 immigration issues as they pertain to criminal cases, yes.

15 Q. So if Mr. Martinez's deportation was based solely on the
16 288 conviction, would there be any reason not to go to trial?

17 A. Well, that's a question that, in my mind, is based upon an
18 inaccurate premise. Because he still had the 245, which was a
19 crime involving moral turpitude then and now, it was alleged
20 as a secondary basis for his deportation.

21 Q. Right.

22 A. And that conviction still remained valid in 2016. If his
23 one and only conviction had been the 288, and that had been
24 vacated, yes, going to trial would have been an option. As a
25 matter of fact, we would have simply moved to dismiss the

1 charges, because the charges alleged things that were not
2 factual.

3 Q. Right. So let me give you a slightly different
4 hypothetical. Instead of saying his only conviction was the
5 288, if the only basis for Mr. Martinez's deport was the 288,
6 and that was vacated, was there any reason not to go to trial?

7 A. No.

8 THE COURT: I think he just answered that. If that
9 had been the only basis.

10 MR. LEE: He said "only conviction." There are two
11 different things.

12 THE COURT: Got it. Thank you.

13 THE WITNESS: Well, I think there is, in one sense, a
14 difference between convictions and circumstances or reasons
15 for a deportation, but in Mr. Martinez's case, I think they
16 are basically synonymous. The reason why he was deported was
17 because of his two prior crimes of moral turpitude.

18 BY MR. LEE:

19 Q. Okay. So before today's court hearing started, I shared
20 with you this binder which I have marked as Defendant's
21 Exhibit A.

22 A. Yes, you did share that with me.

23 Q. When this -- when the Court said the habeas proceeding,
24 you were kind enough to send a copy of your file to my office,
25 correct?

1 BY MR. LEE:

2 Q. If you could identify a document in that binder in the
3 discovery you sent us or any of the other materials that makes
4 you confident 100 percent, that Mr. Martinez's deport was
5 based on both the 288 and the 245.

6 A. Well, I can identify the document by description. Do you
7 want me to find it?

8 MS. RABENN: Objection, vague.

9 THE COURT: Overruled.

10 MS. RABENN: There is more than one deport.

11 THE COURT: I think he asked for any document, any
12 document that he can identify. So the objection is overruled.

13 Go ahead.

14 THE WITNESS: Those documents would be in the
15 discovery. Those were the multiple orders of deportation,
16 denial of asylum, denial of immigration refuge and such, some
17 of which we have already gone over.

18 BY MR. LEE:

19 Q. Right. And I think it's uncontested that Mr. Martinez's
20 original deport was based on the 288, which was vacated?

21 A. Well, but it was vacated in, yeah, sometime in 2015.

22 Q. Right.

23 A. He was deported pursuant to that in 2004 or '05.

24 Q. Right. And I previously gave you the document that the
25 INS file, in 2005, I think in your phrase, it was like an

FILED
SAN MATEO COUNTY

MAY 18 2015

Clerk of the Superior Court
By 
DEPUTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN MATEO

THE PEOPLE OF THE STATE OF
CALIFORNIA,

Plaintiff,

-vs-

RENE MARTINEZ,

Defendant.

No. SC 029407


ORDER AFTER HEARING

After a hearing before this Court on May 1, 2015 the following is hereby Ordered:

1. The judgment entered in this matter on September 9, 1992 is vacated.
2. The plea entered on that date is set aside.
3. The defendant, Rene Martinez, is released from all requirements flowing from said judgment.

Dated: 5/18/15

JOSEPH E. BERGERON


The Honorable Joseph H. Bergeron
Judge of the Superior Court
County of San Mateo

EXHIBIT

27

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
HON. LAWRENCE J. O'NEILL

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ANTONIO RENE MARTINEZ,

Defendant.

) 1:14-cr-158 LJO-SKO

) EVIDENTIARY HEARING RE 2255

) Vol. 2, pgs. 78 To 141,
) inclusive.

Fresno, California

Friday, October 19, 2018

REPORTER'S TRANSCRIPT OF PROCEEDINGS

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Assistant Federal Defender
ERIN SNIDER
Assistant Federal Defender

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1 Friday, October 19, 2018

Fresno, California

2 1:00 p.m.

3 THE COURT: Thank you, everyone. Please be seated.

4 Let's call the case of United States versus Martinez,
5 Action Number 158. Both counsel are present.

6 Mr. Little is present as a witness. I think that
7 before we start with the witness, we have got to be clear on
8 our definition of where we are going here.

9 What are you trying to accomplish now and what is the
10 goal? Because I don't think we were there a couple of days
11 ago.

12 MR. LEE: Well, your Honor, at the end of the
13 hearing, we were planning to seek relief on two alternative
14 grounds.

15 THE WITNESS: I'm sorry, your Honor. Would you like
16 me to step out?

17 MR. LEE: Perhaps that would be best.

18 (Mr. Little left the courtroom.)

19 THE COURT: "Relief," defined how?

20 MR. LEE: Well, and that would be dependent on what
21 the Court would find, if anything, in this particular case.

22 Now, there was some -- in the moving habeas petition,
23 some talk about failure to properly advise before entry of the
24 plea.

25 If the Court were to find that in fact did occur,

1 that there was ineffective assistance for failure to properly
2 advise, and there was a knowing and intelligent plea entered,
3 then we would be asking the Court to allow Mr. Martinez to
4 withdraw his plea.

5 Alternatively, there is also the additional ground of
6 failure to file a notice after being reasonably instructed to
7 do so.

8 THE COURT: Failure to file a notice of?

9 MR. LEE: Notice of appeal during the applicable time
10 period when reasonably instructed to do so.

11 We were going to argue to the Court -- and we have
12 the Supreme Court and Ninth Circuit cases on this -- that
13 there is no showing of prejudice needed in that avenue.

14 That if a -- if the circumstances reasonably known or
15 should have been known to counsel indicated that the defendant
16 was wanting to file an appeal, then it is ineffective
17 assistance for not doing so. The prejudice is inherent in
18 losing the ability to do so.

19 So the remedy there is for the Court to reenter
20 judgment, now giving Mr. Martinez a new 14-day window to file
21 his appeal.

22 So on the first showing, to allow Mr. Martinez to
23 withdraw his plea, there is the need for prejudice there. But
24 there is not for the second, for the failure to file notice of
25 appeal.

1 THE COURT: Do you wish to be heard?

2 MS. RABENN: No, your Honor. I agree that the
3 petitioner does have to show prejudice for the failure to
4 properly advise, and I don't think that the petitioner would
5 be able to make out that claim at all.

6 As to the second one, to be honest, I'm not sure
7 whether or not he has to show a prejudice, and I would like
8 just an opportunity to look at that question.

9 THE COURT: All right. Ms. Schuh, could I ask you to
10 please bring in Mr. Little. Thanks.

11 Mr. Little, if you would please retake the stand, you
12 are still under oath.

13 THE WITNESS: Thank you, your Honor.

14 KEVIN LITTLE,
15 called as a witness on behalf of the Defendant, having been
16 previously sworn, testified as follows:

17 FURTHER DIRECT EXAMINATION

18 BY MR. LEE:

19 Q. Thank you. Good afternoon, Mr. Little.

20 A. Good afternoon.

21 Q. And Mr. Little, when you ended on Monday, since that time,
22 you have sent both myself and the government some information,
23 correct?

24 A. That is correct.

25 MR. LEE: And if I may approach?

1 THE COURT: Received.

2 (Defendant's Exhibit L was received.)

3 BY MR. LEE:

4 Q. If we could backtrack just a little bit. If I could
5 return your attention to Exhibit I.

6 A. Yes.

7 Q. You know, at the end of Monday's hearing, we were talking
8 about Mr. Martinez was initially deported on a 288(a), and
9 then later, there was amendment where the INS was adding,
10 amending to add the 245, correct?

11 A. That's what was discussed. And it is only fair that those
12 representations be corrected, because, at least upon my
13 review, further review of the file, I don't think that's an
14 accurate summary of what his immigration, the course of his
15 immigration proceedings was.

16 Q. Right. And you had addressed that in Exhibit I in that
17 e-mail to counsel, that you stated it was your understanding,
18 and I quote here, "The March 2015 removal order was based on
19 both convictions, not just the 288"?

20 A. That should read March of '05, not '15.

21 Q. Right. Okay. And it continues, "This is very clear if
22 one reviews discovery pages 20 through 26, rather than the
23 single pages I was shown"?

24 A. Yes.

25 Q. And at this point, I would ask you to turn your attention

1 to Exhibit M. That is a copy of Bates 20 through 26 that you
2 referenced in your e-mail?

3 A. Yes.

4 Q. And, specifically, there is Bates 22 and 23. The
5 legibility is not very good. Would you agree that it is hard
6 to read 22 and 23?

7 A. A couple of the pages are not crystal clear, yes.

8 Q. If you go to the very end of M, I've included what is
9 Bates marked 104-105. They were attached to the government's
10 opposition to the habeas in this case.

11 To your knowledge, these are just more legible copies
12 of Bates 22 and 23?

13 A. That's what they appear to be.

14 Q. And I know we reviewed some of these documents on Monday.
15 And so can you explain to me which document in here you
16 believe that the immigration judge relied as a basis for the
17 deportation, the 245 conviction?

18 A. Okay. Well, the deportation order is dated March 29,
19 2005, and it indicates that a hearing had been held on that
20 date.

21 The documents making reference to discovery page 20
22 show that an additional charge of inadmissibility,
23 deportability had been alleged prior to that date that
24 included the assault with a deadly weapon conviction from
25 March of 2001.

1 I think there is other discovery pages that also show
2 that 288 had been alleged as a, likewise, as an additional
3 basis for deportation.

4 I think the actual basis for deportation needs to be
5 well understood. And it's clear that, at least to me, from
6 having reviewed not only this, but similar packets, that when
7 Mr. Martinez was ordered deported on March 29th, 2005, it was
8 not on the basis of just part of what the allegations were at
9 that time, but on all of them.

10 Q. And you're basing that conclusion on -- is that Bates 22?

11 A. Let me see. Well, the clearer version is appended, right?

12 Q. Right.

13 A. Bates 104.

14 Q. Right. The second to the last page?

15 A. Yes.

16 Q. And this is a document we went over on Monday. Do you
17 recall that conversation?

18 A. I do, but at the time, I didn't have a chance to review
19 what I would refer to as the "entire packet" that pertained to
20 that hearing. I only had an opportunity to do that after we
21 finished court.

22 Q. Do you recall on Monday, discussing that INS adding the
23 245 as a grounds for deportation? I believe you called it
24 akin to an amended petition?

25 A. Well, and that's probably, in retrospect, not exactly

1 right, because the way that, if we explain it more accurately
2 and more completely, my understanding of these packets were,
3 is that each further ground for deportation has a page similar
4 to that where it says, "Additional charges of Inadmissibility/
5 Deportability." So it is a separate page, and they
6 cumulatively form a part of the petition.

7 Q. So just because something is alleged as a grounds for
8 deportation, does a judge have to necessarily find every
9 single ground true?

10 A. Well, my understanding is that, no, the judges make their
11 determinations, like any other judges would, on the facts and
12 the law, and find which are correct and which are not.

13 Q. Right. So when we went through 104 on Monday, you know,
14 there is a lot of boxes checked, but it doesn't specify the
15 exact grounds that were the basis for the deport in '05; is
16 that correct?

17 A. Well, it does not state specifically, nor does it
18 specifically identify which charges or which pages of the
19 petition supported the deportation, that's correct.

20 Q. Right. In reviewing the discovery on the case, you had
21 what you believed is commonly referred to as the "A File"?

22 A. That's what these are commonly referred to, yes.

23 Q. Did you have the entirety of the A File?

24 A. That is -- I can tell you what my assumption was. I had
25 the entirety of the A File because there were pleadings from

1 A. I have no reason to disbelieve that.

2 Q. So no high school education. It is fair to say not the
3 most sophisticated client you have had?

4 A. That is fair to say.

5 MR. LEE: Thank you. I have nothing further at this
6 time.

7 THE COURT: Cross?

8 CROSS-EXAMINATION

9 BY MS. RABENN:

10 Q. Good afternoon, Mr. Little.

11 A. Good afternoon.

12 Q. What were your initial communications with the client and
13 the family members with regard to any specific goals or
14 objectives?

15 A. I recall at Mr. Martinez's initial appearance, that at
16 least two of his family members, his mother and one of his
17 sisters, I believe, were present. And that I spoke with them
18 either before or after the hearing, and they provided me with
19 business cards from Mr. Martinez's immigration attorney and
20 his state court criminal attorney.

21 Q. And did they express an ultimate goal of what was most
22 important to them?

23 A. The goal of the case, as confirmed from my initial
24 conversations with Mr. Martinez himself, as well as his
25 family, was to find some way for him not to get deported.

1 Mr. Martinez had children here in the United States.
2 He had a mother who, he indicated, was very ill, who -- for
3 whom he was her primary caretaker. And it was very apparent
4 and very clear to me that that was the goal of this case, to
5 try to see if there was a way to avoid his being deported.

6 And we all thought that -- or I shouldn't say. I
7 don't want to go beyond the question. That's what my initial
8 conversations with him reflected.

9 Q. So to summarize, was preserving his immigration status or
10 possibility of some status more important to them than an
11 eventual sentence?

12 A. Absolutely, it was. Mr. Martinez -- in connection with
13 either the first or second court appearance, we already had a
14 plea agreement.

15 Q. Was that a fast track plea agreement?

16 A. Yes. And when I went over that with Mr. Martinez, it was
17 very clear to me that what they wanted to do was to see how
18 the pending attempts in state court were going to turn out,
19 where they were trying to set aside his assault with a deadly
20 weapon conviction, just as they had succeeded in setting aside
21 the 288 conviction.

22 Q. Do you have Exhibit Q in front of you?

23 A. Yes.

24 Q. So I'm going to bring your attention to that sentence that
25 Mr. Lee read to you, and you kept talking after that. Can you

1 take a look at what you say after that and read it to
2 yourself.

3 A. Yes. Down to line 24 or on to the next page?

4 Q. Onto the second paragraph on the next page. We are
5 looking at pages 2 and 3.

6 A. Yes, okay. I read that.

7 Q. And does that, what you said at that time, basically
8 summarize his reasons for wanting to plead guilty without a
9 plea agreement?

10 A. That's correct. By the time Mr. Martinez pled guilty and
11 was sentenced in August, his efforts to attack his plea of the
12 245 in state court had failed.

13 So by then, the only option was to pursue an appeal
14 of that failure through the state court system.

15 Q. And that effort was being pursued by another attorney, a
16 criminal attorney, correct?

17 A. Correct.

18 Q. And you were in --

19 A. I think it is still being pursued, to be honest with you.

20 Q. And you were in contact with that attorney during this
21 time?

22 A. Yes.

23 Q. And he kept you updated as to the status of that
24 proceeding?

25 A. Yes.

1 Q. And you were also in contact with an immigration attorney?

2 A. Yes.

3 Q. Who kept you updated as to the status of those
4 proceedings?

5 A. Yes.

6 Q. And so in between when this case was filed and when
7 Mr. Martinez pled guilty, there were some events that happened
8 in those other cases, correct?

9 A. Well, yeah. From time to time, it seemed to me that the
10 state court matters were proceeding more rapidly than the
11 immigration matters, but, yes, I got updates from both
12 attorneys, and, in turn, I gave them updates.

13 Q. And that affected your strategy in the federal case?

14 A. Yes, absolutely. You know, not to trivialize it, but for
15 a long time in this case, our strategy was delay, delay, and
16 delay, because we were trying to slow things down so that if
17 he were going to obtain some relief in either an immigration
18 forum or the state court, that we would allow those things to
19 happen before we resolved this case.

20 Q. And on page 2, when you say, "He can't afford to revoke or
21 waive his rights to appeal," were you talking about what you
22 said after that? Was that the basis for an eventual appeal in
23 your mind?

24 A. Well, just to make this clear --

25 Q. Uh-huh.

1 A. In April, he told me that there had been a hearing on his
2 motion under Penal Code section 1016.5 to get that set aside,
3 that conviction set aside on the basis of Mr. Martinez not
4 having been informed of his immigration rights. That motion,
5 he said, did not go well, but it had been taken under
6 submission.

7 He later indicated to me that the judge had issued an
8 order which was consistent with whatever comments had been at
9 that April hearing, where the 1016.5 motion was denied.

10 So we knew, my understanding in early May of '16,
11 that there was no -- that he still had a valid state court
12 conviction. I think we waited a few months longer because
13 Mr. DeRemegio had said he was going to do a reconsideration
14 and/or a remit of the denial.

15 But either he had decided for whatever reason not to
16 do those things or those had been done unsuccessfully by the
17 time Mr. Martinez ended up pleading in August.

18 Q. At the point in time where Mr. Martinez pleaded, did you
19 believe that the government could prove its case against him
20 beyond a reasonable doubt?

21 A. Yes. I don't want to sound facetious, but I think even a
22 nonattorney could prove that case.

23 Q. And standing here today, if, for some reason, Mr. Martinez
24 got his conviction vacated, would the government still be able
25 to prove its case against Mr. Martinez beyond a reasonable

1 doubt?

2 A. To my understanding, the facts haven't changed, so the
3 answer would be yes.

4 Q. Did Mr. Martinez or his family ever ask you to file a
5 direct appeal?

6 A. No, they didn't. The message logs only confirmed what I
7 recall during my subsequent discussions with Mr. Martinez --
8 whether they were at the jail or a marshal lockup, I don't
9 recall -- and with his family, both in person, after the
10 hearing, and also by phone and text.

11 They were upset that he got 41 months, and they
12 wanted to take the other deal, what I think we've referred to
13 earlier, as the "non-fast track deal," which he had earlier
14 decided he didn't want.

15 Q. What did you tell them when they brought these concerns to
16 you?

17 A. I remember telling them that, number one, to my
18 estimation, that didn't provide a basis to withdraw his plea.

19 Number two, the plea agreement that they were saying
20 they now wanted to take would involve a waiver of his rights,
21 which was absolutely what they didn't want.

22 It seemed to me they were getting extremely
23 irrational in what they wanted and didn't want.

24 And I believe that I explained that to Mr. Martinez
25 and also to his family members, but they were insistent that

1 I would do so at this time. That was the transcript of the
2 August 29th hearing.

3 THE COURT: It's not in. Any objection?

4 MS. RABENN: No objection.

5 THE COURT: Received.

6 (Defendant's Exhibit Q was received.)

7 MR. LEE: Out of an abundance of caution, I think I
8 moved all the exhibits today, I through Q, in.

9 THE COURT: You did.

10 MR. LEE: Very good. We have no further witnesses.

11 THE COURT: Ms. Rabenn?

12 MS. RABENN: I don't have any witnesses, your Honor.

13 THE COURT: Mr. Lee?

14 MR. LEE: So your Honor, perhaps I could argue --
15 again, we submit to the Court there is two independent bases
16 for granting habeas relief in this case. One requiring
17 prejudice, one that does not.

18 We will start with this contention about proper
19 advisement. I think it is useful if we could just recap
20 Mr. Martinez had a 1992 conviction for a Penal Code section
21 288(a) violation.

22 And this Court has heard evidence the first
23 deportation was on the basis of that 288, and that 288 alone,
24 and that was in 1996.

25 In 2001, there was the 245, the assault conviction.

1 And then in 2005, there was the second deport.

2 Here, the Court can see from Exhibit C, that the INS
3 had amended to add the 245 as a basis of the deportation.

4 Now, the problem we have here, though, is we do not
5 know what the immigration judge relied on in her deportation
6 order. We don't know if she allowed the amendment, if that
7 was a basis of the deport. The record is not clear.

8 We have referred to a number of times to that
9 document. We know he was deported, but it doesn't have the
10 specificity as to which particular grounds were used.

11 And we would further note that order of the
12 immigration judge in the 2005 deport, it states that it is a
13 summary of the oral decision. It is not the full oral
14 decision, and that this memorandum is solely for the
15 convenience of the parties.

16 We don't have the entire A File before the Court. We
17 don't have the recording, which is available, of that hearing.
18 We don't know the exact bases. There is ambiguity there.

19 And this Court heard testimony that counsel did not
20 have a red flag, did not follow up on some of these
21 deportation issues because Mr. Martinez signed a document
22 confirming he had a valid deportation.

23 And, your Honor, this is a lay individual, who has a
24 ninth grade El Salvadoran education. This is why people get
25 appointed counsel, so counsel can do the legal analysis, to

1 look into these legal issues.

2 And we would submit to the Court that whether the
3 deportation could be attacked at trial, that conversation,
4 this was necessary information to have for that conversation.
5 Otherwise, a waiver of that right and the decision to enter a
6 guilty plea is not knowing, voluntary, and intelligent.

7 This Court also knows that in 2015, that the 288(a)
8 conviction was vacated. So without proof beyond a reasonable
9 doubt that the 245 was a basis for that immigration judge for
10 deporting Mr. Martinez, the elements are not met.

11 And so, again, based on what was available and what
12 is available at this time to this Court, we don't have that
13 element of proof beyond a reasonable doubt, which makes any
14 discussion about pleading instead of going to trial a
15 nonvoluntary, knowing, and intelligent conversation.

16 I would like to -- and again, we would submit to the
17 Court, there very obviously was prejudice. I don't think we
18 need to go through that analysis. I think the Court can see,
19 if that argument is accepted, why Mr. Martinez was prejudiced.

20 But turning to the second basis, the failure to file
21 a notice of appeal. No prejudice is needed there.

22 And I would cite -- well, there are two cases that I
23 believe are relevant to this Court's analysis. The first one
24 is *United States v. Sandoval-Lopez*, and that's the Ninth
25 Circuit. The citation is 409 F.3d 1193.

1 That is a further discussion of the Supreme Court
2 case of *Roe v. Flores-Ortega*. That was the Supreme Court, in
3 2000, and that citation is 528 U.S. 470.

4 Now, what the Supreme Court did in *Roe v.*
5 *Flores-Ortega*, it applied the *Strickland* analysis to the IAC
6 standard to determine when the IAC applies for failure to file
7 a notice of appeal.

8 The Supreme Court discusses, well settled, that if a
9 defendant instructs his counsel to file a notice of appeal --

10 THE COURT: You can stop right there. Did he?

11 MR. LEE: *Roe* goes through both extremes. It is
12 clear as day, if you unambiguously say, "File my notice,"
13 counsel has got to do it.

14 THE COURT: Who did --

15 MR. LEE: I will get -- it is the third part of the
16 *Roe* analysis that we are getting to.

17 THE COURT: So you are not suggesting that you've
18 proven that the defendant here, Mr. Martinez, asked Mr. Little
19 to file a notice of appeal?

20 MR. LEE: We are not arguing that, that that specific
21 phrase was used, no.

22 THE COURT: Okay.

23 MR. LEE: The second, on the other end, *Roe* discusses
24 if the defendant instructs the defendant [sic] not to file a
25 notice of appeal, like "I don't want to appeal," the defendant

1 cannot later complain about counsel's failure to do so.

2 But *Flores-Ortega* was about the middle ground. And
3 the question, at 477, the Supreme Court said was, quote, "Is
4 counsel deficient for not filing a notice of appeal when the
5 defendant had not clearly conveyed his wishes one way or the
6 other?"

7 And in making that determination, there is two
8 questions to be asked. The first one is whether counsel in
9 fact consulted with the defendant about having an appeal.

10 The Supreme Court continues:

11 "We imply the term 'consult' to convey a very specific
12 meaning, advising the defendant about the advantages
13 and disadvantages of taking the appeal, and making a
14 reasonable effort to discover defendant's wishes."

15 THE COURT: So what's the evidence on that?

16 MR. LEE: Well, I would submit that there was a
17 conversation that Mr. Little talked about that happened after
18 plea and sentencing.

19 But I'm more concerned about question two, which is
20 the next question.

21 "If counsel has not consulted with the defendant, the
22 court must in turn ask a second, and subsidiary,
23 question: whether counsel's failure to consult with
24 the defendant itself constitutes deficient
25 performance."

1 That question lies at the heart of the case. Under
2 what circumstances does counsel have an obligation to consult
3 with the defendant about an appeal.

4 THE COURT: What evidence is there that he did not
5 consult?

6 MR. LEE: What you heard from Mr. Little was that
7 there was one, and perhaps more, conversations after plea and
8 sentence, and the only conversation was about wanting to
9 withdraw the plea. You didn't hear any evidence about a
10 discussion of --

11 THE COURT: That's exactly right. You don't hear
12 any. And who's got the burden here?

13 MR. LEE: I will address that in just a moment.

14 THE COURT: Okay.

15 MR. LEE: So the Court answered this question at 480,
16 when it said:

17 "We instead hold that counsel has a constitutionally
18 imposed duty to consult with a defendant about an
19 appeal when there is reason to think either (1) that
20 a rational defendant would want to appeal (for
21 example, because there are nonfrivolous grounds), or
22 (2) that this particular defendant reasonably
23 demonstrated to counsel that he was interested in
24 appealing. In making this determination, courts must
25 take into account all the information counsel knew or

1 should have known."

2 The *Sandoval-Lopez* Ninth Circuit case takes that
3 analysis and gives some guidance there. And *Sandoval-Lopez*,
4 the Ninth Circuit said in 2005, one of the factors this Court
5 is to look at is:

6 "Whether the plea was entered pursuant to a plea
7 agreement, whether the defendant had been sentenced
8 in accord with his agreement, and whether the plea
9 agreement waived or reserved the right to appeal."

10 And here, as the Court knows, it was a straight up
11 plea. So we don't have those factors that would suggest --
12 well, these factors fall in favor that he did want to appeal
13 because there was no waiver of it.

14 Now, the Ninth Circuit, also in *Sandoval-Lopez*, talks
15 about looking at the totality of the circumstances, and that's
16 why we put on the evidence we did.

17 We know that after the plea and sentence, that
18 Mr. Martinez, he was upset, he was angry. His family members,
19 as well as himself, were making efforts to withdraw his plea.

20 And, you know, as Mr. Little stated, the government's
21 plea agreements bundled these things, the withdrawal of the
22 plea, the direct appeal, the habeas petition.

23 In looking at this, the totality, we don't hold
24 Mr. Martinez to the same standards of an attorney. He is a
25 ninth-grade-educated El Salvadoran, who doesn't speak English.

1 It is reasonable to interpret his strong desire to
2 withdraw his plea after sentencing as wanting to appeal. I
3 think that is supported by everything this Court has heard.

4 I point to the Court specifically --

5 THE COURT: But the evidence is not that. The
6 evidence is that he wanted to appeal the conviction of the 245
7 and see if he couldn't get rid of that in state court, which
8 was a collateral matter that Mr. Little was not handling, that
9 was, in fact, being aggressively pursued, apparently, based on
10 the evidence, and that the defendant lost.

11 MR. LEE: Right. And that case was still, and, I
12 believe, and is still pending appeal, that 245 withdrawal.

13 THE COURT: The -- it is pending appeal from the
14 loss.

15 MR. LEE: Right.

16 THE COURT: So he is accomplishing what the evidence
17 says he was seeking.

18 MR. LEE: But the evidence is also saying he was
19 unhappy with the results of this case.

20 THE COURT: Well, he was unhappy with the sentence,
21 but the sentence -- that's the evidence. He was unhappy with
22 the sentence.

23 And you know, the sentence itself, at the time of the
24 change of plea, made it very clear to him before the plea was
25 taken, that the plea agreement, there wasn't one --

1 MR. LEE: Uh-huh.

2 THE COURT: -- and that the Court was not constrained
3 by the guidelines.

4 So if the -- if there is no plea agreement that
5 lulled the defendant somehow into believing that he was going
6 to get a certain plea, and the Court specifically said to him,
7 "I'm not bound by the guidelines. I am bound by statutory
8 maximums," which were also given to him.

9 MR. LEE: Uh-huh.

10 THE COURT: But the sentence didn't come anywhere
11 close to the maximum sentence, and he got what he got. So I'm
12 not following this.

13 MR. LEE: Well, your Honor, he was clearly unhappy
14 with what happened.

15 THE COURT: Yeah, the sentence. He was unhappy with
16 it.

17 MR. LEE: And he reserved his right to appeal this
18 particular case. Now, whether he would be meritorious on
19 appeal or not is not part of this analysis.

20 THE COURT: Well, I understand that part. I am just
21 trying to figure out what the evidence is that he gave any
22 indication at all that he wanted to appeal anything in the
23 federal side.

24 He wanted to appeal on the state side, and that was
25 being accomplished, and, apparently, is still being

1 accomplished.

2 MR. LEE: So I think that issue is very revealing
3 from Mr. Little's testimony of how his interactions with the
4 family was. His mother called him "son" in Spanish. That he
5 was -- well, he thought the relationship was good up until the
6 sentencing.

7 And then there was an expressed desire that "We don't
8 like what happened. We want to withdraw the plea."

9 THE COURT: That's analogous to going to trial and
10 getting convicted and saying, "I think I will take the plea
11 agreement now." I mean it is -- you get what you get, and --

12 MR. LEE: You get what you get, but you have the
13 right to appeal that.

14 THE COURT: You certainly do. --

15 MR. LEE: And if somebody is telling you, "I want to
16 withdraw my plea," I think the answer should be, "Well, you do
17 have the right to appeal. Do you want to do that?"

18 THE COURT: What is the evidence to indicate that he
19 did not ask him that question?

20 MR. LEE: There is no testimony.

21 THE COURT: Exactly. And who has the burden of
22 proof?

23 MR. LEE: So I think, again, this Court can look from
24 the testimony, that all the conversation was regarding the
25 withdrawal of the plea. Not about appeal.

1 That trigger -- we are looking again at a nonlawyer,
2 uneducated, low ninth grade education, coupled with the
3 circumstantial evidence we hear in this case.

4 Everyone was cognizant -- these witnesses before the
5 Court were cognizant about the 14 days, all right.

6 And I would direct this Court specifically to what
7 Alex Martinez said on the stand on Monday. I'm sorry. It was
8 Alex Garcia.

9 You know, his words on the stand were, "And my
10 brother accepted it because he," talking about Kevin Little,
11 "told him that they were going to do an appeal, and within 14
12 days he was going to do that, and then he never did."

13 Now, this Court, I think, got a little frustrated
14 with there was a lot of confusion about --

15 THE COURT: Hearsay.

16 MR. LEE: Hearsay. Who said who to what.

17 THE COURT: Who had personal knowledge, whether or
18 not there was a foundation. I did. Indeed, I did. And I'm
19 still frustrated by it.

20 MR. LEE: Right. And I think part of the confusion
21 is witnesses didn't understand or perhaps didn't remember, was
22 this a voice mail, was this a message to the secretary, was
23 there an in-person conversation, was this a text message.
24 These are events that happened now.

25 THE COURT: Did somebody else tell you about this and

1 that is why you are testifying to it? Is this your belief?
2 Did you piece it together?

3 MR. LEE: What you can see from the phone records --
4 and that's what we previously had admitted as Exhibit -- I
5 believe it was Exhibit L. Your Honor, you have in Exhibit L,
6 that was the sister's T-Mobile bill. And what is Mr. Little's
7 cell phone number, there are, by my recollection, five or six
8 calls made on September 12th.

9 THE COURT: Okay.

10 MR. LEE: This is right at the end of the time period
11 to file an appeal.

12 THE COURT: True.

13 MR. LEE: I think that shows the urgency of trying to
14 get in communication, because everyone was cognizant the Court
15 said something about 14 days, we need to do something within
16 14 days. And we have a flurry of activity on the 12th, right
17 before that time period is about to expire.

18 And that's circumstantial evidence that, combined
19 with however it was conveyed, "I am unhappy with what
20 happened. I want to withdraw my plea. I don't want it to
21 stand the way it is."

22 From a reasonable attorney standpoint, I don't know
23 how you don't interpret that as "I want to appeal my case" or
24 "That prompts me to have that conversation to ascertain for
25 sure."

1 THE COURT: I think that, if I'm not mistaken,
2 Mr. Little's testimony was that he had conversations along
3 those lines, about wanting to withdraw a plea. And he
4 explained to family members why that would be a very, very bad
5 idea.

6 There is no indication that they came to the
7 conclusion that it was a good idea. And Mr. -- and told
8 Mr. Little, "We want" -- it is not up to them, it is up to
9 Mr. Martinez himself.

10 MR. LEE: Sure. And this Court has Mr. Martinez's
11 subsequent letters that say, "I have been trying to get my
12 attorney to do this. Help me."

13 And I again would go back to that Supreme Court case
14 I was just discussing, that whether a failure to file the
15 request for appeal, whether there is any meritorious grounds
16 or not, is just not part of the analysis. And that's because
17 the Supreme Court said --

18 THE COURT: No. I agree with that. I know the law
19 on that, but that's not what I'm asking. I'm not talking
20 about was there a meritorious ground.

21 I'm talking about the testimony by Mr. Little that he
22 had those conversations that you are suggesting he may have
23 had. He said he did have them. I think all of the evidence
24 is indicative that he did have those conversations with the
25 family members.

1 The question is, after those discussions, there is no
2 indication that Mr. Martinez himself wanted to continue, after
3 being told, apparently, that this was a very bad idea and
4 might affect the appeal that was ongoing in the state court
5 with regard to the 245 PC conviction.

6 MR. LEE: Except we have the message logs from
7 Mr. Little's office saying, "Rene Martinez called. He doesn't
8 want the plea."

9 THE COURT: That was the plea that the government had
10 offered.

11 MR. LEE: This was after plea and sentencing, that he
12 is unhappy, he wants to withdraw his plea. And we have no
13 evidence there was any followup directly between Mr. Martinez
14 and Mr. Little where he was talked out of that.

15 THE COURT: I understand your argument.

16 MR. LEE: And as this Court is aware, on habeas
17 petitions, we don't hold pro per habeas, uneducated
18 petitioners without a law degree, to the same standard.

19 Because he cannot come up with the magic words:
20 "File my notice of appeal," versus expressing his
21 dissatisfaction with the outcome, that he couches it as, "I
22 want to withdraw my plea," the Court should construe that in
23 favor of Mr. Martinez making the request to file the notice of
24 appeal, which is unambiguously not waived.

25 And the reason -- one of the reasons given is why he

1 entered the straight up plea instead of taking an offer.

2 THE COURT: Ms. Rabenn?

3 MS. RABENN: Thank you, your Honor.

4 I will address Mr. Lee's arguments in turn. First, I
5 believe that Mr. Lee misunderstands the elements of 1326. The
6 government at no point in time needed to prove that the 245
7 conviction was underlying the removal, that the government had
8 the burden to prove beyond a reasonable doubt that --

9 THE COURT: I didn't hear Mr. Lee suggest you did.

10 MS. RABENN: He said that, if his argument was
11 accepted, that the 245 was not necessarily the conviction that
12 was upholding the removal, that we wouldn't be able to meet
13 our burden and prove the elements.

14 THE COURT: I see what you are saying. Got it.

15 MS. RABENN: What I'm saying is that's not one of the
16 elements.

17 THE COURT: I understand.

18 MS. RABENN: The defendant has -- sorry.

19 The government has to prove that the defendant was
20 removed and that he reentered. And then, you know, to make it
21 a 20-year max, we have to prove a felony.

22 And so 1326(d) specifically limits how the defendant
23 could attack that removal, because the fact that he was
24 removed is easily provable. 1326(d), there is --

25 THE COURT: Well, he admitted that.

1 Mr. Little should have affirmatively done it in the absence of
2 such a request.

3 And for those reasons, the government submits that
4 simply because Mr. Martinez was unhappy with his sentence and
5 decided after the ship had sailed that he wanted to withdraw
6 and completely reverse course on his case, if that is even
7 what happened, that is not a reason for Mr. Little to have
8 filed an appeal.

9 MR. LEE: Your Honor, in terms of the government's
10 analysis of the 245 and the advisement, I would concur except
11 for the fact that this Court, and what's available as
12 evidence, that's a leap. We don't know that the immigration
13 judge relied on the 245 as a basis --

14 THE COURT: We also don't know that she didn't.

15 MR. LEE: Correct. But when you're discussing the
16 case pre-conviction, it is information you need to have a part
17 of the conversation with the client, whether you should take a
18 deal, we should try to collaterally attack, we should have a
19 motion to dismiss.

20 THE COURT: Where is the evidence that that wasn't
21 discussed?

22 MR. LEE: Well, as this Court just indicated, we
23 don't have evidence one way or another. We don't know if it
24 was part of the deport or if the judge relied upon it. She
25 may have, she may not have. But without it, it is hard to

1 have that conversation in a knowing, voluntary, and
2 intelligent manner.

3 THE COURT: Okay.

4 MR. LEE: Your Honor, if the Court looks at the Ninth
5 Circuit and Supreme Court case law, again, this is, you know,
6 if the reasonable -- if the request -- a reasonable attorney
7 would understand what was being asked of him was to file the
8 appeal. It's got to be done, regardless of whether it is
9 meritorious or not.

10 And I would submit to the Court, your Honor, that we
11 had Mr. Little talk about, I think, "After court, after the
12 sentencing, I went down to lockup. I talked to him. He was
13 angry, he was upset. He talked about withdrawing his plea,
14 and I explained to him why it is a bad idea."

15 But then we have Exhibit J, which documents calls
16 Mr. Martinez made from the jail on days subsequent to the plea
17 and sentencing, on September 1st and September 2nd, where he
18 is leaving messages with the office, "Wants to talk to Kevin
19 to go over his deal. He says he does not want the deal. That
20 does not want deal. Wants to talk to Kevin."

21 I would assert to the Court, based on everything this
22 Court knows, this is an unsophisticated way of saying, "I
23 don't like what happened. I want to appeal the case."

24 THE COURT: Well, okay.

25 MR. LEE: Because --

1 THE COURT: I understand your argument.

2 MR. LEE: It is post-plea, post-sentencing. There is
3 no deal to change. The only thing you can do is change the
4 fact of the conviction and sentence.

5 THE COURT: I thought that there was an indication
6 that he was wanting to go back to the government and take the
7 deal. And then the messages from his family. Inconsistent.

8 MR. LEE: Well, what we have is evidence of what Rene
9 Martinez wanted. And he is indicating his dissatisfaction
10 with what happened.

11 The only way to address that at that particular point
12 in time is direct appeal. Whether we call it "direct appeal"
13 or whether we call it "motion to withdraw" or whether we call
14 it "2255 relief," whatever we call it, again, in his point of
15 view, he is not happy. He wants something done.

16 What can be done in this particular time is a direct
17 appeal.

18 THE COURT: Okay.

19 MS. RABENN: Can I add one more thing?

20 THE COURT: One more.

21 MS. RABENN: What we don't have, we have testimony
22 that -- sorry.

23 We have documentary evidence that Mr. Martinez did
24 not want the deal and he communicated that to Mr. Little's
25 office. Then we have testimony that Mr. Little spoke to him

1 and explained the consequences of that.

2 What we don't have is evidence that Mr. Martinez
3 rejected Mr. Little's advice and said, "No," within that time
4 period, "I want -- I want to continue with this course of
5 action. Do something about it." We don't have that evidence.

6 The petitioner has the burden. They failed to meet
7 it because we don't have that the last communication with
8 Mr. Little was that he had to do something within that 14-day
9 period.

10 THE COURT: I understand. I will take a look at the
11 cases that you have cited, and we will take it under
12 submission, and we will get an order out very shortly. Thank
13 you. We will be in recess.

14 (The proceedings were concluded at 2:44 p.m.)

15 I, PEGGY J. CRAWFORD, Official Reporter, do hereby
16 certify the foregoing transcript as true and correct.

17
18 Dated: 11th of February, 2019 /s/ Peggy J. Crawford
19 PEGGY J. CRAWFORD, RDR-CRR
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5 **UNITED STATES DISTRICT COURT**
6 **FOR THE EASTERN DISTRICT OF CALIFORNIA**
7

8 **UNITED STATES OF AMERICA,**

9 **Plaintiff-**
10 **Respondent,**

11 **v.**

12 **ANTONIO RENE MARTINEZ,**

13 **Defendant-**
14 **Petitioner.**
15

1:14-cr-00158-LJO-SKO-1

**ORDER ON 28 U.S.C. § 2255 MOTION
TO VACATE, SET ASIDE, OR
CORRECT SENTENCE**

(ECF Nos. 35, 36, 44, 45)

16 Antonio Rene Martinez ("Petitioner" or "Martinez") brings a 28 U.S.C. § 2255 Motion to
17 Vacate, Set Aside, or Correct Sentence ("Section 2255 Motion"). ECF Nos. 35, 36. On August
18 29, 2016, Martinez entered an open guilty plea, without entering into a plea agreement, to one
19 count of being a deported alien found in the United States in violation of 8 U.S.C § 1326(a).
20 Martinez states that he received ineffective assistance of counsel in two respects: 1) his attorney
21 incorrectly advised him of the sentencing guideline maximum which caused him to reject a plea
22 agreement and instead enter an open guilty plea to one count for violation of 8 U.S.C. § 1326(a);
23 and 2) his attorney did not advise him of a potential affirmative defense to the charge under 8
24 U.S.C. § 1326. ECF No. 36 at 4-8. Namely, Martinez contends that his attorney did not advise
25 him that he could collaterally attack the underlying deportation order if he proceeded to trial in
26 this illegal re-entry case. *Id.* at 7. For the reasons discussed below, the Court DENIES the
27 petition.
28

I. BACKGROUND

On July 31, 2014, Petitioner was indicted on charges of being a deported alien found in the United States, in violation of 8 U.S.C. § 1326(a) and (b)(2). ECF No. 1. It is alleged that Martinez was deported from the United States on or about June 22, 2005, after being convicted of one or more aggravated felonies on or about December 7, 2001, specifically assault with a deadly weapon in violation of California Penal Code (“CPC”) § 245(a)(1). *Id.* Martinez was then found within the State on or about June 15, 2014. *Id.* Martinez was arrested in the Northern District in August 2015 and ordered transported to the Eastern District. ECF No. 3. Petitioner was arraigned on September 10, 2015 and entered a plea of not guilty. ECF No. 4. On August 29, 2016, Martinez entered an open guilty plea, without entering into a plea agreement, to one count of being a deported alien found in the United States in violation of 8 U.S.C § 1326(a). ECF No. 24. He was sentenced on the same day to a 41-month term of imprisonment. *Id.*

At the change of plea hearing on August 29, 2016,¹ the Court inquired whether there was a plea offer and Martinez’s attorney stated: “There was an offer, but there is an issue with this case that where Mr. Martinez simply cannot afford to revoke or waive his rights to appeal.” ECF No. 42 at 2:14-18. He indicated that Martinez had a state court petition pending to vacate one of his prior convictions. *Id.* at 2:19-3:4.² Martinez’s attorney explained that he was pleading without an agreement because he could not afford to waive his right to revisit this case either by appeal or by 2255 depending on the result of the state court appeal. *Id.*³ The Court then asked: “he does realize that if he pleads guilty, he is going to be sentenced before the state court appeal is

¹ At the August 29, 2016 hearing, Martinez was present and received the assistance of a Court-certified Spanish language interpreter. ECF No. 42 at 2.

² Martinez apparently had two prior conviction that were the subject of the 2005 deportation order, one under CPC § 288 and one under CPC § 245(a)(1). He successfully had the § 288 conviction vacated but the motion to vacate the § 245(a) conviction was denied and was being appealed. *Id.* Martinez also apparently had pending immigration proceedings that relied upon the result of the state court proceedings. *Id.*

³ The government submitted in its opposition that Defendant received two plea agreements from the government, one fast-track plea and a non-fast track plea. ECF No. 44 at 5. Both plea agreements required defendant to plead guilty to the one count charged in the indictment and required defendant to knowingly waive his right to appeal and right to collaterally attack pursuant to § 2255 his plea, conviction, and sentence. *Id.* Both plea agreements required the government to recommend a two to three level reduction for acceptance of responsibility depending on the offense level. *Id.* The fast track plea agreement additionally required the government recommend an additional two-level departure in the offense level. *Id.*

1 resolved?" *Id.* at 3:7-10. Martinez's attorney responded: "He fully understands that, yes." *Id.* His
2 attorney further indicated that as to the indictment, the conviction under CPC § 245(a)(1) was the
3 subject of the pending appeal and therefore the conviction at that time remained valid and would
4 be admitted. *Id.* at 4:11-18.

5 The Court advised Martinez and Martinez confirmed his understanding that the
6 maximum penalty for his case is a \$250,000 fine or 20 years of imprisonment or both. *Id.* at 5:7-
7 10. The Court confirmed that Martinez understood that the Court is obligated to consider the
8 federal guidelines in sentencing but not obligated to follow them, and that Martinez would not be
9 able to take the change of plea back if the Court did not follow the guidelines. *Id.* 6:9-15.
10 Martinez indicated he had no questions. *Id.* During the change of plea, Martinez admitted to
11 entering the United States after being deported on or around June 22, 2005, as a result of being
12 convicted of a crime punishable by a term of imprisonment of more than one year; specifically
13 assault with a deadly weapon in violation of CPC § 245(a)(1) on December 7, 2001. *Id.* at 7:25-
14 8:21.

15 Sentencing was conducted the same day as the change of plea, based on the pre-plea
16 presentence investigation report ("PSR") prepared by probation on September 25, 2015. ECF
17 No. 10; ECF No. 42 at 7:23-8:22. The PSR calculated a total offense level of 21 and a criminal
18 history category of II, resulting in a guideline sentence range of 41 to 51 months.⁴ The Court
19 sentenced Martinez to a 41-month term of imprisonment. ECF Nos. 24-25.

20 On September 1, 2017, Petitioner filed a Section 2255 Motion, claiming he received
21 ineffective assistance of counsel. ECF Nos. 35-36.⁵ Included with Petitioner's Section 2255
22 Motion, Petitioner requested the Court appoint him counsel. ECF No. 36. The Court denied that
23 motion without prejudice on September 25, 2017 and directed the government to file an
24

25 ⁴ The guideline range was calculated based on the 2014 edition of the United States Sentencing Guidelines. ECF No.
10, ¶ 6.

26 ⁵ Martinez originally filed a motion for reconsideration of the judgment and commitment on March 2, 2017. ECF
27 No. 30. The Court notified him it would construe the motion as a Section 2255 motion and gave him the opportunity
28 to withdraw or to amend it with any further Section 2255 claims before construing it as such a motion. ECF No. 31.
On May 18, 2017, Martinez withdrew the request. ECF Nos. 33-34. Martinez then filed the current Section 2255
Motion, received on September 1, 2017, with a request that he be permitted to supplement it. ECF No. 35. On
September 11, 2017, he filed a supplement to the motion detailing the basis for his motion. ECF No. 36.

1 opposition. ECF No. 38. The government filed an opposition to Martinez's Section 2255 Motion
2 and included a declaration from Martinez's counsel, Mr. Kevin Little, as well as other
3 documentary evidence. ECF No. 44. Mr. Little's declaration directly refutes Martinez's
4 assertions about the advice he received both on the potential sentence and on whether he advised
5 Martinez about the possibility of collateral attack at trial to the charge in the indictment. ECF No.
6 44, Exhibit A, "Little Decl.," ¶¶ 12-18. Martinez replied on December 14, 2017. ECF No. 45. As
7 a result of the factual dispute concerning what Martinez was told by counsel, the Court elected to
8 hold an evidentiary hearing and appointed Martinez counsel for the purpose of the hearing. ECF
9 No. 46. The evidentiary hearing took place on October 15, 2018 and October 19, 2018. ECF Nos.
10 50, 52.⁶

11 II. STANDARD OF REVIEW

12 A. Section 2255

13 A federal prisoner making a collateral attack against the validity of his or her conviction
14 or sentence must do so by way of a motion to vacate, set aside, or correct the sentence pursuant
15 to 28 U.S.C. § 2255, filed in the court which imposed sentence. *Tripati v. Henman*, 843 F.2d
16 1160, 1162 (9th Cir. 1988). Section 2255 provides four grounds upon which a sentencing court
17 may grant relief to a petitioning in-custody defendant:

18 [1] that the sentence was imposed in violation of the
19 Constitution or laws of the United States, or [2] that the
20 court was without jurisdiction to impose such sentence, or
21 [3] that the sentence was in excess of the maximum
22 authorized by law, or [4] is otherwise subject to collateral
23 attack.

24 28 U.S.C. § 2255(a). Generally, only a narrow range of claims fall within the scope of § 2255.
25 *United States v. Wilcox*, 640 F.2d 970, 972 (9th Cir. 1981). The alleged error of law must be "a
26 fundamental defect which inherently results in a complete miscarriage of justice." *Davis v.*

27 ⁶ After scheduling the evidentiary hearing, the Court learned that although Martinez was sentenced to a 41-month
28 term of imprisonment on August 29, 2016 he was released in June 2018 and deported sometime thereafter. Martinez
did not appear at the evidentiary hearing but his appointed counsel was present.

1 *United States*, 417 U.S. 333, 346 (1974) (quoting *Hill v. United States*, 368 U.S. 424, 428
2 (1962)).

3 Under § 2255, “a district court must grant a hearing to determine the validity of a petition
4 brought under that section, ‘[u]nless the motions and the files and records of the case
5 conclusively show that the prisoner is entitled to no relief.’” *United States v. Blaylock*, 20 F.3d
6 1458, 1465 (9th Cir. 1994) (quoting 28 U.S.C. § 2255) (emphasis in original). The court may
7 deny a hearing if the movant’s allegations, viewed against the record, fail to state a claim for
8 relief or “are so palpably incredible or patently frivolous as to warrant summary dismissal.”
9 *United States v. McMullen*, 98 F.3d 1155, 1159 (9th Cir. 1996) (internal quotations omitted),
10 *cert. denied*, 520 U.S. 1269 (1997). While a hearing may be required “[w]here section 2255
11 motions have been based on alleged occurrences outside the record,” no hearing is required if
12 “the issue of credibility can be conclusively decided on the basis of documentary testimony and
13 evidence in the record.” *Shah v. United States*, 878 F.2d 1156, 1158 (9th Cir. 1989). Ultimately,
14 “Section 2255 requires only that the district court give a claim careful consideration and plenary
15 processing, including full opportunity for presentation of the relevant facts.” *Id.* at 1159.

16 **B. Ineffective Assistance of Counsel**

17 The Sixth Amendment guarantees “the right to effective assistance of counsel.” *McMann*
18 *v. Richardson*, 397 U.S. 759, 771 n. 14 (1970). Ineffective assistance of counsel claims are
19 analyzed under the framework set out by the Supreme Court in *Strickland v. Washington*, 466
20 U.S. 668 (1984). *Ross v. Stewart*, 32 F. App’x 227, 228-29 (9th Cir. 2002). In *Strickland*, the
21 Supreme Court held that there are two components to an ineffective assistance of counsel claim:
22 “deficient performance” and “prejudice.” 466 U.S. at 694. “Deficient performance” means
23 representation that “fell below an objective standard of reasonableness” and requires the movant
24 to show that counsel made errors so serious that she was not functioning as the “counsel”
25 guaranteed by the Sixth Amendment. *Id.* at 687-88; *Stanley v. Cullen*, 633 F.3d 852, 862 (9th
26 Cir. 2011). To demonstrate prejudice, the movant must show that “there is a reasonable
27 probability that, but for counsel’s unprofessional errors, the result of the proceeding would have
28 been different.” *Strickland*, 466 U.S. at 694. “It is not enough ‘to show that the errors had some

1 conceivable effect on the outcome of the proceeding.” *Harrington v. Richter*, 562 U.S. 86
2 (2011) (quoting *Strickland*, 466 U.S. at 693). A court need not determine whether counsel’s
3 performance was deficient before examining the prejudice suffered by the movant as a result of
4 the alleged deficiencies. *Strickland*, 466 U.S. at 697. The Court is also not required to address
5 both prongs if the defendant makes an insufficient showing on one. *Id.*

6 The Supreme Court has held that “the two-part *Strickland* test applies to challenges to
7 guilty pleas based on ineffective assistance of counsel.” *Hill v. Lockhart*, 474 U.S. 52, 58 (1985).
8 In the context of guilty pleas, the first prong of the *Strickland* test echoes the standard of attorney
9 competence set forth *McMann v. Richardson*, 397 U.S. 759 (1970). *Id.* at 58-59. “Where . . . a
10 defendant is represented by counsel during the plea process and enters his plea upon the advice
11 of counsel, the voluntariness of the plea depends on whether counsel’s advice ‘was within the
12 range of competence demanded of attorneys in criminal cases.’” *Hill*, 474 U.S. at 56 (quoting
13 *McMann*, 397 U.S. at 771). “The second, or ‘prejudice,’ requirement, on the other hand, focuses
14 on whether counsel’s constitutionally ineffective performance affected the outcome of the plea
15 process.” *Hill*, 474 U.S. at 59. “In other words, in order to satisfy the ‘prejudice’ requirement, the
16 Petitioner must show that there is a reasonable probability that, but for counsel’s errors he would
17 not have pleaded guilty and would have insisted on going to trial.” *Id.*; see also *United States v.*
18 *Keller*, 902 F.2d 1391, 1394 (9th Cir. 1990); *Glover v. United States*, 531 U.S. 198, 203 (2001)
19 (“[t]he determinative question—whether there is “a reasonable probability that, but for counsel’s
20 unprofessional errors, the result of the proceeding would have been different”—remains
21 unchanged”) (citation omitted).

22 III. DISCUSSION

23 Petitioner’s Section 2255 Motion argues that he received ineffective assistance of counsel
24 on two grounds. ECF No. 36. First, Martinez argues that his attorney told him the incorrect
25 sentencing guidelines maximum he could receive. *Id.* at 4-6. Specifically, Martinez states that he
26 rejected a fast-track plea deal the government offered recommending a sentence of 24 months
27 because his counsel told him to reject the offer because “24 months is the maximum he
28 would receive” if he entered an open plea of guilty. Martinez contends if he had known he could

1 be sentenced to more than 24 months, then he would have accepted the government's plea deal.
2 *Id.* at 5. Secondly, Petitioner claims his attorney's assistance was ineffective, and his guilty plea
3 was not knowing and voluntary, because his attorney did not properly investigate and advise him
4 about an affirmative defense to the charge in the indictment under 8 U.S.C. § 1326. *Id.* at 6-8.
5 Specifically, Martinez states that his attorney, despite knowing that the deportation order was
6 being challenged in independent proceedings as constitutionally infirm, failed to inform him that
7 he could mount a collateral attack on that deportation order should he proceed to trial in this
8 matter. *Id.* at 7. Martinez further states that had he known he could attack the deportation order if
9 he proceeded to trial in this matter, he would have proceeded to trial. *Id.* In passing reference,
10 Martinez also states that his attorney did not file a direct appeal as requested by Martinez but
11 provides no details about this allegation. *Id.* at 8. At the evidentiary hearing, Martinez's counsel
12 pursued this as a basis for granting the Section 2255 Motion. As a result, the Court also
13 addresses the merits of this claim herein.

14 In response, the government asserts that Petitioner's ineffective assistance of counsel
15 claims have no merit and that the Section 2255 Motion should therefore be denied and dismissed
16 with prejudice. As to the first ground of Martinez's Section 2255 Motion, the government
17 contends only "gross mischaracterizations" of the likely sentence rises to the level of ineffective
18 assistance of counsel and the 17-month difference does not constitute a "gross
19 mischaracterization" of the sentence under Ninth Circuit precedent. ECF No. 44 at 7. The
20 government further contends that Martinez's contention that Mr. Little advised him of a
21 maximum 24-month sentence is not credible based on the declaration submitted by Mr. Little
22 and the Court's advisement at the change of plea hearing that the maximum sentence was 20
23 years. As to the second ground for Martinez's Section 2255 Motion, the government first
24 contends that Mr. Little did in fact advise Martinez of the possibility of a collateral attack on his
25 removal at trial and second that Martinez was not prejudiced even if Mr. Little failed to advised
26 him of such a defense because he cannot meet the statutory requirements of mounting such an
27 attack under 8 U.S.C. § 1326(d). ECF No. 44 at 8-11.

1 Pursuant to Mr. Little's declaration, the government submits that Mr. Little properly
2 advised Martinez about the applicable sentencing guidelines range and also advised him of the
3 possibility of collaterally attacking the deportation order if he went to trial. Little Decl. ¶¶ 12-18.
4 Mr. Little's declaration indicates that he was in contact with two other attorneys that were
5 representing Martinez. *Id.* ¶¶ 7-8. One attorney was representing Martinez in state criminal court
6 proceedings and had successfully set aside one of his felony convictions and was actively
7 working to have the other felony conviction (the conviction that was identified in the indictment
8 in this case) set aside on the basis that he was not advised of the immigration consequences of his
9 guilty plea. *Id.* ¶¶ 7-8. The other attorney was an immigration attorney that was appealing the
10 denial of a petition for waiver of deportation and anticipating filing a new immigration petition if
11 his criminal attorney was successful in having his felony conviction for violation of CPC §
12 245(a)(1) set aside. *Id.* Mr. Little submits that Martinez and his family were uniform in their
13 desire to reject the fast track plea agreement in order to delay the federal proceedings and have a
14 chance in obtaining positive results in his related state court criminal and immigration
15 proceedings. *Id.* ¶ 11. Additionally, Mr. Little's declaration contradicts Martinez's contention
16 that he incorrectly advised him that the sentencing guideline maximum was 24 months. *Id.* ¶¶ 12,
17 18. Mr. Little submits that he advised Martinez that he was facing as much as 57 months. *Id.* ¶
18 18. Mr. Little contends that Martinez's highest priority was to maintain a chance to remain
19 lawfully in the United States, rather than obtaining the lowest sentence, and he made a knowing
20 and voluntary decision to turn down the fast track plea agreement as well as the non-fast track
21 agreement. *Id.* ¶¶ 11, 13, 16-18. Lastly, Mr. Little's declaration directly contradicts Martinez's
22 contention that he was not advised of the possibility of attacking the deportation order at trial. *Id.*
23 ¶ 16.⁷

24 Because Martinez and his attorney offered conflicting accounts of what Martinez was
25 advised regarding a potential defense and the sentencing guidelines maximum, the Court held an
26 evidentiary to resolve first whether counsel's performance was deficient. ECF No. 46. At the

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28 ⁷ Mr. Little's declaration also attached a number of emails between himself and the AUSA, as well as emails he
exchanged with Martinez's state criminal attorney and his immigration attorney. ECF No. 44 at 17-86.

1 evidentiary hearing, held on October 15 and October 19, 2018, Martinez's attorney also argued
2 that the failure to file an appeal constituted ineffective assistance of counsel. ECF Nos. 50, 52.
3 The Court discusses its findings of fact following the evidentiary hearing as to each ineffective
4 assistance claim in the respective sections below.

5 **A. Advice of Counsel as to Maximum Sentencing Guideline Range**

6 Martinez claims that his attorney incorrectly advised him that the applicable sentencing
7 guideline range for his offense was a maximum of 24 months. Martinez received a sentence of
8 41 months. ECF No. 25.⁸ Mr. Little states that he advised Martinez of a sentencing guideline
9 exposure of as much as 57 months. ECF No. 36 at 5; Little Decl. ¶ 18.

10 Even assuming the truth of Martinez's contention that his attorney advised him
11 incorrectly on the sentencing guidelines maximum, the 17-month disparity in the sentence he
12 received versus what he thought the maximum guideline was would not be grounds for a
13 successful ineffective assistance of counsel claim. "[A] mere inaccurate prediction, standing
14 alone, would not constitute ineffective assistance" unless the prediction constituted a "gross
15 mischaracterization of the likely outcome." *Iaea v. Sunn*, 800 F.2d 861, 865 (9th Cir. 1986)
16 (citations omitted); *Doganieri v. United States*, 914 F.2d 165, 168 (9th Cir. 1990) (finding that
17 three-year disparity between an attorney's sentencing prediction of "not more than twelve years"
18 if defendant pleaded guilty and the fifteen-year sentence defendant in fact received did "not rise
19 to the level of a gross mischaracterization of the likely outcome of his case, and thus does not
20 constitute ineffective assistance of counsel"). Here, even if Martinez's counsel had predicted a
21 maximum sentence of 24 months where Martinez received 41 months, this would not amount to
22 a "gross mischaracterization" of the outcome under Ninth Circuit precedent. *Id.*; *Sophanthovong*
23 *v. Palmateer*, 378 F.3d 859, 869 (9th Cir. 2004) (60-month difference between presumptive
24 sentence predicted by defense attorney and the actual sentence imposed, where sentence was still
25 "well below the maximum sentence," was not a gross mischaracterization); *Rosenbaum v. United*

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27 ⁸ The Court notes that although Martinez was sentenced to 41 months on August 29, 2016, he was released in June
28 2018 and deported sometime thereafter. Martinez filed his Section 2255 Motion while he was still in custody and
therefore meets the "in-custody" jurisdictional requirement of 28 U.S.C § 2255, which applies at the time the motion
is filed. *United States v. Ndiagu*, 591 F. App'x 632 (9th Cir. 2015).

1 *States*, 290 F. Supp. 70, 71 (M.D. Fla. 1968) (petitioner, whose sole basis for post-conviction
2 relief was that he had understood maximum sentence on plea of guilty would be two years and
3 that he instead received sentence of four years and six months, was not entitled to post-
4 conviction relief), *aff'd*, 413 F.2d 298 (5th Cir. 1969). Accordingly, even if Martinez's
5 allegations are true, the seventeen-month disparity in the predicted and actual sentence does not
6 amount to a gross mischaracterization in the outcome and therefore does not constitute deficient
7 performance under the first prong of the *Strickland* test.

8 Additionally, Mr. Little's testimony at the evidentiary hearing as to what he advised
9 Martinez, namely that his sentencing exposure was higher than 24 months (and as high as 57
10 months) and that Martinez's priority was to preserve his appellate rights in order to maintain the
11 best chance to remain lawfully in the United States, was consistent with his submitted
12 declaration and credible. *See* Little Decl. ¶ 18. Mr. Little's testimony directly refutes Petitioner's
13 contentions that he was advised that the sentencing guideline maximum was 24 months.
14 Martinez did not offer any contrary evidence to undermine Mr. Little's credible testimony and in
15 fact his counsel appears to have withdrawn this claim at the hearing by not pursuing it as a
16 ground for relief.⁹ Based on the evidence presented at the hearing, the Court additionally
17 concludes that Martinez was correctly advised of his sentencing guideline exposure and that his
18 counsel's performance was factually not deficient. Accordingly, Martinez fails to meet the first
19 prong of the *Strickland* test, *see* 466 U.S. at 689, and the Court need not consider the prejudice
20 prong, since Petitioner is not able to meet the first prong. *See Rios v. Rocha*, 299 F.3d 796, 805
21 (9th Cir. 2002) ("Failure to satisfy either prong of the *Strickland* test obviates the need to
22 consider the other.").

23 Thus, the Court DENIES Petitioner's Section 2255 motion with regard to his claim that
24 he received ineffective assistance of counsel on his maximum sentencing guideline exposure.

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⁹ At the evidentiary hearing, Martinez's counsel submitted that Petitioner sought relief based on two alternative grounds that each amounted to ineffective assistance of counsel: 1) the failure to advise Martinez about the potential defense to the indictment; and 2) failure to file a notice of direct appeal after being instructed to do so.

1 **B. Collateral Attack on Removal Order**

2 Martinez also claims he received ineffective assistance of counsel because his attorney
3 did not advise him of a potential defense to the charge in the indictment under 8 U.S.C. § 1326.
4 ECF No. 36 at 7. Namely, Martinez contends that his attorney did not advise him that he could
5 mount a collateral attack on the underlying deportation order if he proceeded to trial in this
6 matter. *Id.* In this regard, Martinez further claims that his attorney failed to investigate the
7 underlying removal order and inform him that a collateral attack was a viable defense. *Id.* Mr.
8 Little's declaration directly refutes this contention and he states that he did in fact advise
9 Martinez of the possibility of such a defense at trial. Little Decl. ¶ 16. Mr. Little's on the record
10 statements at the change of plea and the emails submitted with his declaration indicate that he
11 was aware of the challenge to the state court conviction and in contact with Martinez's state
12 criminal lawyer and his immigration lawyer. ECF No. 42 at 2-3, Little Decl. ¶¶ 7-11.

13 In evaluating whether a defendant received ineffective assistance of counsel, "[w]here the
14 alleged error of counsel is a failure to advise the defendant of a potential affirmative defense to
15 the crime charged, the resolution of the 'prejudice' inquiry will depend largely on whether the
16 affirmative defense likely would have succeeded at trial." *Elmore v. Sinclair*, 799 F.3d 1238,
17 1252 (9th Cir. 2015) (quoting *Hill*, 474 U.S. at 59). In a criminal prosecution under 8 U.S.C. §
18 1326, a defendant has a Fifth Amendment right to collaterally attack his underlying immigration
19 removal order in the criminal proceeding "because the removal order serves as a predicate
20 element of his conviction." *United States v. Ubaldo-Figueroa*, 364 F.3d 1042, 1047 (9th Cir.
21 2004). "To sustain a collateral attack under § 1326(d), a defendant must, within constitutional
22 limitations, demonstrate (1) that he exhausted all administrative remedies available to him to
23 appeal his removal order, (2) that the underlying removal proceedings at which the order was
24 issued improperly deprived him of the opportunity for judicial review, and (3) that the entry of
25 the order was fundamentally unfair." *Id.* at 1048 (citing 8 U.S.C. § 1326(d)). An underlying
26 deportation proceeding is "fundamentally unfair" if "(1) [a defendant's] due process rights were
27 violated by defects in his underlying deportation proceeding, and (2) he suffered prejudice as a
28 result of the defects." *Id.* (quoting *United States v. Zarate-Martinez*, 133 F.3d 1194 (9th Cir.

1998)); *see United States v. Muro-Inclan*, 249 F.3d 1180, 1184 (9th Cir. 2001) (“To establish prejudice, [the defendant] ‘does not have to show that he actually would have been granted relief. Instead, he must only show that he had a “plausible” ground for relief from deportation.”) (citation omitted).

Martinez’s Section 2255 Motion did not offer any facts to establish how or why the entry of the underlying removal order was fundamentally unfair or how it violated his due process rights. Accordingly, it remains wholly unclear whether the alleged failure to advise him of his right to collateral attack may have amounted to ineffective assistance of counsel. Based on the parties’ submissions, the Court does not have enough information about the removal proceedings to make a determination about the likelihood of success of such a defense in order to determine if the alleged failure to advise him of the defense could have prejudiced Martinez under the second prong of the *Strickland* analysis.¹⁰ Additionally, because there is a factual dispute regarding what Martinez was advised regarding a potential affirmative defense, the resolution of the first prong under *Strickland* requires the Court to make a credibility determination about disputed facts that occurred off the record. *See Shah*, 878 F.2d at 1158 (“Where section 2255 motions have been based on alleged occurrences outside the record, we have often held that an evidentiary hearing was required”); 28 U.S.C. § 2255(b) (a court must hold an evidentiary hearing on a § 2255 motion “unless the files and records of the case conclusively show that the prisoner is entitled to no relief”).

At the evidentiary hearing, Mr. Little testified, consistent with his submitted declaration, that he did advise Martinez of the possibility of collateral attack of the deportation order if he went to trial. He further explained that he discussed with Martinez that there was no valid reason

¹⁰ The Court notes that although the government attached certain documents related to Martinez’s immigration proceedings to its opposition, there is insufficient information concerning the removal order and deportation proceedings to make a determination of whether the proceedings were somehow fundamentally unfair. BCF No. 44 at 10. The government attached a page concerning the charges against Martinez in the removal proceedings (Exhibit C); an October 23, 2015 order of the immigration court denying a motion to reopen the deportation proceedings (Exhibits D & G); a motion to vacate Martinez’s conviction under California Penal Code § 288(a) (Exhibit E); the state court order granting the motion to vacate the conviction (Exhibit F); and the December 30, 2015 decision of the Board of Immigration Appeals denying Martinez’s appeal of the decision denying his request to reopen proceedings (Exhibit H). It appears that the document that was transmitted to the Court as Exhibit D is not what is described to be in the government’s brief, but is instead a duplicate copy of Exhibit G.

1 to attack the order at trial while his conviction under CPC § 245(a) was still outstanding. As a
2 result, the defense strategy initially was to delay in order to await the result of the state court
3 proceedings challenging the conviction under CPC § 245(a)(1). Apparently at some point in
4 early May, it became clear that the CPC § 245(a)(1) conviction remained valid without further
5 appeals and therefore Martinez then pled guilty without a plea agreement in order to preserve his
6 right to file a § 2255 motion if he was later successful in challenging the state conviction.
7 Furthermore, Mr. Little testified that while the CPC § 245(a)(1) conviction was still valid, he
8 would not have considered going to trial in this case because Martinez had confessed to the
9 elements of the charge when he was arrested. Again, the Court finds his testimony concerning
10 what he advised Martinez to be credible. Furthermore, the Court finds Mr. Little's representation
11 on the whole appears to have been competent and thorough.

12 The only evidence Martinez submitted at the hearing on this claim was the testimony of
13 Mr. Little. Martinez's counsel elicited testimony that Mr. Little may not have obtained the entire
14 immigration "A-file" and also did not seek the recording of the deportation hearing that would
15 have been available had he sought it. Instead, Mr. Little relied on the deportation order and other
16 documents that were produced in discovery to conclude that the CPC § 245(a)(1) conviction
17 formed the basis of the removal order. As a result, Martinez's counsel argued at the hearing that
18 there was "ambiguity in the record" as to what happened at the deportation hearing and whether
19 the § 245(a)(1) conviction formed a basis for the removal order. Martinez's counsel argued that
20 Mr. Little needed to get the complete record in order to have an intelligent conversation with his
21 client about whether to attack the deportation order at trial. Martinez has not submitted any
22 authority for the proposition that a competent defense attorney defending in an 8 U.S.C § 1326
23 action would request all these immigration documents if the other documents indicated that the
24 deportation was based on a valid conviction without any reason to believe that the record would
25 contradict the immigration court's deportation order. Mr. Little testified that the discovery he
26 received in this matter made it very clear that the removal order was based on both the CPC §
27 288 and § 245(a)(1) convictions and that he had no reason to believe the discovery he received in
28 the matter was otherwise incomplete. Martinez has not established that a failure to retrieve

1 additional documents under the facts of this case “fell below an objective standard of
2 reasonableness.” *Strickland*, 466 U.S. at 687-88. At best, this argument amounts to speculation.¹¹
3 The argument that there may have been some hypothetical possibility that other documents or the
4 recording of the deportation hearing would have revealed something other than what otherwise
5 clear from the record before Mr. Little, falls short of showing that there was deficient
6 performance. *Toomey v. Bunnell*, 898 F.2d 741, 743 (9th Cir. 1990) (burden on habeas petitioner
7 to show through evidentiary proof that counsel’s performance was objectively deficient).
8 Additionally, Martinez did not offer any evidence concerning how he could meet the
9 requirements of 8 U.S.C. § 1326(d) to mount a successful collateral attack, including by failing
10 to present any evidence on how the deportation proceedings were “fundamentally unfair.”
11 Accordingly, Martinez has not established that he was prejudiced under the second prong of the
12 *Strickland* analysis even if his counsel’s failure to review other immigration documents
13 somehow amounted to deficient performance.

14 The Court here finds that Mr. Little’s performance was not deficient on his advice on a
15 potential defense to the 8 U.S.C. § 1326 charge in the indictment. Thus, the Court DENIES
16 Petitioner’s Section 2255 Motion with regard to his claim that he received ineffective assistance
17 of counsel on his ability to collaterally attack the deportation order if he went to trial.

18 **C. Failure to File A Direct Appeal**

19 While Martinez did not clearly set forth the failure to file a direct appeal as a ground for
20 ineffective assistance of counsel in his Section 2255 Motion, Martinez’s counsel elicited
21 testimony on this point and argued it as basis for relief at the evidentiary hearing. Accordingly,
22 the Court addresses this argument here.
23
24

25
26 ¹¹ It appears Martinez’s counsel did not check whether the underlying deportation hearing provided support for this
27 hypothetical scenario. Additionally, the government’s opposition submitted the immigration judge’s October 23,
28 2015 decision on the motion to reopen proceedings, which gives every indication that the conviction under CPC §
245(a)(1) did form the basis of the deportation as the immigration court apparently heard testimony on both prior
convictions. ECF No. 44, Exhibit G at 3-4. Additionally, in 2005 the § 245(a) conviction was added as an additional
charge of deportability. *Id.*, Exhibit C.

1 The Supreme Court reaffirmed in *Roe v. Flores-Ortega*, that “a lawyer who disregards
2 specific instructions from the defendant to file a notice of appeal acts in a manner that is
3 professionally unreasonable.” 528 U.S. 470, 477 (2000). The Court applied a modified version of
4 the *Strickland* analysis to determine *when failure to consult* with a client regarding an appeal
5 constitutes deficient performance. The Court defined “consult” to mean “advising the defendant
6 about the advantages and disadvantages of taking an appeal, and making a reasonable effort to
7 discover the defendant's wishes.” *Id.* at 478. “Counsel has a constitutionally imposed duty to
8 consult with the defendant about an appeal when there is reason to think either (1) a rational
9 defendant would want to appeal (for example, because there are nonfrivolous grounds for
10 appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was
11 interested in appealing.” *Id.* at 480. The Court further found, with regard to the *Strickland*
12 prejudice prong, “in these circumstances, a defendant must demonstrate that there is a reasonable
13 probability that, but for counsel’s deficient failure to consult with him about an appeal, he would
14 have timely appealed.” *Id.* at 484. “[T]he defendant does not have to show that he might have
15 prevailed on appeal to show prejudice, just that he probably would have appealed had his lawyer
16 asked.” *United States v. Sandoval-Lopez*, 409 F.3d 1193, 1196 (9th Cir. 2005) (noting that the
17 Supreme Court rejected the Ninth Circuit’s per se rule on the prejudice prong of *Strickland* in
18 cases involving failure to file a direct appeal).

19 First, Martinez has not offered any evidence that he gave specific instructions to his
20 counsel to file a direct appeal. Mr. Little testified that Martinez never asked about filing a direct
21 appeal. Additionally, Martinez does not suggest there were any nonfrivolous grounds for
22 appealing after entering his guilty plea and there is no reason to think a rational defendant would
23 want to appeal given the circumstances. However, Martinez’s counsel elicited testimony from
24 Mr. Little that after the sentencing Martinez discussed a desire to withdraw his plea with Mr.
25 Little. Petitioner’s counsel argued at the hearing that this request to withdraw his plea could be
26 interpreted as “reasonably demonstrat[ing] . . . that he was interesting in appealing” under
27 *Flores-Ortega*, in part because Martinez was uneducated and therefore would not know what
28 exact legal language to use to ask for an appeal. Counsel has not submitted any authority for the

1 latter argument. The Court disagrees with this contention under the facts presented here. In
2 determining whether a particular defendant “reasonably demonstrated to counsel that he was
3 interested in appealing[,]” such that counsel had a constitutionally imposed duty to consult with a
4 defendant about an appeal, a court “must take into account all the information counsel knew or
5 should have known.” *Flores-Ortega*, 528 U.S. at 480. “Only by considering all relevant factors
6 in a given case can a court properly determine whether . . . the particular defendant sufficiently
7 demonstrated to counsel an interest in an appeal.” *Id.*

8 Mr. Little testified that he never interpreted Martinez’s request to withdraw the plea as a
9 request to file a direct appeal in part because there was no meritorious basis for filing an appeal.
10 Additionally, “a highly relevant factor in this inquiry will be whether the conviction follows a
11 trial or a guilty plea, both because a guilty plea reduces the scope of potentially appealable issues
12 and because such a plea may indicate that the defendant seeks an end to judicial proceedings.”
13 *Id.* Here, Martinez entered a guilty plea. The record is also clear that Martinez’s number one
14 priority was preserving his immigration status in order to be able to stay in the country if he was
15 successful in vacating his state court conviction or in his pending immigration petition. In fact,
16 the strategy in the case had been to delay in order to see if Martinez would be successful in his
17 pending state court and immigration proceedings. Once the state trial court denied his motion to
18 vacate the CPC § 245(a) conviction, continuing to delay was no longer an option. Moreover, the
19 reason that Martinez entered an open guilty plea without accepting the offered plea agreement
20 was to preserve his right to bring a § 2255 motion if he was ultimately successful in appealing
21 the state court conviction. Given this backdrop, there was no obvious reason why Martinez’s
22 dissatisfaction with his sentence and corresponding request to withdraw his plea should have
23 reasonably demonstrated to Mr. Little that Martinez was interested in appealing without any
24 basis to support an appeal. Furthermore, the Court at sentencing specifically advised Martinez of
25 his right to appeal, but instead of making a request to appeal he consistently asked about
26 withdrawing his plea.

27 Even construing the evidence to find that Martinez demonstrated an interest in appealing,
28 Mr. Little testified that he did in fact consult with Martinez about the advantages and

1 disadvantages of filing a motion to withdraw his plea and advised against it. Mr. Little explained
2 to Martinez why dissatisfaction with the length of his sentence was not a basis to withdraw his
3 plea and that there was no benefit to withdrawing the plea. Even if Martinez successfully
4 withdrew his plea, he could either go to trial or enter into a new plea deal if the government
5 offered one. If he went to trial on the charge under 8 U.S.C § 1326, he could not successfully
6 challenge the still valid state court conviction at trial, and Martinez had confessed to the elements
7 of the charge when he was arrested. Therefore, withdrawing the plea and going to trial would
8 most likely have resulted in a higher sentence upon losing at trial. If he withdrew his plea instead
9 to enter into a plea deal with the government for a shorter sentence, such plea agreement would
10 likely include a waiver of all his appellate rights and that would be detrimental to him if he was
11 ultimately successful at invalidating his state court conviction under CPC § 245(a)(1).

12 Under *Flores-Ortega*, “[i]f counsel has consulted with the defendant, the question of
13 deficient performance is easily answered: Counsel performs in a professionally unreasonable
14 manner only by failing to follow the defendant's express instructions with respect to an appeal.”
15 528 U.S. at 478. There is no evidence that Mr. Little failed to follow the defendant's “express
16 instructions” because Martinez did not testify or present evidence of what his specific
17 communications with Mr. Little were apart from Mr. Little's testimony. At the hearing,
18 Martinez's counsel presented witness testimony from Irma Martinez, Martinez's sister; Alicia
19 Martinez, his mother; and Alex Garcia, his brother-in-law, about calls or communication they
20 had with Mr. Little or his office staff. Irma Martinez testified that she never spoke with Mr. Little
21 after the sentencing but she claimed that before the sentencing Mr. Little said he was going to
22 appeal. Alicia Martinez testified that she did not personally tell Mr. Little that her son wanted to
23 appeal. Alex Garcia's testimony was both unclear and somewhat contradictory as to the timing
24 of when he spoke with Mr. Little but he stated that Mr. Little told him he was going to appeal at
25 the sentencing. In contrast, Mr. Little credibly testified that none of Martinez's family asked him
26 to file a direct appeal but there was discussion on the withdrawal of his plea. Moreover,
27 Martinez's family's testimony does not weigh credibly on the conversation Mr. Little had with
28 Martinez *after* the sentencing, advising him that a motion to withdraw the plea, as was requested,

1 was unwise. His family's testimony was unclear as to what, if anything, was communicated to
2 Mr. Little after he conferred with Martinez, and the Court gives it little weight. Petitioner's
3 counsel also submitted exhibits evidencing calls made to Mr. Little's office after the sentencing
4 by Martinez and his family and argued that the flurry of activity in the time leading up to the
5 appeal deadline is circumstantial evidence that Martinez wanted Mr. Little to appeal. The third-
6 party testimony and records of phone calls and messages do not elucidate whether Martinez
7 expressly instructed his counsel to file an appeal in this matter when he spoke with his counsel
8 after the sentencing.

9 There is evidence that Mr. Little advised his client of the unwisdom and the futility of
10 filing a motion to withdraw the plea. The Court also finds there is insufficient evidence that after
11 this advisement, Martinez continued to insist on filing an appeal, in any form, and that Mr. Little
12 refused. Hence, Martinez has not established deficient performance under the test delineated in
13 *Flores-Ortega* or as interpreted by the Ninth Circuit in *Sandoval-Lopez*.¹² The record shows that
14 Mr. Little "consulted" with Martinez about the futility of filing a motion to withdraw the plea.
15 There is evidence that Martinez called Mr. Little's office a number of times in the three days
16 after sentencing asking to speak to Mr. Little about his "deal." Mr. Little was uncertain as to the
17 timing of when he advised Martinez on the futility of filing a motion in relation to the timing of
18 these calls. In this Court's estimation, this uncertainty does not overcome the "strong
19 presumption that counsel's conduct falls within the wide range of reasonable professional
20 assistance." *Strickland*, 466 U.S. at 689; *see, e.g., Mangum v. United States*, No. CIV.A. 05-241,
21 2006 WL 858076, at *3 (D.R.I. Mar. 27, 2006) ("The Court concludes that under the framework
22 of *Flores-Ortega*, the evidence is insufficient to show any express instructions by Mangum to
23 his counsel to file an appeal, once he was advised that there were no grounds. Rather, the Court
24 finds, based on the comparative testimony and credibility of the witnesses, that Mangum

25
26 ¹² At the hearing, Petitioner's counsel relied solely on *Flores-Ortega* and *Sandoval-Lopez* to support the ineffective
27 assistance of counsel claim based on a failure to file a direct appeal. The Ninth Circuit in *Sandoval-Lopez* concluded
28 that an evidentiary hearing is required when a defendant alleges that his attorney refuses to file a notice of appeal
when ordered to do so. 409 F.3d at 1198. Therefore, the holding provides minimal guidance in the situation
presented here and does not support Martinez's argument for relief since he has failed to demonstrate that he
explicitly told his lawyer to appeal and that his lawyer failed to do so.

1 accepted his counsel's advice not to pursue an appeal but then changed his mind some eight to
2 nine months later"); *Sanzone v. Goode*, No. 10-CV-4431, 2011 WL 3625544, at *3, n.3
3 (E.D.N.Y. Aug. 12, 2011) (where petitioner had asked to withdraw his plea the court found it
4 was "objectively reasonable" for petitioner's attorney not to file an appeal on petitioner's behalf
5 given that petitioner had pled guilty pursuant to plea bargain and stated on the record he was not
6 coerced into accepting the bargain). Under the totality of the evidence, it appears that Martinez's
7 counsel provided him with competent advice. Martinez has not submitted sufficient evidence that
8 his counsel's performance "fell below an objective standard of reasonableness." *Strickland*, 466
9 U.S. at 687-88.

10 While the failure on the first prong of *Strickland* is sufficient to defeat Martinez's
11 ineffective assistance of counsel claim, Martinez also has not met the prejudice prong.
12 Petitioner's counsel argued at the hearing that no showing of prejudice is required when a
13 petitioner alleges that his counsel failed to file a direct appeal. However, that is not always the
14 case. The Supreme Court recognized in *Flores-Ortega* that

15 while the performance and prejudice prongs may overlap, they are not in all cases
16 coextensive. To prove deficient performance, a defendant can rely on evidence that he
17 sufficiently demonstrated to counsel his interest in an appeal. *But such evidence alone is*
18 *insufficient to establish*, that had the defendant received reasonable advice from counsel
about the appeal, he would have instructed his counsel to file an appeal.

19 528 U.S. at 486 (emphasis added). In finding that there was prejudice, *Sandoval-Lopez*
20 distinguished the facts of that case from *Flores-Ortega*, stating that "[Sandoval-Lopez] did not
21 merely demonstrate to counsel his interest in an appeal, he explicitly told his lawyer he wanted to
22 appeal and his lawyer refused to do so." 409 F.3d at 1198. That is not the case presented here.
23 Thus, Martinez's proffer that he demonstrated an "interest" in filing an appeal does not satisfy
24 his obligation to show that but for counsel's deficient performance there was a reasonable
25 probability that he would have appealed. The Ninth Circuit in *Sandoval-Lopez*, expressly
26 recognized the difference "where a defendant expresses some interest in appealing but would
27 have been talked out of it if his counsel had explained the unwisdom of such a decision." 409
28 F.3d at 1198. The evidence shows that Mr. Little did consult with his client and made a

1 reasonable effort to discover his client's wish for a lesser sentence but also recognized that
2 Martinez's main priority remained his immigration prospects. After receiving competent advice
3 that neither aim would be furthered by the withdrawal of his plea, it is not clear that Martinez
4 still wanted to file a motion to withdraw his plea or that he communicated express instructions to
5 file one despite the futility.

6 Thus, the Court DENIES Petitioner's Section 2255 Motion with regard to his claim that
7 he received ineffective assistance of counsel for his counsel's failure to file an appeal.

8 **D. Certificate of Appealability**

9 A Petitioner cannot appeal from the denial or dismissal of his Section 2255 motion unless
10 he has first obtained a certificate of appealability. 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b). A
11 certificate of appealability will issue only when a Petitioner has made "a substantial showing of
12 the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To satisfy this standard when the
13 Court has dismissed a Section 2255 motion (or claims within a Section 2255 motion) on
14 procedural grounds, a Petitioner must show that reasonable jurists would find debatable (1)
15 whether the court was correct in its procedural ruling, and (2) whether the motion states a valid
16 claim of the denial of a constitutional right. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). When
17 the Court has denied a Section 2255 motion or claims within the motion on the merits, a
18 Petitioner must show that reasonable jurists would find the Court's decision on the merits to be
19 debatable or wrong. *Id.* Based on the preceding analysis, the Court concludes that reasonable
20 jurists may differ with the Court's conclusion that Petitioner failed to make a substantial showing
21 on the denial of a constitutional right with regard to the failure to file a direct appeal. *Id.* at 483.
22 On the other grounds presented by the Section 2255 motion, the Court finds that Petitioner has
23 not made any showing, let alone a substantial one, of the denial of a constitutional right. 28
24 U.S.C. § 2253(c)(2). Accordingly, the Court issues a certificate of appealability with respect to
25 the failure to file a direct appeal and declines to issue a certificate of appealability on the
26 remaining grounds.

1 **IV. CONCLUSION AND ORDER**

2 For the reason discussed above, this Court DENIES Petitioner's Section 2255 motion to
3 vacate, set aside, or correct sentence. The Court also issues a certificate of appealability with
4 respect to ineffective assistance of counsel claim regarding the failure to file a notice of appeal.

5
6 IT IS SO ORDERED.

7 Dated: November 9, 2018

/s/ Lawrence J. O'Neill
UNITED STATES CHIEF DISTRICT JUDGE

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**Form 1. Notice of Appeal from a Judgment or Order of a
United States District Court**

Name of U.S. District Court:

U.S. District Court case number:

Date case was first filed in U.S. District Court:

Date of judgment or order you are appealing:

Fee paid for appeal? *(appeal fees are paid at the U.S. District Court)*

☐ Yes ☐ No ☒ IFP was granted by U.S. District Court

List all Appellants *(List each party filing the appeal. Do not use "et al." or other abbreviations.)*

Is this a cross-appeal? ☐ Yes ☒ No

If Yes, what is the first appeal case number?

Was there a previous appeal in this case? ☐ Yes ☒ No

If Yes, what is the prior appeal case number?

Your mailing address:

City: State: Zip Code:

Prisoner Inmate or A Number (if applicable):

Signature Date

Complete and file with the attached representation statement in the U.S. District Court

Feedback or questions about this form? Email us at forms@ca9.uscourts.gov

ER23

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Form 6. Representation Statement

Instructions for this form: <http://www.ca9.uscourts.gov/forms/form06instructions.pdf>

Appellant(s) *(List each party filing the appeal, do not use "et al." or other abbreviations.)*

Name(s) of party/parties:

ANTONIO RENE MARTINEZ

Name(s) of counsel (if any):

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Telephone number(s): 559-487-5561

Email(s): Charles_Lee@fd.org

Is counsel registered for Electronic Filing in the 9th Circuit? ☒ Yes ☐ No

Appellee(s) *(List only the names of parties and counsel who will oppose you on appeal. List separately represented parties separately.)*

Name(s) of party/parties:

United States of America

Name(s) of counsel (if any):

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To list additional parties and/or counsel, use next page.

Feedback or questions about this form? Email us at forms@ca9.uscourts.gov

Continued list of parties and counsel: *(attach additional pages as necessary)*

Appellants

Name(s) of party/parties:

Name(s) of counsel (if any):

Address:

Telephone number(s):

Email(s):

Is counsel registered for Electronic Filing in the 9th Circuit? ☐ Yes ☐ No

Appellees

Name(s) of party/parties:

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Telephone number(s):

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Name(s) of party/parties:

Name(s) of counsel (if any):

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

NOV 22 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ANTONIO RENE MARTINEZ,

Defendant-Appellant.

No. 19-15046

D.C. Nos. 1:17-cv-01195-LJO
1:14-cr-00158-LJO-

SKO-1

Eastern District of California,
Fresno

ORDER

Before: CANBY, TASHIMA, and CHRISTEN, Circuit Judges.

The parties' joint motion to vacate and remand (Docket Entry No. 18) is granted. We vacate the district court's order denying appellant's 28 U.S.C. § 2255 motion, and remand the case for the district court to re-enter the criminal Judgment and Commitment originally entered on September 2, 2016.

The mandate will issue forthwith.

APPEAL,CLOSED,INTERPRETER

U.S. District Court
Eastern District of California – Live System (Fresno)
CRIMINAL DOCKET FOR CASE #: 1:14-cr-00158-LJO-SKO All Defendants

Case title: USA v. Martinez
Related Case: 1:17-cv-01195-LJO

Date Filed: 07/31/2014
Date Terminated: 03/28/2019

Assigned to: District Judge
Lawrence J. O'Neill
Referred to: Magistrate Judge
Sheila K. Oberto

Appeals court case numbers:
19-15046 USCA, 20-10056
USCA

Defendant (1)

Antonio Rene Martinez
TERMINATED: 03/28/2019

represented by **Antonio Rene Martinez**
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ER406

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ATTORNEY TO BE NOTICED
Designation: Retained

Pending Counts

REENTRY OF DEPORTED
ALIENS
(1)

Disposition

CUSTODY: 41 Months. Special Assessment \$100.

Highest Offense Level (Opening)

Felony

Terminated Counts

None

Disposition

**Highest Offense Level
(Terminated)**

None

Complaints

None

Disposition

Unknown

Panel Administrator Connie Garcia

represented by **Connie Garcia**
Federal Defender's Office
Email: Connie_Garcia@fd.org
PRO SE

Plaintiff

USA

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Date Filed	#	Docket Text
07/31/2014	<u>1</u>	INDICTMENT as to Antonio Rene Martinez (1) count(s) 1. (Attachments: # <u>1</u> True Bill) (Gonzalez, R) (Entered: 07/31/2014)
08/31/2015	<u>3</u>	TRANSFER DOCUMENTS RECEIVED from Northern District of California re Rule 5(c)(3) as to Antonio Rene Martinez. (Sant Agata, S) (Entered: 09/02/2015)
09/09/2015	<u>6</u>	ARREST WARRANT RETURNED Executed on 8/24/15 as to Antonio Rene Martinez. (Verduzco, M) (Entered: 09/11/2015)
09/10/2015	4	MINUTES (Text Only) for proceedings before Magistrate Judge Sheila K. Oberto: ARRAIGNMENT and PLEA re INDICTMENT as to Antonio Rene Martinez (1) Count 1 held on 9/10/2015. Defendant advised of charges and rights; waived further reading of charges and statutory and constitutional rights; NOT GUILTY PLEA ENTERED. Discovery/reciprocal requested and ordered. Detention Hearing set for 9/14/2015, at 01:30 PM in Courtroom 9 (SAB) before Magistrate Judge Stanley A. Boone. Defendant to remain temporarily detained pending the detention hearing. FAST TRACK CASE: Status Conference set for 11/16/2015, at 08:30 AM in Courtroom 4 (LJO) before District Judge Lawrence J. O'Neill. Time is excluded under the Speedy Trial Act for the reasons set forth on the record. The Court finds that good cause exists and that the ends of justice outweigh the interest of the public and the defendant in a speedy trial. XT Start: 9/10/2015 Stop: 11/16/2015. The Court has been notified that an interpreter is required in this action for Antonio Rene Martinez. It is counsel's responsibility to timely notify the Court Staff Interpreter when a hearing requiring an interpreter is scheduled, continued or cancelled. Failure to do so may result in sanctions. See <u>LR 403 – Court Interpreter Services in Criminal Actions</u> Government Counsel: B. Enos on behalf of M. Giacomazzi present. Defense Counsel: P. Sasso, appointed, present. Custody Status: Custody – FULLY SHACKLED. Court Reporter/CD Number: ECRO / A. Gil-Garcia. Certified Court Interpreter: Becky Rubenstein, Language: Spanish–Oath on File. (Timken, A) (Entered: 09/10/2015)
09/10/2015	5	SHACKLING MINUTE ORDER: Pursuant to Local Rule 401, the Court hereby determined that the appropriate restraint level for Antonio Rene Martinez is Fully Shackled (USM # 20735–111). Minute order signed by Magistrate Judge Sheila K. Oberto on 9/10/2015. (Timken, A) (Entered: 09/10/2015)
09/14/2015	8	MINUTES (Text Only) for proceedings before Magistrate Judge Stanley A. Boone: DETENTION HEARING as to Antonio Rene Martinez held and addressed on 9/14/2015. The Court orders defendant Antonio Rene Martinez DETAINED. The Government provided discovery and informs the Court this is a fast track case. Government Counsel: Mia Giacomazzi present. Defense Counsel: Kevin Little present. Custody Status: (C) Fully Shackled. Court Reporter/CD Number: ECRO O Rosales. Certified Court Interpreter: R Rubenstein, Language: Spanish–Oath on File. (Hernandez, M) (Entered: 09/14/2015)
09/14/2015	9	DETENTION ORDER signed by Magistrate Judge Stanley A. Boone on 9/14/2015 as to Antonio Rene Martinez. (Hernandez, M) (Entered: 09/14/2015)
09/25/2015	<u>10</u>	(TO BE VIEWED BY ASSIGNED COUNSEL ONLY) PRE-PLEA PRESENTENCE INVESTIGATION REPORT as to Antonio Rene Martinez. Counsel to provide a copy of the report to the court at the plea hearing. (Provencio, D) (Entered: 09/25/2015)
09/27/2015	<u>11</u>	NOTICE of ATTORNEY APPEARANCE: Kevin Gerard Little appearing for Antonio Rene Martinez. Attorney Little, Kevin Gerard added. (Little, Kevin) (Entered: 09/27/2015)
10/29/2015	<u>12</u>	STIPULATION and PROPOSED ORDER for Continuance of Status Conference to December 14, 2015 by USA. (Giacomazzi, Mia) (Entered: 10/29/2015)
10/30/2015	<u>13</u>	JOINT REQUEST and ORDER as to Antonio Rene Martinez to Continue the Status Conference currently set for 11/16/2015 to 12/14/2015 at 08:30 AM in Courtroom 4 (LJO) before District Judge Lawrence J. O'Neill, signed by District Judge Lawrence J. O'Neill on 10/30/2015 (Kusamura, W) (Entered: 10/30/2015)

12/14/2015	14	MINUTES (Text Only) for proceedings before District Judge Lawrence J. O'Neill: STATUS CONFERENCE as to Antonio Rene Martinez held on 12/14/2015. Defense counsel request continuance in order to investigate underlying conviction. No objection by USA. Status Conference continued to 4/4/2016 at 08:30 AM in Courtroom 4 (LJO) before District Judge Lawrence J. O'Neill. Time is to be excluded under the Speedy Trial Act in that good cause exists and that the ends of justice outweigh the interest of the public and the defendant in a speedy trial. For the reasons set forth on the record, the continuance requested is granted for good cause and the Court finds the ends of justice outweigh the interest of the public and the defendant in a speedy trial. XE Start: 12/14/2015 Stop: 4/4/2016. Government Counsel: Kimberly Sanchez present. Defense Counsel: Virna Santos present. Custody Status: CUSTODY. Court Reporter/CD Number: Peggy Crawford. Certified Court Interpreter: Juan Carlos Morales, Language: Spanish—Oath on File. (Munoz, I) (Entered: 12/15/2015)
01/14/2016	15	MINUTE ORDER (TEXT ENTRY ONLY) DUE TO THE UNAVAILABILITY OF THE COURT: Status Conference currently set for 4/4/2016 has been CONTINUED to 4/11/2016 at 08:30 AM in Courtroom 4 (LJO) before District Judge Lawrence J. O'Neill signed by District Judge Lawrence J. O'Neill on January 14, 2016. (Munoz, I) (Entered: 01/14/2016)
01/22/2016	16	DESIGNATION of COUNSEL FOR SERVICE. Added attorney Vincenza Rabenn for USA (Rabenn, Vincenza) (Entered: 01/22/2016)
04/05/2016	17	MINUTE ORDER (TEXT ENTRY ONLY) Change of Plea or Trial Setting Conference set for 4/11/2016 at 09:30 AM in Courtroom 4 (LJO) before District Judge Lawrence J. O'Neill signed by District Judge Lawrence J. O'Neill on April 5, 2016. NOTE: NEW TIME 9:30AM. (Munoz, I) (Entered: 04/05/2016)
04/11/2016	18	MINUTES (Text Only) for proceedings before District Judge Lawrence J. O'Neill: Status Conference as to Antonio Rene Martinez held on 4/11/2016. Defense counsel request continuance for further investigation regarding prior convictions. No objection by USA. Change of Plea or Trial Setting Conference 5/2/2016 at 08:30 AM in Courtroom 4 (LJO) before District Judge Lawrence J. O'Neill. Time is to be excluded under the Speedy Trial Act in that good cause exists and that the ends of justice outweigh the interest of the public and the defendant in a speedy trial. For the reasons set forth on the record, the continuance requested is granted for good cause and the Court finds the ends of justice outweigh the interest of the public and the defendant in a speedy trial. XE Start: 4/11/2016 Stop: 5/2/2016. Government Counsel: Henry Carbajal present. Defense Counsel: Kevin Little present. Custody Status: CUSTODY. Court Reporter/CD Number: ECRO. Certified Court Interpreter: Javier Avelar, Language: Spanish—Oath on File. (Munoz, I) (Entered: 04/12/2016)
04/20/2016	19	MINUTE ORDER (TEXT ENTRY ONLY) Change of Plea or Trial Setting Conference set for 5/2/2016 at 09:00 AM in Courtroom 4 (LJO) before District Judge Lawrence J. O'Neill signed by District Judge Lawrence J. O'Neill on April 20, 2016. NOTE: NEW TIME 9:00AM. (Munoz, I) (Entered: 04/20/2016)
05/02/2016	20	MINUTES (Text Only) for proceedings before Chief Judge Lawrence J. O'Neill: STATUS CONFERENCE as to Antonio Rene Martinez held on 5/2/2016. Defense counsel request continuance to review state court case and immigration issues. USA states their position on the record. Trial Setting Conference set for 7/18/2016 at 08:30 AM in Courtroom 4 (LJO) before Chief Judge Lawrence J. O'Neill. Time is to be excluded under the Speedy Trial Act in that good cause exists and that the ends of justice outweigh the interest of the public and the defendant in a speedy trial. For the reasons set forth on the record, the continuance requested is granted for good cause and the Court finds the ends of justice outweigh the interest of the public and the defendant in a speedy trial. XE Start: 5/2/2016 Stop: 7/18/2016. Government Counsel: Mia Giacomazzi present. Defense Counsel: Michael Aed present. Custody Status: CUSTODY. Court Reporter/CD Number: Peggy Crawford. Certified Court Interpreter: Gregoria Lara, Language: Spanish—Oath on File. (Munoz, I) (Entered: 05/03/2016)
07/18/2016	21	MINUTES (Text Only) for proceedings before Chief Judge Lawrence J. O'Neill: STATUS CONFERENCE as to Antonio Rene Martinez held on 7/18/2016. Defense counsel updated the Court and request continuance to finalize one more key issue to resolve the case. No objection by USA. Trial Setting Conference set for 8/1/2016 at 08:30 AM in Courtroom 4 (LJO) before Chief Judge Lawrence J. O'Neill. Time is to be excluded under the Speedy Trial Act in that good cause exists and that the ends of

		justice outweigh the interest of the public and the defendant in a speedy trial. For the reasons set forth on the record, the continuance requested is granted for good cause and the Court finds the ends of justice outweigh the interest of the public and the defendant in a speedy trial. XE Start: 7/18/2016 Stop: 8/1/2016. Government Counsel: Vincenza Rabenn present. Defense Counsel: Kevin Little present. Custody Status: CUSTODY. Court Reporter/CD Number: Peggy Crawford. Certified Court Interpreter: Javier Avelar, Language: Spanish—Oath on File. (Munoz, I) (Entered: 07/19/2016)
08/01/2016	<u>22</u>	MINUTES (Text Only) for proceedings before Chief Judge Lawrence J. O'Neill: STATUS CONFERENCE as to Antonio Rene Martinez held on 8/1/2016. Jury Trial set for 10/12/2016 at 08:30 AM in Courtroom 4 (LJO) before Chief Judge Lawrence J. O'Neill. Time is to be excluded under the Speedy Trial Act in that good cause exists and that the ends of justice outweigh the interest of the public and the defendant in a speedy trial. For the reasons set forth on the record, the continuance requested is granted for good cause and the Court finds the ends of justice outweigh the interest of the public and the defendant in a speedy trial. XE Start: 8/1/2015 Stop: 10/12/2016. Government Counsel: Vincenza Rabenn present. Defense Counsel: Kevin Little present. Custody Status: CUSTODY. Court Reporter/CD Number: Peggy Crawford. Certified Court Interpreter: Becky Rubenstein, Language: Spanish—Oath on File. (Munoz, I) (Entered: 08/02/2016)
08/16/2016	<u>23</u>	MINUTE ORDER (TEXT ENTRY ONLY) Change of Plea Hearing set for 8/29/2016 at 08:30 AM in Courtroom 4 (LJO) before Chief Judge Lawrence J. O'Neill signed by Chief Judge Lawrence J. O'Neill on August 16, 2016. (Munoz, I) (Entered: 08/16/2016)
08/29/2016	<u>24</u>	MINUTES (Text Only) for proceedings before Chief Judge Lawrence J. O'Neill: PLEA and SENTENCE HEARING held on 8/29/2016 as to Antonio Rene Martinez (1). Straight plea. No plea agreement on file. PLEA OF GUILTY entered on Count 1 by Antonio Rene Martinez (1). Sentence Count 1 CUSTODY: 41 Months. Special Assessment \$100. Prison: Northern CA. Appeal Rights waived. DEFENDANT TERMINATED. CASE CLOSED. Government Counsel: Vincenza Rabenn present. Defense Counsel: Kevin Little present. Custody Status: CUSTODY. Court Reporter/CD Number: Peggy Crawford. Certified Court Interpreter: Aimee Benavides, Language: Spanish—Oath on File. (Munoz, I) (Entered: 08/30/2016)
09/02/2016	<u>25</u>	JUDGMENT and COMMITMENT signed by District Judge Dale A. Drozd for Chief Judge Lawrence J. O'Neill on 8/29/16 as to Antonio Rene Martinez. (Verduzco, M) (Entered: 09/02/2016)
09/26/2016	<u>27</u>	LETTER dated 9/26/2016, from Antonio Rene Martinez. (Hellings, J) (Entered: 09/30/2016)
09/28/2016	<u>26</u>	SENTENCING PRESENTENCE INVESTIGATION REPORT (REDACTED) as to Antonio Rene Martinez. (Provencio, D) (Entered: 09/28/2016)
10/06/2016	<u>29</u>	LETTER from Antonio Rene Martinez. (Verduzco, M) (Entered: 10/19/2016)
10/11/2016	<u>28</u>	LETTER from Antonio Rene Martinez. (Verduzco, M) (Entered: 10/12/2016)
03/02/2017	<u>30</u>	MOTION for RECONSIDERATION re <u>25</u> Judgment and Commitment by Antonio Rene Martinez. (Gonzalez, R) (Entered: 03/02/2017)
04/24/2017	<u>31</u>	ORDER NOTIFYING Petitioner of the Consequences or Re-Characterizing his Motion as Made Under 28 U.S.C. 2255 signed by Chief Judge Lawrence J. O'Neill on 4/24/2017 as to Antonio Rene Martinez. (Sant Agata, S) (Entered: 04/24/2017)
04/24/2017		SERVICE BY MAIL: <u>31</u> Order – CR, Set Deadlines/Hearings served on Antonio Rene Martinez (Sant Agata, S) (Entered: 04/24/2017)
05/08/2017		MAIL RETURNED as Undeliverable, Register # is Incorrect: <u>31</u> Order mailed to Antonio Rene Martinez 2155496 at Taft Cl. (Jessen, A) (Entered: 05/09/2017)
05/09/2017	<u>32</u>	DEFENDANT'S REGISTER NUMBER UPDATED to 20735–111 as referenced on Document <u>30</u> . (Jessen, A) (Entered: 05/09/2017)
05/09/2017		RE-SERVICE BY MAIL: <u>31</u> Order served on Antonio Rene Martinez. (Jessen, A) (Entered: 05/09/2017)

05/18/2017	<u>33</u>	MOTION to WITHDRAW Defendant's Pleadings (At ECF No. <u>30</u>) Filed in a Letter October 2, 2016, by Antonio Rene Martinez. (Jessen, A) (Entered: 05/18/2017)
05/22/2017	<u>34</u>	ORDER GRANTING <u>33</u> Defendant's Motion to Withdraw Motion as to Antonio Rene Martinez (1) and Directing Clerk to Terminate All Pending Motions (Docs. <u>29</u> , <u>30</u> , & <u>33</u>) signed by Chief Judge Lawrence J. O'Neill on 5/19/2017. (Jessen, A) (Entered: 05/22/2017)
05/22/2017		SERVICE BY MAIL: <u>34</u> Order on Motion to Withdraw served on Antonio Rene Martinez. (Jessen, A) (Entered: 05/22/2017)
09/01/2017	<u>35</u>	MOTION to VACATE, Set Aside or Correct Sentence under 28 U.S.C. 2255 by Antonio Rene Martinez. (Hellings, J) Civil case 1:17-cv-01195-LJO opened. (Entered: 09/06/2017)
09/11/2017	<u>36</u>	MOTION to VACATE, Set Aside or Correct Sentence under 28 U.S.C. 2255 by Antonio Rene Martinez. (Marrujo, C) (Entered: 09/14/2017)
09/14/2017	<u>37</u>	MOTION to Proceed In Forma Pauperis by Antonio Rene Martinez. (Marrujo, C) (Entered: 09/15/2017)
09/25/2017	<u>38</u>	ORDER Denying Request for Appointment of Counsel; Setting Briefing Schedule for the Filing of Any Opposition and Reply; Denying Motion to Proceed In Forma Pauperis re <u>35</u> , <u>36</u> , <u>37</u> , signed by Chief Judge Lawrence J. O'Neill on 9/25/17 as to Antonio Rene Martinez. (Gonzalez, R) (Entered: 09/25/2017)
09/25/2017		SERVICE BY MAIL: <u>38</u> Order – CR, served on Antonio Rene Martinez. (Gonzalez, R) (Entered: 09/25/2017)
10/19/2017	<u>39</u>	MOTION for EXTENSION of TIME by USA as to Antonio Rene Martinez. (Attachments: # <u>1</u> Proposed Order)(Rabenn, Vincenza) (Entered: 10/19/2017)
10/20/2017	<u>40</u>	CERTIFICATE of SERVICE by USA as to Antonio Rene Martinez re <u>39</u> MOTION for EXTENSION of TIME . (Rabenn, Vincenza) (Entered: 10/20/2017)
10/20/2017	<u>41</u>	TRANSCRIPT REQUEST by USA for proceedings held on 08/29/2016 before Judge O'Neill. Court Reporter Peggy Crawford. (Rabenn, Vincenza) (Entered: 10/20/2017)
10/20/2017	<u>42</u>	TRANSCRIPT of Proceedings as to Antonio Rene Martinez held on 8/29/2016, Plea and Sentence, before Chief Judge Lawrence J. O'Neill, filed by Court Reporter Peggy Crawford, Phone number 559-266-3789 E-mail peggy crawford@gmail.com. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Any Notice of Intent to Request Redaction must be filed within 5 court days. Redaction Request due 11/13/2017. Redacted Transcript Deadline set for 11/20/2017. Release of Transcript Restriction set for 1/19/2018. (Crawford, P) (Entered: 10/20/2017)
10/20/2017	<u>43</u>	ORDER GRANTING Extension of Time, signed by Chief Judge Lawrence J. O'Neill on 10/20/2017 as to Antonio Rene Martinez. (Government's Answer: 11/26/2017, Traverse due by 12/18/2017) (Martin-Gill, S) (Entered: 10/20/2017)
10/20/2017		SERVICE BY MAIL: <u>43</u> Order – CR, served on Antonio Rene Martinez (Martin-Gill, S) (Entered: 10/20/2017)
11/24/2017	<u>44</u>	OPPOSITION by USA to <u>35</u> MOTION to VACATE, Set Aside or Correct Sentence under 28 U.S.C. 2255. (Rabenn, Vincenza) (Entered: 11/24/2017)
12/14/2017	<u>45</u>	RESPONSE to the Government's Opposition to his Motion to Vacate by Antonio Rene Martinez re <u>44</u> Opposition to Motion. (Martin-Gill, S) (Entered: 12/14/2017)
08/15/2018	<u>46</u>	ORDER for Evidentiary Hearing on 28 U.S.C. § 2255 Motion to Vacate, Set Aside, r Correct Sentence <u>35</u> , <u>36</u> , <u>44</u> , <u>45</u> , signed by Chief Judge Lawrence J. O'Neill on 8/15/2018 as to Antonio Rene Martinez: Evidentiary Hearing set for 10/15/2018 at 01:30 PM. (Hellings, J) (Entered: 08/15/2018)
08/15/2018		SERVICE BY MAIL: <u>46</u> Order – CR, Set Deadlines/Hearings, served on Antonio Rene Martinez. (Hellings, J) (Entered: 08/15/2018)

08/16/2018	<u>47</u>	NOTICE of ATTORNEY APPEARANCE: Charles J. Lee appearing for Antonio Rene Martinez. Attorney Lee, Charles J. added. (Lee, Charles) (Entered: 08/16/2018)
08/16/2018	<u>48</u>	NOTICE of ATTORNEY APPEARANCE: Erin Snider appearing for Antonio Rene Martinez. Attorney Snider, Erin added. (Snider, Erin) (Entered: 08/16/2018)
10/15/2018	<u>50</u>	MINUTES (Text Only) for proceedings before Chief Judge Lawrence J. O'Neill: EVIDENTIARY HEARING (Day One) as to Antonio Rene Martinez held on 10/15/2018. Opening statements. Witnesses: Victor Gonzalez, Irma Martinez, Alicia Martinez, Kevin Little sworn/testified. Exhibit marked and received. Evidentiary Hearing (Day Two) continued to 10/19/2018 at 1:00pm. Government Counsel: Vincenza Rabenn present. Defense Counsel: Charles Lee, Erin Snider present. Court Reporter/CD Number: Peggy Crawford. Certified Court Interpreter: Becky Rubenstein, Language: Spanish-Oath on File. (Munoz, I) (Entered: 10/17/2018)
10/16/2018	<u>49</u>	TRANSCRIPT REQUEST for proceedings held on 10/15/2018 before Judge O'Neill. Court Reporter Peggy Crawford. (Lee, Charles) (Entered: 10/16/2018)
10/17/2018	<u>51</u>	TRANSCRIPT of Proceedings as to Antonio Rene Martinez held on 10/15/2018, Evidentiary Hearing re 2255 Motion, before Chief Judge Lawrence J. O'Neill, filed by Court Reporter Peggy Crawford, Phone number 559-266-3789 E-mail peggy crawford@gmail.com. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Any Notice of Intent to Request Redaction must be filed within 5 court days. Redaction Request due 11/8/2018. Redacted Transcript Deadline set for 11/19/2018. Release of Transcript Restriction set for 1/17/2019. (Crawford, P) (Entered: 10/17/2018)
10/19/2018	<u>52</u>	MINUTES (Text Only) for proceedings before Chief Judge Lawrence J. O'Neill: EVIDENTIARY HEARING re: 2255 (Day Two) as to Antonio Rene Martinez held on 10/19/2018. Witness: Kevin Little testified. Exhibits marked and received. Closing arguments. Matter submitted. Order to be issued. Government Counsel: Vincenza present. Defense Counsel: Charles Lee present. Custody Status: NO APPEARANCE. Court Reporter/CD Number: Peggy Crawford. (Munoz, I) (Entered: 10/24/2018)
11/13/2018	<u>53</u>	ORDER on <u>35</u> Motion to Vacate (2255) as to Antonio Rene Martinez (1); signed by Chief Judge Lawrence J. O'Neill on 11/9/18. (Gonzalez, R) Civil Case 1:17-cv-01195-LJO closed. (Entered: 11/13/2018)
11/13/2018		SERVICE BY MAIL: <u>53</u> Order on Motion to Vacate - 2255, served on Antonio Rene Martinez. (Gonzalez, R) (Entered: 11/13/2018)
01/07/2019	<u>54</u>	NOTICE of APPEAL by Antonio Rene Martinez re <u>53</u> Order on Motion to Vacate - 2255, Order on Motion for Extension of Time. (Attachments: # <u>1</u> Representation Statement)(Lee, Charles) (Entered: 01/07/2019)
01/08/2019	<u>55</u>	APPEAL PROCESSED to Ninth Circuit re <u>54</u> Notice of Appeal filed by Antonio Rene Martinez. Filed dates for Notice of Appeal *1/7/2019*, Complaint *7/31/2014* and Appealed Order / Judgment *11/13/2018*. Court Reporter: *Peggy Crawford*. *Fee Status: CJA or IFP granted on 8/15/2018* (Attachments: # <u>1</u> Appeal Information) (Gonzalez, R) (Entered: 01/08/2019)
01/08/2019	<u>56</u>	USCA CASE NUMBER 19-15046 for <u>54</u> Notice of Appeal filed by Antonio Rene Martinez. (Gonzalez, R) (Entered: 01/09/2019)
01/23/2019	<u>57</u>	TRANSCRIPT REQUEST for proceedings held on 12/14/15, 4/11/16, 5/2/16, 7/18/16, 8/1/16, 10/19/18 before Judge Lawrence J. O'Neill. MULTIPLE REPORTERS REQUESTED (Sasso, Peggy) (Entered: 01/23/2019)
02/06/2019	<u>58</u>	TRANSCRIPT of Proceedings Status Conference as to Antonio Rene Martinez held on 4/11/16, before Chief Judge Lawrence J. O'Neill, filed by Jennifer Coulthard, Phone number 312-617-9858 E-mail jenrmrcr2@gmail.com. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Any Notice of Intent to Request Redaction must be filed within 5 court days. Redaction Request due 2/28/2019. Redacted Transcript Deadline set for 3/11/2019. Release of Transcript Restriction set for 5/9/2019. (Dunn-Coulthard, J) (Entered: 02/06/2019)

02/11/2019	<u>59</u>	TRANSCRIPT of Proceedings as to Antonio Rene Martinez held on 12/14/2015, Status Conference, before Chief Judge Lawrence J. O'Neill, filed by Court Reporter Peggy Crawford, Phone number 559-266-3789 E-mail peggy crawford@gmail.com. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Any Notice of Intent to Request Redaction must be filed within 5 court days. Redaction Request due 3/4/2019. Redacted Transcript Deadline set for 3/14/2019. Release of Transcript Restriction set for 5/13/2019. (Crawford, P) (Entered: 02/11/2019)
02/11/2019	<u>60</u>	TRANSCRIPT of Proceedings as to Antonio Rene Martinez held on 5/2/2016, Status Conference, before Chief Judge Lawrence J. O'Neill, filed by Court Reporter Peggy Crawford, Phone number 559-266-3789 E-mail peggy crawford@gmail.com. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Any Notice of Intent to Request Redaction must be filed within 5 court days. Redaction Request due 3/4/2019. Redacted Transcript Deadline set for 3/14/2019. Release of Transcript Restriction set for 5/13/2019. (Crawford, P) (Entered: 02/11/2019)
02/11/2019	<u>61</u>	TRANSCRIPT of Proceedings as to Antonio Rene Martinez held on 7/18/2016, Status Conference, before Chief Judge Lawrence J. O'Neill, filed by Court Reporter Peggy Crawford, Phone number 559-266-3789 E-mail peggy crawford@gmail.com. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Any Notice of Intent to Request Redaction must be filed within 5 court days. Redaction Request due 3/4/2019. Redacted Transcript Deadline set for 3/14/2019. Release of Transcript Restriction set for 5/13/2019. (Crawford, P) (Entered: 02/11/2019)
02/11/2019	<u>62</u>	TRANSCRIPT of Proceedings as to Antonio Rene Martinez held on 8/1/2016, Change of Plea/Trial Setting Conference, before Chief Judge Lawrence J. O'Neill, filed by Court Reporter Peggy Crawford, Phone number 559-266-3789 E-mail peggy crawford@gmail.com. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Any Notice of Intent to Request Redaction must be filed within 5 court days. Redaction Request due 3/4/2019. Redacted Transcript Deadline set for 3/14/2019. Release of Transcript Restriction set for 5/13/2019. (Crawford, P) (Entered: 02/11/2019)
02/11/2019	<u>63</u>	TRANSCRIPT of Proceedings as to Antonio Rene Martinez held on 10/19/2018, Evidentiary Hearing re 2255, Day 2, before Chief Judge Lawrence J. O'Neill, filed by Court Reporter Peggy Crawford, Phone number 559-266-3789 E-mail peggy crawford@gmail.com. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Any Notice of Intent to Request Redaction must be filed within 5 court days. Redaction Request due 3/4/2019. Redacted Transcript Deadline set for 3/14/2019. Release of Transcript Restriction set for 5/13/2019. (Crawford, P) (Entered: 02/11/2019)
02/21/2019	<u>64</u>	TRANSCRIPT REQUEST by USA for proceedings held on 12/14/2015, 05/02/2016, 07/18/2016, 08/01/2016, 10/19/2018 before Judge O'Neill. Court Reporter Peggy Crawford. (Rabenn, Vincenza) (Entered: 02/21/2019)
11/22/2019	<u>65</u>	USCA ORDER as to <u>54</u> Notice of Appeal filed by Antonio Rene Martinez. The decision of the District Court is REMANDED. (Flores, E) (Entered: 11/26/2019)
11/22/2019	<u>66</u>	USCA MANDATE as to <u>54</u> Notice of Appeal filed by Antonio Rene Martinez. <i>The judgment of this Court, entered November 22, 2019, takes effect this date.</i> (Gonzalez, R) (Entered: 01/22/2020)
01/28/2020	<u>67</u>	FIRST AMENDED JUDGMENT and COMMITMENT signed by District Judge Lawrence J. O'Neill on January 28, 2020 as to Antonio Rene Martinez pursuant to remand from the Ninth Circuit Court of Appeals. (Munoz, I) (Entered: 01/28/2020)
02/10/2020	<u>68</u>	NOTICE of APPEAL by Antonio Rene Martinez. (Lee, Charles) (Entered: 02/10/2020)

02/10/2020	<u>69</u>	APPEAL PROCESSED to Ninth Circuit re <u>68</u> Notice of Appeal filed by Antonio Rene Martinez. Filed dates for Notice of Appeal *2/10/2020*, Complaint *7/31/2014* and Appealed Order / Judgment *1/28/2020*. ** *Fee Status: CJA or IFP granted on 9/10/2015* (Attachments: # <u>1</u> Appeal Information) (Orozco, A) (Entered: 02/10/2020)
02/10/2020		SERVICE BY MAIL: <u>69</u> Appeal Processed to USCA – CR, <u>68</u> Notice of Appeal served on Antonio Rene Martinez (Orozco, A) (Entered: 02/10/2020)
02/11/2020	<u>70</u>	USCA CASE NUMBER 20–10056 for <u>68</u> Notice of Appeal filed by Antonio Rene Martinez. (Orozco, A) (Entered: 02/11/2020)
02/14/2020	<u>71</u>	USCA ORDER as to <u>68</u> Notice of Appeal filed by Antonio Rene Martinez (The motion of the Federal Defenders Office to be relieved as appellantscounsel of record and for appointment of David A. Schlesinger, Esq. is GRANTED) (Martin–Gill, S) (Entered: 02/14/2020)
02/19/2020	<u>72</u>	ORDER APPOINTING ATTORNEY David Andrew Schlesinger for Antonio Rene Martinez, signed by District Judge Dale A. Drozd on 2/19/2020. (Martin–Gill, S) (Entered: 02/19/2020)
03/05/2020	<u>73</u>	TRANSCRIPT REQUEST for proceedings held on 09/10/2015, 09/14/2015 before Judge Sheila K. Oberto, Stanley A. Boone re <u>68</u> Notice of Appeal. MULTIPLE REPORTERS REQUESTED (Schlesinger, David) (Entered: 03/05/2020)
04/02/2020	<u>74</u>	TRANSCRIPT of Proceedings as to Antonio Rene Martinez held on 9/10/2015 , before Magistrate Judge Sheila K. Oberto. ARRAIGNMENT and PLEA filed by ECRO, Phone number 559–499–5928 or 559–499–5612, E–mail Fresno_ECRO@caed.uscourts.gov. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Any Notice of Intent to Request Redaction must be filed within 5 court days. Redaction Request due 4/23/2020. Redacted Transcript Deadline set for 5/4/2020. Release of Transcript Restriction set for 7/2/2020. (Timken, A) (Entered: 04/02/2020)
04/02/2020	<u>75</u>	TRANSCRIPT of Proceedings as to Antonio Rene Martinez held on 9/14/2015 , before Magistrate Judge Stanley A. Boone. DETENTION HEARING filed by ECRO, Phone number 559–499–5928 or 559–499–5612, E–mail Fresno_ECRO@caed.uscourts.gov. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Any Notice of Intent to Request Redaction must be filed within 5 court days. Redaction Request due 4/23/2020. Redacted Transcript Deadline set for 5/4/2020. Release of Transcript Restriction set for 7/2/2020. (Timken, A) (Entered: 04/02/2020)