No. 21-7762

In the
Supreme Court of the United States

JESUS LEONARDO CASTILLO-MARTINEZ,
Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent

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

REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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A. Certiorari Should Be Granted To Determine Whether Immigration Counsel Was Deficient In Failing To Recognize And Raise A Determinative Issue Of Law Pending Before This Court.

The government begins with an assertion that there is no right to appointed counsel in immigration proceedings. Gov. Br. at 13-14.[1] But the civil nature of such proceedings does not efface all other constitutional protections. "Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty—at times a most serious one—cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness." Bridges v. Wixon, 326 U.S. 135, 154 (1945). To this end, "the Fifth Amendment entitles aliens to due process of law in deportation proceedings." Reno v. Flores, 507 U.S. 292, 306 (1993). Noncitizens also hold a statutory right to be represented by counsel of their own choosing at their expense. 8 U.S.C. § 1229a(b)(4). That right of choice and representation is "'an integral part of the procedural due process to which the alien is entitled.'" Batanic v. INS, 12 F.3d 662, 667 (7th Cir. 1993) (citation omitted).

[1] Citations are as follows: "Pet." refers to the petition for writ of certiorari, "Pet. App." refers to the appendices to the petition, and "Gov. Br." refers to the government's brief in opposition.

As a number of courts of appeals have recognized, due process includes the right to effective assistance of counsel where a noncitizen is represented by counsel. See Lozada v. INS, 857 F.2d 10, 13 (1st Cir. 1988); Iavorski v. INS, 232 F.3d 124, 128-29 (2d Cir. 2000); Calderon-Rosas v. Att'y Gen., 957 F.3d 378, 384-85 (3d Cir. 2020); Allabani v. Gonzales, 402 F.3d 668, 676 (6th Cir. 2005); Nehad v. Mukasey, 535 F.3d 962, 967 (9th Cir. 2008); Osei v. INS, 305 F.3d 1205, 1208 (10th Cir. 2002); Dakane v. Att'y Gen., 399 F.3d 1269, 1273 (11th Cir. 2005); cf. Mai v. Gonzales, 473 F.3d 162, 165 (5th Cir. 2006) ("[The Fifth Circuit] has repeatedly assumed without deciding that an alien's claim of ineffective assistance may implicate due process concerns under the Fifth Amendment."). The government fails to address this majority consensus or argue that these cases were wrongly decided.

Instead, the government argues that a noncitizen is bound by the errors of his selected counsel. Gov. Br. at 14 (citing Coleman v. Thompson, 501 U.S. 722, 752-753 (1991)). The government fails to include Coleman's caveat. Coleman states, "So long as a defendant is represented by counsel whose performance is not constitutionally ineffective under the standard established in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984), we discern no inequity in requiring him to bear the risk of attorney error that results in a procedural default."[2] 501 U.S. at 752 (emphasis added).

[2] While the Strickland standard does not apply in immigration proceedings, there is a due process right to effective assistance of counsel as noted above. Strickland involves a Sixth Amendment framework, but the same requisites of deficient performance and a reasonable probability of prejudice apply in the immigration context. See Muyubisnay-Cungachi v. Holder, 734 F.3d 66, 72 (1st Cir. 2013).

Here, Castillo-Martinez did not receive effective assistance of counsel. As noted in the petition for certiorari, ineffective assistance claims in the immigration context require proof of both deficient performance and prejudice. Pet. at 11 n.3. Thus, contrary to the government's contention, Gov. Br. at 17-18, Castillo-Martinez does not argue that "conceding an issue pending before the Supreme Court automatically constitutes ineffective assistance of counsel" or seek adoption of "an inflexible rule." But there are criteria for assessing deficiency and employing baseline standards for attorney performance does not run afoul of the case-by-case analysis required in evaluating ineffective assistance claims. Indeed, in Hinton v. Alabama, 571 U.S. 263 (2014), this Court stated that ignorance of law fundamental to a case combined with the failure to perform basic research on that point "is a quintessential example of unreasonable performance." Id. at 274. Other courts have also found the failure to research and present favorable arguments on potentially controlling issues to constitute deficient performance by counsel. See e.g., United States v. Freeman, 24 F.4th 320, 326, 330-331 (4th Cir. 2022) (en banc) (quoting Hinton, court held counsel's waiver of meritorious objections at sentencing made without complete investigation constituted deficient performance); Bridges v. United States, 991 F.3d 793, 797-98, 803 (7th Cir. 2021) (quoting Hinton, court found that effective counsel would have found and considered issue undecided in circuit but decided in defendant's favor in another circuit); United States v. Lopez-Chavez, 757 F.3d 1033, 1041 (9th Cir. 2014) (deficient performance where counsel failed to raise controlling open question on which there was circuit split); Jensen v. United States, 369 F.3d 237, 243-44 (3rd Cir. 2004) (ineffective assistance where counsel failed to raise an argument accepted in two other circuits and

rejected by a third at the time of sentencing that would have reduced defendant's base offense level; court noted decisions "were readily available"). In Bridges, supra, 991 F.3d at 804, the court also noted that while defense attorneys "are generally not obliged to anticipate changes in the law . . . there are some circumstances where they may be obliged to make, or at least to evaluate, an argument that is sufficiently foreshadowed in existing case law."

In challenging deficiency, the government describes counsel's actions as "electing to focus on one defense to removal rather than another," Gov. Br. at 17 (quoting panel majority below at Pet. App. A at 22), but the record does not support the government's contention that concession was a strategic choice; rather, the facts demonstrate that counsel could only have been under the misimpression that it was the only choice. It could only have been based on an unfamiliarity with then-current legal developments that ultimately would have a direct impact on the removal proceedings. Counsel was tasked with fighting the removal, and regardless of his client's other criminal convictions, counsel was faced with a Notice To Appear (NTA) on which, as Moncrieffe v. Holder, 569 U.S. 184 (2013), indicates, Castillo-Martinez could not lawfully be removed. Basic research would have revealed the potential defects and there was no strategic reason to fail to challenge a deficient charging document. Raising the issue provided the potential to avoid deportation on the only basis alleged in the NTA and advancing the Moncrieffe claim would not have undermined the Convention Against Torture arguments. See Flores-Rivera v. United States, 16 F.4th 963, 969 (1st Cir. 2021) ("Forgoing an argument is not a reasonable strategic decision when 'there is absolutely no downside' to objecting to an error.") (citation omitted).

Nor was it reasonable to intentionally waive the Moncrieffe claim simply to start the clock on an alternative and tenuous avenue of relief that would not be potentially available until two decades later. See Gov. Br. at 18 (citing panel majority below at Pet. App. A at 22 n.7. which stated, "An alien previously ordered removed because of an aggravated felony conviction is not eligible to seek readmission for 20 years. . . . Any delay in removal [from litigating the Moncrieffe issue] would also delay the running of Castillo-Martinez's 20-year absence requirement."). Under the facts and circumstances of this case, Castillo-Martinez maintains that immigration counsel's failure to recognize and raise a determinative issue pending in a case argued in, and awaiting decision by, this Court was deficient performance of counsel.[3]

B. Certiorari Should Be Granted To Resolve The Circuit Conflict As To A Noncitizen's Burden Of Proving Prejudice In A § 1326(d) Collateral Attack.

Turning to prejudice,[4] the government asserts that the court of appeals correctly held that Castillo-Martinez must demonstrate "he would have avoided removal if his marijuana conviction had not been classified as an aggravated felony." Gov. Br. at 19-20. The government's argument, and the First Circuit's holding on this point, rest on the assumption that the government could have amended the NTA to provide another basis for a mandatory removal, or amended the statutory provision cited in the NTA

[3] The government appears to suggest that any challenge to the adequacy of counsel's performance is a fact-specific argument that would not warrant this Court's review. Gov. Br. at 18. But all evaluations of the adequacy of counsel's performance require looking at the facts of the case, and this process has not precluded this Court from granting certiorari in and deciding ineffective assistance of counsel cases. See, e.g., Andrus v. Texas, 140 S. Ct. 1875 (2020); Garza v. Idaho, 139 S. Ct. 738 (2019); Lee v. United States, 137 S. Ct. 1958 (2017).

[4] Castillo-Martinez contests the First Circuit's finding of lack of prejudice for both his Fifth Amendment ineffective assistance of counsel claim and the fundamental unfairness required under § 1326(d)(3). The panel majority addressed both in the context of § 1326(d)(3) and viewed both as permitting an evaluation of more than what was listed in the NTA. Pet. App. A at 18-19, 23-26.

and sought removal based on his status as a controlled-substance offender for the marijuana offense. Gov. Br. at 21. The First Circuit also placed the burden on Castillo-Martinez to demonstrate he would not have been removed following those hypothetical proceedings. But while a prejudice inquiry generally focuses on the reasonable likelihood that the result of the proceedings would have been different, and whether a noncitizen was prevented from reasonably presenting his case, it does not require a noncitizen to show that they would also defeat removal based on grounds not pursued by the government. Indeed, such an approach is precarious. As discussed by the dissent below,

> [M]ust a defendant -- or a court -- in an unlawful reentry proceeding anticipate and refute every conceivable legal ground that the government could have attempted to predicate an order of removal on when seeking the removal of that individual, notwithstanding that "the order" of removal that was actually entered and that is the only one that "is outstanding" at the time of the alleged unlawful reentry is the product of constitutionally deficient legal assistance? And if not, what are the limits on either the defendant's or the court's obligation to account for those possibilities?

Pet. App. A at 56.

To avoid engaging in such time-consuming, hypothetical, and unnecessary inquiries, Pet. App. A at 56, this Court should reject an approach to evaluating prejudice on the basis of guesswork as to whether "orders never entered might have been lawful." Pet. App. A at 54. It should focus on the reasonable likelihood that the result of the proceeding actually brought would be different and whether the noncitizen was prevented from reasonably presenting his case against the charge actually made. This type of analysis "ensures that a consequence as serious as

expulsion from the country follows from an actual lawful order and not merely a hypothetical one that was never entered at all." Pet. App. A at 56.

Here, Castillo-Martinez has shown that he would not have been removed on the basis of the removal order actually entered because his marijuana offense was not an aggravated felony, i.e., a different result, and has shown he was prevented by counsel's performance from reasonably presenting his case. See Pet. App. A at 52, 55 (in dissent, Judge Barron concluding that "Castillo-Martinez can show that his counsel's failure to raise the Moncrieffe-related argument did prevent him from reasonably presenting the case that it would be unlawful to order him removed on the sole ground on which his order of removal rested . . . [and] Moncrieffe makes clear that the only removal order that was entered could not have been lawfully entered").

The Ninth Circuit has employed the prejudice analysis advanced by Castillo-Martinez—focusing on the NTA actually brought or the removal order actually entered—and it conflicts with the First Circuit's speculative and expansive practice. The government's attempts to minimize the conflict between the Ninth Circuit's approach and that employed by the First Circuit, Gov. Br. at 21-23, should be rejected. For example, in United States v. Martinez-Hernandez, 932 F.3d 1198 (9th Cir. 2019), while the court evaluated whether the conviction on which removal had been based could still qualify as an aggravated felony under a different section of the same statute previously invoked, id. at 1205, it noted that the government was not offering a different conviction or factual allegations not referenced in the NTA as support for a finding of no prejudice. Id. at 1204-05. In United States v. Camacho-Lopez, 450 F.3d 928 (9th Cir. 2006), the court concluded that the defendant suffered prejudice where

the NTA charged removability only for having committed an aggravated felony and his prior conviction did not fit that definition. Id. at 930 and n.1. In United States v. Martinez, 786 F.3d 1227 (9th Cir. 2015), the court looked to the offense set out in the NTA and found (1) it did not qualify as an aggravated felony as charged and (2) the government could not demonstrate that the defendant was removed pursuant to a valid removal order. Id. at 1230, 1233 n.2. And in United States v. Ochoa-Oregel, 904 F.3d 682 (9th Cir. 2018), the court stated, "[E]ven if the government might have been able to remove him on other grounds through a formal removal proceeding, his removal on illegitimate grounds is enough to show prejudice." Id. at 685-86.

The government attempts to distinguish Ochoa-Oregel as "limited to the case where an alien is erroneously removed in absentia and did not have a meaningful opportunity to contest the order . . . ." Gov. Br. at 23 (quoting 904 F.3d at 685 n.1). However, here, Castillo-Martinez also lacked a meaningful opportunity to contest removal as immigration counsel's uninformed concession deprived Castillo-Martinez of the opportunity to present his case that he was not eligible for mandatory deportation based on the allegations in the NTA.

C. Certiorari Should Be Granted To Resolve The Conflict As To The Procedures Necessary To Satisfy § 1326(d)(1) And (d)(2).

Despite satisfying both the deficiency and prejudice prongs of his ineffective assistance of counsel claim, the government contends that Castillo-Martinez did not employ the proper procedural mechanisms to advance the claim. The government maintains that Castillo-Martinez's ineffective assistance allegation could not satisfy the exhaustion requirement of § 1326(d)(1) because such a claim can be raised, but was not, in a motion to reopen in the Board of Immigration Appeals. Gov. Br. at 15.

However, it ignores the limitations of that provision. A noncitizen is required to "exhaust[ ] any administrative remedies that may have been available to seek relief against the order." § 1326(d)(1) (emphasis added). This Court's definition of availability recognizes an inherent practical element. As stated in Ross v. Blake, 578 U.S. 632 (2016), in addressing the exhaustion requirements of the Prison Litigation Reform Act of 1995:

> An inmate [] must exhaust available remedies, but need not exhaust unavailable ones. . . . [T]he ordinary meaning of the word "available" is "'capable of use for the accomplishment of a purpose,' and that which 'is accessible or may be obtained.'" Accordingly, an inmate is required to exhaust those, but only those, grievance procedures that are "capable of use" to obtain "some relief for the action complained of."

Id. at 642 (citations omitted). As evidenced by this Court's discussion of Ross v. Blake in United States v. Palomar-Santiago, 141 S. Ct. 1615, 1621 (2021), this Court continues to view exhaustion requirements through a pragmatic lens.

Here, if required, a motion to reopen was not practically available. Immigration regulations prohibit the filing of a motion to reopen by one who has already been removed. See 8 C.F.R. § 1003.2(d) ("A motion to reopen . . . shall not be made by or on behalf of a person who is the subject of . . . removal proceedings subsequent to his or her departure from the United States."); 8 C.F.R. § 1003.23(b)(1) (same). While the First Circuit has held this post-departure bar does not apply to motions timely filed within 90 days of the final administrative decision, see Santana v. Holder, 731 F.3d 50 (1st Cir. 2013), the court did not address the bar's effect on untimely motions. In addition, Castillo-Martinez was removed to the Dominican Republic on April 16, 2013; Moncrieffe was decided on April 23, 2013, after he was deported. At that time he had no counsel. It is unreasonable to expect that an uncounseled and removed noncitizen

would be aware of legal developments in the United States occurring after his removal, and then be able to effectively use that information to litigate his claim in the United States, particularly within 90 days of the March 2013 final administrative decision. Thus, a motion to reopen was not available within the meaning of § 1326(d)(1).

Moreover, this Court has not yet defined what procedures would satisfy the requirements of § 1326(d)(1) and (d)(2). Nor has it held that a motion to reopen is required to satisfy the exhaustion requirement where a removed noncitizen alleges he did not receive effective assistance of counsel in his removal proceedings. This case is the vehicle in which it should resolve those questions.

In doing so, this Court can resolve the circuit split as to whether ineffective assistance of counsel can satisfy the requirements of § 1326(d)(1) and (d)(2). As noted in the petition for certiorari, both the Second and Ninth Circuits have held that a meritorious ineffective assistance claim satisfies or excuses compliance with § 1326(d)(1) and (d)(2). See Pet. at 13 (citing United States v. Lopez-Chavez, 757 F.3d 1033, 1044 (9th Cir. 2014), and United States v. Cerna, 603 F.3d 32, 40-42 (2d Cir. 2010)). While, as the government states, neither court has reaffirmed those decisions since Palomar-Santiago, Gov. Br. at 16, the split remains. Both cases remain precedential in their respective circuits and are in clear conflict with the panel majority's decision below. Nor does the Ninth Circuit's subsequent questioning of Palomar-Santiago's impact on its § 1326(d) analysis eliminate the conflicting approaches among the courts. See United States v. Castellanos-Avalos, 22 F.4th 1142 (9th Cir. 2022) (questioning, but not addressing, the viability of its § 1326(d) analysis post-Palomar-Santiago). Again, it illustrates that there is a still a question to be

resolved. And Palomar-Santiago left open the question posed here—the interplay between an ineffective assistance claim and the requirements of § 1326(d)(1) and (d)(2).

D. Certiorari Should Be Granted Because This Case Presents A Compelling Vehicle To Resolve The Circuit Conflicts And The Questions Presented.

Despite the circuit conflicts present in this case, the government argues that this case is an inadequate vehicle for review of the first question presented because the question is of limited significance to Castillo-Martinez. Gov. Br. at 25. But questions implicating the validity of a conviction—here, an illegal re-entry conviction—are not insignificant. In addition, the completion of a sentence does not remove the collateral consequences faced by a defendant. Moreover, if the initial 2013 removal is held invalid, the re-entry bar under 8 U.S.C. § 1182(a)(9)(A)(ii) that generally applies after successive removals would also be impacted. See United States v. Arias-Ordonez, 597 F.3d 972, 978 (9th Cir. 2010) (noting reinstatement orders are invalid by operation of law if the original removal was not legally sound). As outlined above, Castillo-Martinez has established ineffective assistance of immigration counsel at his removal proceedings and the unlawfulness of the 2013 removal order.[5]

Furthermore, the issues in this case have a significance broader than the personal ramifications for Castillo-Martinez; given the prevalence of deportation proceedings triggered by a criminal conviction and the prevalence of illegal re-entry prosecutions, clarity surrounding the substantive rights and procedural gateways

[5] While a petitioner need not show a likelihood of prevailing in order to obtain this Court's review of important issues, cf. Gov. Br. at 23-24, Castillo-Martinez has done so here.

involved in such proceedings is vital. In light of the conflict among the courts and the important questions presented in the case, certiorari is warranted.

II. This Court Should Grant Review To Reconcile The Lower Courts' Inconsistent Analyses Concerning Incomplete Notices To Appear, And Provide Necessary Clarification On Whether The Service Of An Undated NTA Vests The Immigration Court With Jurisdiction.

The government contends that a Notice to Appear is sufficient to confer jurisdiction even absent date and time information. Gov. Br. at 26. This position relies on the regulations promulgating the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), see 8 C.F.R. §§ 1003.15 (listing NTA contents) & 1003.18(b) (time and place information necessary "where practicable"), but is wholly divorced from the statute, see 8 U.S.C. § 1229(a)(1) (initiation of removal proceedings requires notice to appear containing time and place of proceeding). Section 1229(a)(1) clearly requires that removal proceedings be initiated by a dated NTA. The regulations cannot unilaterally do away with this requirement.

The government does not explain why the statute can be ignored rather than read in conjunction with the regulations. Nor does it address the fact that the regulations mirror the two-step system that Congress jettisoned. In addition, the government fails to recognize that treating the time and place requirement as non-jurisdictional ignores concerns that noncitizens were being stripped of their right to proper notice of removal proceedings, and as a result, their ability to obtain representation for those proceedings. If time and date information is essential and critical, and this Court has stated that it is, Pereira v. Sessions, 138 S. Ct. 2105 (2018), it follows that jurisdiction vests only when the charging document contains that

essential and critical information. Finally, the government does not address why a subsequent notice of hearing cures the initial defective NTA when it fails in several respects to meet the requirements of § 1229(a)(1).

The government highlights that this Court has rejected a number of certiorari petitions raising the issue of whether an NTA without date and time information confers jurisdiction on the immigration court, and that no circuit has held that jurisdiction cannot vest in the absence of a statutorily-compliant NTA.[6] Gov. Br. at 12, 28-29. However, those facts do not preclude this Court from reaching the issue at this time. As just one example, this Court granted review in Rehaif v. United States, 139 S. Ct. 2191 (2019), despite a lengthy history of certiorari denials on the same issue presented in the Rehaif petition. See Rehaif v. United States, No. 17-9560, Gov. Br. at

[6] This does not mean that all circuit court judges agree that the jurisdictional question has been definitively or properly resolved. Recently, in United States v. Bastide-Hernandez, 39 F.4th 1187 (9th Cir. 2022) (en banc), Judge Friedland wrote:

> Although our court today holds that service of an NTA is not required to confer jurisdiction on the immigration court, there are strong arguments for the contrary position. The Supreme Court may therefore hold that jurisdiction vests over removal proceedings only upon service of a single, statutorily compliant NTA.
>
> . . .
>
> Given that the Supreme Court has on two occasions [Pereira and Niz-Chavez v. Garland, 141 S. Ct. 1474 (2021)] strictly enforced the statutory NTA requirements, and given that there is evidence that Congress intended an NTA to be necessary for jurisdiction over removal proceedings, the Supreme Court may eventually disagree with out court's holding today.
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> . . .
>
> At oral argument before our court, the Government admitted that, despite progress in this area, some NTAs will continue to have a placeholder reading "to be determined" or "to be set" instead of the time and date of the hearing. This admission shows that, more than a year after the Supreme Court's warning in Niz-Chavez, the Government is not "turning square corners" when it issues NTAs.

Id. at 1194-97 (Friedland, J., concurring) (citation omitted).

7 (government arguing against the grant of the writ, noting that "this Court has repeatedly declined requests to review the question presented and similar questions, including in cases involving arguments that support the position petitioner presses"). Nor did it matter that a series of decisions from the circuit courts of appeals had previously decided the issue against the petitioner's position in Rehaif. See Rehaif v. United States, No. 17-9560, Gov. Br. at 5-6 (government noting the absence of any circuit split and that for over 30 years, every circuit to consider the knowledge of status issue had determined that it was not required). And here, confusion abounds in the lower courts on the appropriate treatment of defective NTAs (some courts holding jurisdiction vests with an undated NTA; others holding a subsequent dated hearing notice triggers jurisdiction; and still others holding the date and time requirement is a non-jurisdictional claim processing rule). See Pet. at 21-25. This case serves as an ideal vehicle for this Court to evaluate the differing approaches and provide a single standard for lower courts to follow to eliminate the legal clashing.

CONCLUSION

For the reasons set forth above and in Castillo-Martinez's petition, Castillo-Martinez respectfully requests that the Court grant the writ of certiorari.

Respectfully submitted,

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