UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

[redacted],

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

No.: [redacted]

Hon. Edwin M. Kosik, U.S.D.J.

BRIEF IN SUPPORT OF MOTION
TO VACATE, SET ASIDE OR CORRECT
A SENTENCE PURSUANT TO 28 U.S.C. SEC. 2255

Petitioner, [redacted] the "Petitioner"), through his Attorneys, Baurkot & Baurkot, respectfully moves this Court pursuant to Section 2255, Title 28 of the United States Code (the "USC") for an Order vacating, setting aside or correcting his sentence, or, alternatively, for an evidentiary hearing on the instant Motion. See 28 USC §§ 2255(a), (b).

In support of this Motion, Respondent states what follows.

I. BACKGROUND

Petitioner was indicted on November 8, 2011, along with four (4) others. He was charged under six (6) separate counts: 21 U.S.C. Sec. 846, Conspiracy to Distribute and Possess with Intent to Distribute Heroin, one count; 21 U.S.C. Sec. 841(a)(1), 18 U.S.C.

Sec. 2, Aiding and Abetting in Distribution and Possession with Intent to Distribute Heroin, three counts; 21 U.S.C. Sec. 841(a)(1), Distribution and Possession with Intent to Distribute Heroin, two counts. See Ex. A (Indictment, Case No.: 3:CR-11-312-02). On November 9, 2011, Petitioner was taken into federal custody. See Ex. B (Docket Sheet). The following day, Petitioner was appointed a CJA Panel Attorney and entered a plea of not guilty. See id. Petitioner remained in custody until November 9, 2011 until November 21, 2011, when he was released on bond. Id.

In the year that followed, Petitioner and his prior-counsel prepared to proceed with trial before this Court. A jury trial commenced on November 13, 2012; several witnesses testified. Id. The following day, the course of Petitioner's future was drastically altered: he ended his trial and decided to enter a plea of guilty on all six (6) of the counts for which he was indicted. See Plea Hearing ("Plea Hearing") Transcripts of Plea Hearing dated Nov. 14, 2012, Ex. C at 1-2 (the "PH-TR").

a) The Plea Hearing

At the Plea Hearing, Petitioner was present with prior-counsel. Id. It appears, however, that Plea Hearing was hastily put together and moved forward without ensuring that Petitioner's plea met Constitutional muster.

First, the Government proffered the plea agreement to the Court, specifically that Petitioner would enter a plea of guilty to all six (6) counts, face a maximum exposure of 120 years' imprisonment, $6 million in fines, $600 special assessment and up to a life term of supervised release. PH-TR, at 22. The agreement was oral in nature – nothing was written, nothing was signed, nothing was reviewed. Id. It appears that the Government

had only learned of Petitioner's change of plea that morning. Id. While the Court was open as to sentencing, the Government and Petitioner agreed,

> as further part of the oral plea agreement, the parties will be recommending under Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure that there be a required sentence of 42 months' imprisonment, a three-year term of supervised release, the minimum fine within the applicable guideline range and the $600 special assessment.

Id. at 22. The Court then proceeds with questioning—noting that the agreement is oral in nature, not written and, when most crucial to the understanding of the agreement, appears to switch the line of questioning from Petitioner to Petitioner's prior-counsel:

The Court:	Okay. You know counsel for the government spoke that there is an oral plea agreement that exists between you and the government; is that correct?
Petitioner:	Correct.
The Court:	And did you authorize your lawyer to negotiate that agreement in [sic] your behalf?
Petitioner:	Yes, sir.
The Court:	There's been no execution of an agreement?
Government:	Only what's being put on the record, yes.
The Court:	But you acknowledge there's such an agreement and that you're in complete sympathy with its terms; is that correct.
Petitioner:	Yes, sir.
The Court:	I'll ask your lawyer if he agrees with that.
Prior-Counsel:	Yes, sir.

> Government: Your Honor, if we can just inquirer, do you have any questions about the terms? Do you fully understand it?
>
> Prior-Counsel: I fully understand . . . .

Id. at 25-26. The Government proceeds with a factual basis to Petitioner's plea; the Court briefly describes the elements that the Government must prove, should Petitioner have proceeded through trial. Id. at 30-35. With that, it appears that are all content without the mention of immigration related issues:

> The Court: For that reason, I ask you how do you plead to it?
>
> Petitioner: I plead guilty.
>
> The Court: I can perceive that you're an intelligent, deliberate young man. And I know you have valid and responsible counsel. So I'm satisfied that your plea is voluntary in this case, and I will adjudge you guilty of the offenses charged against you in the indictment.
>
> When we're finished here, you will be meeting with the probation officer.

PH-TR at 35-36. It is then –at the very conclusion of the entire Plea Hearing when the Government takes it upon itself to "put on the record" that Petitioner

> understands that he is not a citizen of the United States and that as a collateral consequences of this conviction that deportation could be a consequences of a conviction. I think that's one of the reasons why we ended up here in trial, but it is necessary, I think, to put on the record he's fully aware of the consequences of his guilty plea.

Id. at 36-37. Prior-counsel says nothing. The Court addresses the issue in four (4) questions:

The Court:	Are you aware of that, are you?
Petitioner:	Yes.
The Court:	How long have you been in this country?
Petitioner:	Since I was five.
The Court:	Since '95?
Petitioner:	Correct.
The Court:	Do you have working papers here?
Petitioner:	Yes.
The Court:	I don't know what the circumstances are with immigration.
Prior-Counsel:	Deportation.
The Court:	You come from a nice family. You certainly make a nice appearance unless you're faking it, and I don't believe you are. I can only wish you the best of luck.
Petitioner:	Thank you.

Id. at 37. Prior-counsel said one (1) word. The Government made a record. The Court asked only of what Petitioner may have known, thought he knew. In Petitioner's own answers, he establishes his own lack of knowledge about his then-immigration status:

The Court:	Do you have working papers here?
Petitioner:	Yes.

> The Court: I don't know what the circumstances are with immigration.

Id. Petitioner was a Lawful Permanent Resident of the United States of America; there is a clear distinction in Petitioner's understanding of his then-immigration status—a fact which clearly indicates a lack of overall (mis)understanding of the immigration outcome should Petitioner had let the plea stand or immediately requested leave to withdraw his plea. Sentencing was then scheduled.

On May 7, 2013, Petitioner appeared before the Court for his Sentencing Hearing (the "Sentencing"). See Ex. D, Transcripts of Sentencing Hearing ("SH-TR") at 1.

b) The Sentencing Hearing

Petitioner appeared for the Sentencing, with the same prior-counsel. SH-TR at 2. At Sentencing, the question of immigration and/or deportation is with "ifs," "maybes," and "possibly." The Government briefly notes immigration related issue, as well as the "quick" manner in which Petitioner's plea resulted:

> At the time of his guilty plea, Judge, it was pursuant to a 11(c)(1)(C) agreement. It was an oral agreement given the -- kind of the quickness that the plea came about. And at that time the parties put on the record that we would recommend to this Court an aggregate term of 42 months imprisonment to be followed by a three-year term of supervised release, a fine I think it was the minimum fine within the applicable guideline range, a $600 special assessment.
>
> Judge, it was also advised at the time that deportation was a likely if not almost a sure bet as a result of the convictions. So he was advised that deportation was also a potential – a strong likelihood.

> Okay. So if the Court was to follow the recommendation of the parties, it would be a 42-month sentence 4 on each of the counts to run concurrent with each other, a $10,000 fine, a three-year term of supervised release, but it 6 strikes us that that would be on a non-reporting basis because of the likely consequence of deportation and that there would 8 be a $600 special assessment.

SH-TR at 42-43. This is followed with prior-counsel noting that Petitioner "faces a potential deportation" and that "he's got – he has go to learn to adapt to society here or Ecuador or whatever and start making the right decisions." Id. at 45.

As in the Plea Hearing, the Court does not remedy the deportation (mis)understanding in creating a distinction between the "possible" and the "absolute" in the realm of immigration consequences, which are the direct, not collateral consequences of Petitioner's plea:

> And in the event that you're not deported, you will report in person to the probation office in the district where you are released within 72 hours of release from custody.
>
> While you're on supervised release, particularly if you will remain in this country, you will not commit another federal, state or local crime and shall not possess a dangerous weapon.
>
> You will comply with the standard conditions that have been adopted by this Court and the following additional conditions: No. 1, you will submit to one drug test within 15 days of commencing supervision and at least two periodic drug tests thereafter, and you will cooperate in the collection of a D.N.A. sample as directed by the probation officer unless that has already been done.
>
> It's further ordered you will remain outside the United States and supervision – if ordered deported, you will remain outside the United States, and supervision will be on a non-reporting basis.

47-48 (emphasis added). The Sentencing Hearing concluded. Petitioner walked out of the Courtroom without an adequate understanding of the absolute nature of his conviction with respect to his immigration status in the United States.

With that, Petitioner was permitted to remain free from incarceration, until a voluntary surrender date of May 29, 2013. See Ex. A, at 6. A direct appeal did not follow. Id. at 15. Petitioner now moves for an order vacating, setting aside or correcting his sentence, or, alternatively, for an evidentiary hearing on the same Motion. See 28 USC §§ 2255(a), (b).

c) Immigration Law and Petitioner's Immigration Background

Petitioner is a native and citizen of Ecuador. PH-TR at 37. He came to the United States in 1995 as a Lawful Permanent Resident. Id. He first entered the United States when he was five (5) years of age. Id. Petitioner was and remains a Lawful Permanent Resident. Nonetheless, as a result of this conviction, Petitioner is, absent any doubt now, or, in the past, to be deported to Ecuador. It was never about ifs or maybes or possibilities.

Lawful Permanent Residents ("LPR") convicted of certain crimes are deportable from the United States. One's ability to defend against deportation and remain in the United States is oft-dependent (virtually always dependent) on the crime, or, the actual conviction, or other related issues. For example, a LPR convicted of a simple possession of cocaine (regardless of degree, or jurisdiction), while deportable, has available to him defenses that are broad in their discretionary nature.[1] The broadest form of discretionary

[1] The Immigration and Nationality Act provides that

relief is Cancellation of Removal for Certain Lawful Permanent Residents. See 8 USC 1229b(A).

On the other hand, a person convicted of simple possession of cocaine with the intent to distribute (again, regardless of degree, or jurisdiction), would be equally as deportable; but, would be classified, under the Immigration and Nationality Act as an "aggravated felon," which is anything but defendable in deportation proceedings. See 8 USC 1101(a)(43).[2] Again, while the two are equally as deportable, conviction of one will

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> [a]ny alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.

See 8 U.S.C. § 1227(a)(2)(B)(i) (emphasis added). Likewise, any person who is convicted of a state or local offense related to "illicit trafficking in a controlled substance (as defined in section 102 of the Controlled Substances Act [21 USC § 802]), including a drug trafficking crime (as defined in section 924(c) of title 18, United States Code)" is deportable. 8 U.S.C. §§ 1101(a)(43)(B); 1227(a)(2)(A)(iii). Drug trafficking offenses always fall within the first, controlled substance, ground of deportability. Not all controlled substance offenses, however, fall within the drug trafficking deportability ground. This distinction is crucial, provided that the latter is "further defined" as an "aggravated felony." See supra Note 2 (discussion on an "aggravated felony.").

[2] The federal statute that defines an "aggravated felon" under Federal Immigration Law is found at 8 U.S.C. § 1101(a)(43). There, a long list of generic and specific offenses exists, which Federal Immigration Law deems "aggravated felonies." Id. One aggravated felony is a state or federal conviction for the commission of or the attempt/conspiracy to commit "illicit trafficking in a controlled substance (as defined in section 102 of the Controlled Substances Act [21 USC § 802]), including a drug trafficking crime (as defined in section 924(c) of title 18, United States Code)." 8 U.S.C. § 1101(a)(43)(B).

lead to certain removal and of the other, to one's ability to defend against deportation. To understand anything but that would be absolutely inaccurate.[3]

Here, Petitioner pled guilty to violating conspiracy to commit, aiding and abetting and actual possession with the intent to distribute narcotics, specifically, heroin. See PH-TR at 2-3. Under Federal Immigration Law, a conviction to violating said illicit narcotics trafficking offenses have two grounds of deportability: (1) as a controlled substance immigration violation; and (2) as an illicit trafficking in narcotics immigration violation. See 8 U.S.C. §§ 1101(a)(43)(B); 1227(a)(2)(A)(iii); 1227(a)(2)(B)(i). The first, on its own, taken with the offense date, is a deportable offense that may be preventable. See 8 USC §§ 1229b(A)(a). When combined with the second, however, Petitioner's removal became – absent any doubt –determined the day he entered his plea of guilty. On that day, Petitioner submits he lacked an accurate understanding into the immigration consequences of his guilty plea at the time he entered his guilty plea.

Here, Petitioner's conviction clearly fell within the "aggravated felon" definition, which, quite literally, was a signed order of removal.

[3] Petitioner submits that this is a rather short discussion on the Immigration and Nationality Act. The grounds of removability, the varying definitions, the many forms of relief, the often arbitrary cutoff points and numbers within the law, the circuit by circuit interpretation of differing state statutes in the context of immigration proceedings – there are many distinctions that make immigration law abnormally, for lack of a better word, inconsistent and confusing. It is this confusion and the lack of attention to very specific details with the law itself that existed prior to the date of the Sentencing Hearing and into the Sentencing Hearing, which Petitioner now complains of.

II. ARGUMENT

(a) Standard of Review

Section 2255, Title 28 of the United States Code, entitles Petitioner to relief only if his custody or sentence violates federal law or the Constitution. This statute provides, in pertinent part:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 USC § 2255.

A district court has discretion in determining whether to hold an evidentiary hearing on a habeas petition under Section 2255. See Gov't of the V.I. v. Forte, 865 F.2d 59, 62 (3d Cir. 1989). In exercising this discretion, the court must first determine whether the Petitioner's claims, if proven, would entitle him to relief, and then consider whether an evidentiary hearing is needed to determine the truth of the allegations. See Gov't of the V.I. v. Weatherwax, 20 F.3d 572, 574 (3d Cir. 1994). Accordingly, a district court may summarily dismiss a motion brought under Section 2255 without a hearing where the "motion, files, and records, 'show conclusively that the movant is not entitled to relief.'" United States v. Nahodil, 36 F.3d 323, 326 (3d Cir. 1994) (quoting United States v. Day, 969 F.2d 39, 41-42 (3d Cir. 1992)). At a minimum, Petitioner submits, an evidentiary

hearing is warranted, as the record clearly indicates that, if Petitioner's statements are taken as true, relief is certainly entitled.

Here, Petitioner's seeks Section 2255 relief provided his misunderstanding of the immigration related consequences of his conviction was due to misinformation of prior-counsel on the immigration related consequences of a conviction to the offense.

(b) Petitioner's Misunderstanding of the Immigration Related Consequences of His Conviction was Due to Misinformation on the Immigration Related Consequences and, therefore, this Court Should Grant Petitioner's Motion and Vacate Its Judgment, or, Alternatively, Should Conduct an Evidentiary Hearing.

Petitioner was misinformed about the immigration consequences of his plea. Therefore, this Court must either grant this Motion and vacate Petitioner's sentence, or, alternatively, conduct an evidentiary hearing. He was affirmatively misadvised when entering his guilty plea, as to the actual deportation consequences of his plea to the Offense, specifically, the gravity of one conviction over another, in terms removal prevention. In Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the Supreme Court established a two-part test for analyzing ineffective assistance of counsel claims. First, the defendant must show that counsel's performance "fell below an objective standard of reasonableness." Id. at 688. This requires a showing that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 687.

Second, the defendant must show that counsel's ineffectiveness was prejudicial. Id. at 692. In order to satisfy the "prejudice" requirement in a guilty plea context, "the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, 59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985). Courts can "dispose of an ineffectiveness claim" on either Strickland prong. United States v. Nino, 878 F.2d 101, 105 (3d Cir. 1989).

In Padilla v. Kentucky, the Supreme Court dealt specifically with the issues related to deportation consequences and the obligations of criminal defense attorneys when representing aliens. 559 U.S. 356, 130 S. Ct. 1473, 1478, 176 L. Ed. 2d 284 (2010). When Padilla was decided, the state of "advice" related to deportation consequences of criminal convictions was in flux. Only a handful of Federal Circuit Courts and state high appellate courts, had specifically held that a criminal counsel's affirmative misadvice as to deportations and criminal convictions, was sufficient to meet the first Strickland prong. Id. at 356; see also United States v. Couto, 311 F.3d 179, 188 (2d Cir. 2002); United States v. Kwan, 407 F.3d 1005 (9th Cir. 2005); Sparks v. Sowders, 852 F.2d 882 (6th Cir. 1988); United States v. Russell, 686 F.2d 35, 222 U.S. App. D.C. 313 (Fed. Cir. 1982); State v. Rojas-Martinez, 2005 UT 86, 125 P. 3d 930, 935; In re Resendiz, 25 Cal. 4th 230, 105 Cal. Rptr. 2d 431, 19 P. 3d 1171 (2001). The Padilla Court spoke loud and clear, however, in finding both misinformation and no information regarding immigration consequences to meet the first Strickland prong. Padilla, 559 U.S. at 369. An attorney's

complete failure to provide advice and an attorney's "affirmative misadvice" both fall below an objective standard of reasonableness. Id.

Following Padilla, state and federal courts were inundated with appeals and post-conviction motions, claiming ineffective representation due to immigration related advice. The floodgates that the Padilla Court dismissed may certainly have opened with many motions like that Petitioner now makes. Id. at 371. Moreover, Petitioner submits, the affirmative duty the Padilla placed on the criminal defense bar has led to an increase in the levels of misinformation, and, misunderstanding. A criminal attorney simply saying that a person's immigration status "may" be affected as a result of a conviction will never end the conversation for the immigrant about to enter a guilty plea.

Here, Petitioner submits just that. At the time he pled guilty, he was not adequately aware of the consequences of his plea. He was told that his there "may" be an effect on his immigration status. Petitioner walked out of the Plea Hearing, misinformed as to the certainty of his deportation. The question of prejudice is simply an assessment of potential outcomes: (1) trial and a jury finds Petitioner not-guilty; (2) trial and a jury finds Petitioner guilty and he is imprisoned; (3) no trial and Petitioner enters a plea of guilty to the six (6) count indictment against him (which was what he ended up pleading guilty to in the end) and asks for the mercy of the Court in an open sentencing, goes to prison and is deported; or (4) no trial and Petitioner enters a negotiated plea of guilty with an agreed sentence, serves his sentence and is deported. When truly – realistically explored—the prejudice is certainly a finding well within reason—sufficient reason, at this juncture, to warrant an evidentiary hearing.

In light of this, the Court must grant this Motion and vacate Petitioner's sentence, or, alternatively, order an evidentiary hearing.

III. CONCLUSION

Wherefore, Petitioner, [redacted], respectfully requests that this Honorable Court grant this Motion and Vacate, Set Aside or Correct Its Sentence, or, alternatively, that the Court conduct an evidentiary hearing.

Respectfully Submitted:

BAURKOT & BAURKOT

[redacted]