No. 11-2328

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MARIO REEVES,
Defendant-Appellant.

On Appeal from the United States District Court
For the Northern District of Illinois
The Honorable Judge Joan Gottschall
Case No. 07-CR-614-2

REPLY BRIEF OF DEFENDANT-APPELLANT MARIO REEVES

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I. *Padilla* changed the Sixth Amendment landscape.

The government's argument rests on the erroneous assumption that *Padilla* did not change Sixth Amendment jurisprudence. When that faulty premise is stripped away, however, the Supreme Court's *Padilla* decision shows that courts must reexamine, consistent with the considerations in *Padilla*, each case that would have formerly been decided under the direct-collateral test to determine whether that analysis is still appropriate. In short, the pre-*Padilla* status quo for which the government advocates simply is not an option post-*Padilla* for three reasons. First, the government's argument that the direct-collateral test remains "intact" is factually infirm because the Supreme Court had never previously adopted the direct-collateral distinction, and expressly refused to apply it in *Padilla*. Second, the government's argument is logically unsound; the Supreme Court dismantled the direct-collateral distinction by removing one of its core "collateral" consequences: deportation. Finally, the government's position is unworkable, plagued by inconsistency, and irreconcilable with courts that have altered its Sixth Amendment analysis in light of *Padilla*.

First, the government's argument that "[*Padilla* left] intact the law developed in the lower courts, including this Court, which filters *Strickland* claims by initially determining whether counsel's alleged failure relates to a direct or collateral consequence of the guilty plea" (Gov't Br. 10) is factually incorrect. The Court in *Padilla* explicitly distanced itself from the direct-collateral test. *Padilla v.*

Kentucky, 130 S. Ct. 1473, 1481 (2010). The Court mentioned the direct and collateral dichotomy only in explaining the Supreme Court of Kentucky's use of it. *Id*. Then, the Court dismissed the direct-collateral distinction before applying its own Sixth Amendment analysis. *Id*. ("We, however, have never applied a distinction between direct and collateral consequences" and will not consider "[w]hether that distinction is appropriate" here.). The Court's deliberate distancing from the direct-collateral distinction cannot be construed, as the government suggests, as an acceptance of this paradigm in lower courts. A test that the Court has never adopted or sanctioned in the first instance, and that the Court undermined when given the opportunity to affirm, cannot be deemed "intact."

Second, the government's argument fails as a matter of logic. Before *Padilla*, lower courts routinely found deportation a bedrock collateral consequence and thus outside counsel's duty to advise. *See, e.g.*, *Santos–Sanchez v. United States*, 548 F.3d 327, 336 (5th Cir. 2008), *vacated by* 130 S. Ct. 2340 (2010) (holding that failure to advise a defendant of deportation as a collateral consequence of pleading guilty is legally insufficient ground for ineffective assistance); *Broomes v. Ashcroft*, 358 F.3d 1251, 1257 (10th Cir. 2004) (same); *United States v. Fry*, 322 F.3d 1198, 1200 (9th Cir. 2003) (same); *United States v. Gonzalez*, 202 F.3d 20, 26, 28 (1st Cir. 1999) (same); *United States v. Del Rosario*, 902 F.2d 55, 59 (D.C. Cir. 1989) (same); *United States v. George*, 869 F.2d 333, 338 (7th Cir. 1989) (same); *United States v. Yearwood*, 863 F.2d 6, 7-8 (4th Cir. 1988) (same); *United States v. Campbell*, 778 F.2d 764, 767 (11th Cir. 1985) (same). But *Padilla* employed its own test that

shifted deportation from outside to inside the purview of the Sixth Amendment. *Padilla*, 130 S. Ct. at 1482 ("We conclude that advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel."). Therefore, the direct-collateral distinction is no longer dispositive because at least one historically collateral consequence is now subject to Sixth Amendment protection. It is remarkable, then, that the government continues to press for the direct-collateral test, one that includes deportation. (Gov't Br. 12 & n.4) (defining collateral consequences and then citing examples of collateral consequences that include deportation.) A test that cannot be applied reliably, accurately, or logically in the wake of the Supreme Court's decision cannot remain "intact," "instructive," or "compelling," as the government suggests. (Gov't Br. 11, 12.)

Third, the inconsistencies within the government's status-quo approach are laid bare in its attempts to apply it in the post-*Padilla* landscape. For example, although the government states, "examples of consequences held to be collateral" include deportation, (Gov't Br. 12 n.4), it then on the same page "set[s] deportation aside" in order to argue that the old test remains viable (Gov't Br. 12). And while the government acknowledges that many of the cases on which it relies have been overruled by *Padilla*, it nonetheless insists that the "analysis of collateral and direct consequences remains instructive." (Gov't Br. 11 n.3) (citing *United States v. George* for the proposition that the "Sixth Amendment . . . assurance does not extend to collateral aspects of the prosecution," but then acknowledging that "the holding in *George* is overruled by *Padilla*"); *see also* (Gov't Br. 13) (citing *United States v.*

Lewis, 902 F.2d 576, 577 (7th Cir. 1990), for proposition that "counsel does not violate his constitutional duty of minimally adequate representation" when he fails to advise of future sentencing consequences, but noting "the *Lewis* decision rested in part on precedent overruled by *Padilla*"). Notably absent from the government's brief is an explanation of why these cases remain instructive in light of *Padilla.*

Unsurprisingly, the government does not even attempt to reconcile its position with post-*Padilla* courts that have addressed these questions, recognized that a new test applies, and found that the old direct-collateral test cannot accurately predict what will pass constitutional muster in Sixth Amendment duty-to-advise cases. Although courts have adopted a variety of approaches to non-deportation cases in the wake of *Padilla*, many courts recognize that the direct-collateral test can no longer be dispositive and instead apply a *Padilla* analysis.[1] *See, e.g.*, *Taylor v. State*, 698 S.E.2d 384, 386-89 (Ga. Ct. App. 2010) (holding that counsel must advise of sex offender registration); *Jacobi v. Commonwealth*, No. 2009-CA-001572-MR, 2011 WL 1706528, at *3-4 (Ky. Ct. App. May 6, 2011) (must advise of parole eligibility); *People v. Fonville*, 804 N.W.2d 878, 892-96 (Mich. Ct. App. 2011) (must advise of sex offender registration); *Commonwealth v. Abraham*, 996 A.2d 1090, 1092-95 (Pa. Super. Ct.), *appeal granted in part*, 607 Pa. 618 (Nov.

[1] Some courts have, however, chosen to limit *Padilla*'s reach to deportation cases only. *See, e.g.*, *Pelaya v. Cate*, No. CV 10-2270-VBF (VBK), 2011 WL 976771, at *1 (C.D. Cal. Jan. 18, 2011); *Thomas v. United States*, No. PMD-06-4572, 2011 WL 1457917, at *4 (D. Md. Apr. 15, 2011), *amended by* No. RWT 10cv2274, 2012 WL 37521 (D. Md. Jan. 6, 2010); *People v. Hughes*, 953 N.E.2d 1017, 1022-25 (Ill. App. Ct. 2011), *appeal granted*, No. 2-09-0992 (Ill. Nov. 30 2011); *Sames v. State*, 805 N.W.2d 565, 565-70 (Minn. Ct. App. 2011); *Smith v. State*, 353 S.W.3d 1, 3-5 (Mo. Ct. App. 2011).

30, 2010) (must advise of loss of pension rights); *see also Maxwell v. Larkins*, No. 4:08 CV 1896 DDN, 2010 WL 2680333, at *8-10 (E.D. Mo. July 1, 2010) (holding that counsel need not advise of possibility of civil commitment).

As these cases show, *Padilla* itself is not collateral; it must be factored into a Sixth Amendment inquiry. Accordingly, this Court should not accept the government's invitation to "reaffirm its precedent which determined the scope of the Sixth Amendment by considering whether the error attributed to counsel concerned a direct or collateral consequence of the plea." (Gov't Br. 10-11.) Rather, this Court should apply *Padilla*'s three-part test and conclude, as discussed below, that recidivist sentencing enhancements fully satisfy that test.

II. The government's erroneous reliance on the direct-collateral paradigm infects its analysis of the *Padilla* factors.

Although the government purports to apply the three *Padilla* factors, it actually just filters them through the old direct-collateral test. As a result, it erroneously concludes that recidivist sentencing enhancements do not fall within the realm of advice that competent counsel must give defendants contemplating a plea agreement. As discussed in the opening brief, a guilty plea that renders a defendant forever eligible for severe recidivist sentencing enhancements raises concerns of great importance to a defendant, involves a consequence wholly interrelated with the criminal process, and subjects him to severe penalties that are largely automatic in application. (Def.'s Br. 17-24.) It is this automatic eligibility, and not the fruition of these severe enhancements, that matters and it is a result that is neither uncertain nor contingent. *Cf.* (Gov't Br. 7) (painting the

consequences as "uncertain and contingent" and "in a word, collateral, and therefore outside the scope of the right to counsel.").

A. Defendants may rationally place great importance on decades-long recidivist sentencing enhancements.

The government inserts the direct-collateral paradigm into *Padilla*'s first prong: the importance and severity of plea consequences. (Gov't Br. 17) ("[T]he important consequences are direct [consequences]."). The government posits that only an irrational defendant would treat anything but the direct consequences of a plea—"risks of trial, possible sentences" and, now, deportation—as a core consideration in the plea calculus. (Gov't Br. 17-18.) It goes so far as to declare a defendant irrational, perhaps even criminal, for having significant concerns about the risk of decades-long or life-long sentences for reoffending.[2] (Gov't Br. 17.) But the core considerations for a rational defendant weighing a guilty plea are not dictated by a direct-collateral classification, just as they do not become important only after the Supreme Court has said that they are. The government is viewing the first *Padilla* prong through the wrong lens.

What matters to a defendant in considering a plea are the benefits and burdens of that plea relative to those of going to trial or of other potential plea

[2] Indeed, it even suggests that by advising a client of the risks of recidivism, counsel herself may be engaging in "long-range criminal planning." (Gov't Br. 17.) But the American Bar Association (ABA) Standards for Criminal Justice specifically *require* her to advise a defendant of potential recidivist sentencing consequences, so characterizing counsel's actions in this regard as potentially criminal is unwarranted. *See ABA Standards for Criminal Justice: Pleas of Guilty* § 14-3.2f(c) (3d ed. 2004); *see also id.* § 14-1.4(c) (requiring courts to advise of additional consequences, including future sentencing enhancements); *id.* § 19-2.3(a) (requiring courts to advise defendants of "collateral sanctions" unless "defense counsel's duty of advisement . . . has been discharged").

agreements. These burdens include consequences beyond any immediate sentence levied, and of particular import are severe consequences that may have far-reaching effect, long after the defendant's sentence is complete. Further, to properly evaluate a particular plea relative to others, a defendant must have the chance to negotiate on an even playing field; this cannot happen in the face of asymmetrical knowledge. *See Padilla*, 130 S. Ct. at 1486 ("By bringing deportation consequences into this process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties."). Counsel's duty is to apprise the defendant of these important considerations so that the defendant may make an informed decision whether to accept the plea, decline it and go to trial, or seek an alternative plea that avoids particularly troublesome consequences. *See Libretti v. United States*, 516 U.S. 29, 50-51 (1995) ("[I]t is the responsibility of defense counsel to inform a defendant of the advantages and disadvantages of a plea agreement . . . .").

As for severity, the government conflates the severity of sentencing enhancements with the automatic nature of that consequence. (Gov't Br. 18) ("[D]eportation is a particularly severe penalty which nearly automatically follows conviction . . . [whereas] sentencing enhancements do not follow automatically from conviction . . . ."). Severity, of course, is defined by its degree, not its certainty. A capital defendant who may yet be spared faces no less severe a penalty than one already condemned. Accordingly, as the government recognizes, *see* (Gov't Br. 16-17), the automatic nature of a consequence has its own prong within the *Padilla*

framework and should not be used to confound one prong with another. Sentencing enhancements that double a mandatory minimum sentence to twenty years or result in a life sentence are undoubtedly severe, a fact for which the government has no response.

B. The second prong of the *Padilla* test is automatically satisfied here by the inherent criminal nature of sentencing enhancements.

There is no question that recidivist sentencing enhancements are intimately related to the criminal process and that, therefore, *Padilla*'s second prong is satisfied in this case. However, there are consequences of a plea that may be less centrally related to the criminal process and, therefore, should be evaluated before imputing them to a counsel's Sixth Amendment duties. *See Padilla*, 130 S. Ct. at 1481 (explaining that deportation, as a civil penalty, may still implicate the Sixth Amendment because of its close connection to the criminal process). *Cf. Stroe v. I.N.S.*, 256 F.3d 498, 500 (7th Cir. 2001) (deportation proceedings, as civil proceedings, do not implicate the Sixth Amendment right to assistance of counsel). Examples of consequences that lie near this line, and thus merit further scrutiny, include deportation, as the Supreme Court recognized. *Padilla*, 130 S. Ct. at 1481 (stating that "deportation . . . is not . . . a criminal sanction. Although removal proceedings are civil in nature, deportation is nevertheless intimately related to the criminal process" (citation omitted)). Other consequences also fall within this category, such as civil commitment and sex offender registration. But recidivist sentencing enhancements are not one of them. The government tries to recast the

Court's rationale in order to jettison Reeves's case from this prong, *see* (Gov't Br. 18-20) (stating that the Court must have meant "plea process" when it said the consequence must be intimately related to the "criminal process"), but offers no explanation for this curiously narrow interpretation. The government also tries to explain interrelatedness in terms of intimate, or direct, causation, *see* (Gov't Br. 18-19), or in other words, in terms of the automatic nature of the consequence. The government again confounds prongs of the *Padilla* analysis to avoid the basic fact that evaluating a consequence's interrelatedness with the criminal process is only necessary where that consequence is not part of the criminal process. In any event, given that defendants are immediately and irrevocably eligible for severe sentencing enhancements, it is not just "most difficult," but rather, impossible "to divorce [this] penalty from the conviction." *Padilla*, 130 S. Ct. at 1481.

C. The court's lack of discretion to avoid statutory sentencing enhancements, combined with routine application of recidivist penalties under federal sentencing guidelines, shows such enhancements to be both nearly certain and automatic.

A defendant's life-long eligibility for severe recidivist enhancements is not contingent or speculative; his status as a felony offender applies immediately upon conviction, thus is plainly automatic. Moreover, prosecutors' habitual pursuit of statutory enhancements, combined with courts' lack of discretion to avoid them, means that as a practical matter sentence enhancements are a nearly automatic result.

When defining deportation as an "automatic consequence," it is not, as the government argues, the utter certainty of the consequence or lack of contingency on

future behavior that guides the *Padilla* Court's determination. *See* (Gov't Br. 16). Indeed, the requirement to notify defendants applies not only to those cases in which the deportation consequence is "truly clear," but also in the "numerous situations in which the deportation consequences of a particular plea are unclear or uncertain." *Padilla*, 130 S. Ct. at 1483. Even in these latter cases, defense counsel must advise the noncitizen defendant of the potential or "risk of adverse immigration consequences." *Id.* In analyzing the automatic nature of deportation as a consequence of conviction, *Padilla* instead focused its attention on the authority of sentencing judges to affirm that dramatic punishment or, alternatively, to disregard it as an "unjust result[]." 130 S. Ct. at 1479. While judges once had the ability to make a binding recommendation against deportation, Congress stripped away this authority in 1990. *Id.* at 1480. When the Attorney General's discretion was subsequently curtailed, deportation became "practically inevitable" for non-citizen felons, as the Department of Homeland Security sought deportation whenever a defendant was eligible for it. *Id.* at 1480.

Authority to apply or reject statutory recidivist enhancements, such as 21 U.S.C. § 851 (2006), has similarly been stripped from sentencing judges, and now rests solely in the hands of prosecutors. (Sentencing Tr. 123.) And under the Bush Administration, the filing of § 851 notices became much more common. Sarah French Russell, *Rethinking Recidivist Enhancements: The Role of Prior Drug Convictions in Federal Sentencing*, 43 U.C. Davis L. Rev. 1135, 1163 (2010). A memorandum issued by John Ashcroft in 2003 establishes the current Department

of Justice policy: prosecutors must file statutory enhancements in all cases, except where a plea agreement may result from forgoing the higher sentence.[3] *Id.* at 1135 & n.154 (citing Memorandum from John Ashcroft, U.S. Att'y Gen., to All Federal Prosecutors (Sept. 22, 2003)). Even then, only some defendants will qualify for the reprieve. *Id.* The DOJ has not revised this policy under the Obama Administration, and U.S. Sentencing Commission reports show that many prosecutors abide by the rule, employing statutory enhancements with alarming frequency, not only to secure convictions, but also to secure informants and to induce pleas. U.S. Sentencing Comm'n, *Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* 113 (2011) (finding that prosecutors in multiple districts reported filing § 851 notices in any case where an

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[3] The memorandum provides:

> The use of statutory enhancements is strongly encouraged, and federal prosecutors must therefore take affirmative steps to ensure that the increased penalties resulting from specific statutory enhancements, such as the filing of an information pursuant to 21 U.S.C. § 851 or the filing of a charge under 18 U.S.C. § 924(c), are sought in *all* appropriate cases. As soon as reasonably practicable, prosecutors should ascertain whether the defendant is eligible for any such statutory enhancement. In many cases, however, the filing of such enhancements will mean that the statutory sentence exceeds the applicable Sentencing Guidelines range, thereby ensuring that the defendant will not receive any credit for acceptance of responsibility and will have no incentive to plead guilty. . . . Accordingly, an Assistant Attorney General, United States Attorney, or designated supervisory attorney may authorize a prosecutor to forego the filing of a statutory enhancement, but *only in the context of a negotiated plea agreement*, and subject to the following additional requirements:
>
> a. . . . In the context of a statutory enhancement that is based on prior criminal convictions, . . . such authorization may be granted only after giving particular consideration to the nature, dates, and circumstances of the prior convictions, and the extent to which they are probative of criminal propensity.

Memorandum from John Ashcroft, U.S. Att'y Gen., to All Federal Prosecutors (Sept. 22, 2003) (emphasis added).

offender insisted on going to trial, or withdrawing notices in return for a guilty plea and "substantial assistance").[4]

The government in Reeves's case affirmed the automatic nature of the § 851 enhancement by voicing its own commitment to pursuing § 851 enhancements for any eligible defendant who refuses to cooperate. (5/2/11 Sentencing Tr. 123-24) (justifying the discrepancy between the sentence given to Reeves and that given to Aukey Williams, for whom the Government did not seek a statutory enhancement: "[Aukey] cooperated from day one . . . anyone in Mr. Reeves' position . . . who is subject to an 851, an 851 will be filed on that person in any narcotics case that this office files."). Because the court has no discretion to avoid prosecutors' routine resort to the enhancement, a defendant pleading guilty to a narcotics felony is automatically and permanently eligible for a mandatory, severely enhanced sentence should he recidivate; thus, the third *Padilla* factor is satisfied.

As the government points out, § 851 is not the only vehicle through which recidivist sentencing enhancements are applied to defendants. (Gov't Br. 14.) Indeed, in addition to various statutory provisions, the federal sentencing guidelines use prior convictions to increase a defendant's criminal history category. A higher history category means a higher recommended sentencing range. U.S.

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[4] The 20-30% of cases in which defendants received § 851 recidivist enhancements, *see* (Def.'s Br. 24), does not include those cases where prosecutors dropped the enhancement in exchange for a guilty plea. Given the DOJ policy that prosecutors must file for § 851 enhancements when available, but may drop this threat when doing so might induce a plea, Russell, *supra*, at 1163, the percentage of defendants who face an § 851 enhancement, even if abandoned in exchange for a plea, is undoubtedly much higher. *See also* U.S. Sentencing Comm'n, *Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* 252-61 (2011).

Sentencing Guidelines Manual, § 4A1.1. Some types of prior convictions, like the drug conviction at issue in Reeves's case, can increase both the criminal history category and the offense level, leading to dramatically longer sentences. *Id.* § 2K2.1 (enhancement in firearm cases for defendants with prior drug convictions); *id.* § 2L2.1 (enhancement in illegal reentry cases for defendants with prior drug convictions); *id.* § 4B1.1 (career offender provision).

Although the guidelines are no longer mandatory, judges must "give serious consideration to the extent of any departure" and must adequately justify unusually harsh or lenient sentences. *Gall v. United States*, 552 U.S. 38, 46 (2007) ("[E]ven though the Guidelines are advisory rather than mandatory, they are . . . the product of careful study based on extensive empirical evidence derived from the review of thousands of individual sentencing decisions.") As a result, most judges still sentence within the recommended ranges in a majority of cases. U.S. Sentencing Comm'n, *Post-Kimbrough/Gall Data Report* 2, tbl.1 (2008). Following *United States v. Booker*, 543 U.S. 220 (2005) (rendering the sentencing guidelines advisory), and before the Supreme Court's decisions in *Gall* and *Kimbrough v. United States*, 552 U.S. 85, 90 (2007), judges imposed sentences within the guidelines ranges in 61.3% of cases. Judges imposed below-range sentences without government support in only 12.2% of cases. U.S. Sentencing Comm'n, *Post-Kimbrough/Gall Data Report* 2, tbl.1 (2008). Following the Supreme Court's emphasis in *Gall* and *Kimbrough* that the guidelines are truly advisory even in the most run-of-the-mill cases, the rate of non-government sponsored below-range

sentences increased only slightly to 13.8% of cases. *Id.* Given the high recidivism rates among the drug offender population, *see* (Def.'s Br. 23), and in light of the fact that some form of recidivist sentencing enhancement—whether required by statute or recommended by the guidelines—applies in the vast majority of cases, a defendant's eligibility for future sentencing enhancements is both certain and automatic and its application is nearly so.

D. A *Padilla* warning for recidivist sentence enhancements is not complicated or onerous for counsel to provide.

Not only are these warnings essential and important, they are easy to provide. Thus, the government's expressed concern that defense counsel will have to address a "myriad" of possible enhancement consequences arising from subsequent convictions is misplaced. (Gov't Br. 7.) In *Padilla*, the essence of counsel's message in most cases need not be more than an advisement that the "criminal charges may carry a risk of adverse immigration consequences." 130 S. Ct. at 1483. Such an advisement would be sufficient to prompt the defendant to inquire further, and perhaps be directed to specialized counsel, *see id.* at 1494 (Alito, J., concurring), to become sufficiently informed. Similarly, counsel need not do more than advise that additional drug offenses could result in harsh mandatory minimum sentences of decades or more, up to life, *see* 21 U.S.C. § 851, over which the sentencing court would have no discretion. Moreover, such advice is particularly easy to provide, just a matter of seconds, and generally requires no additional research on counsel's part. Should this advice trigger additional

questions, then defense counsel, as a criminal attorney, is particularly well-equipped to address a defendant's questions and concerns.

III. As in *Padilla*, remand for a partial hearing to determine prejudice is appropriate where the defendant pleads sufficient facts to establish a constitutional deficiency.

The government argues that Reeves "never offered any evidence to support his *Strickland* claim," and thus requests this Court to remand this case for a full hearing on both *Strickland* prongs. (Gov't Br. 20.) All that *Padilla* requires, however, is facial proof of counsel's failure to advise. *Padilla*, 130 S. Ct. at 1478 ("Assuming the truth of his allegation, the Supreme Court of Kentucky denied Padilla post-conviction relief without the benefit of an evidentiary hearing."). Thus, no evidentiary hearing is required as to the first prong. Reeves's trial counsel satisfied Reeves's burden of showing that no sentencing-enhancement advice was given prior to his plea by setting forth the facts supporting his ineffective-assistance claim in his response to the government's § 851 information.[5] *Id.* at 1483 ("Accepting his allegations as true, Padilla has sufficiently alleged constitutional deficiency to satisfy the first prong of *Strickland*."). Thus, this Court should reverse

[5] The defendant's response states: "[A]t the times Mario Reeves entered his pleas of guilty to any of his prior convictions . . . he was not advised by either the Judge, his attorney, or the Assistant State's Attorney that his convictions therein could or would be used against him to enhance any sentence he may receive in the future. If Mario Reeves had been advised and known that his pleas of guilty could be used to qualify him for a statutorily enhanced sentence, . . . he would have never entered pleas of guilty." (R. 681, Def.'s Supplemental Resp. to § 851 Enhancement at 3.) In any event, a supplemental affidavit from Reeves or his former trial counsel would also satisfy his burden on remand. (Gov't Br. 21) (implying that evidence by affidavit could prove these allegations); *Padilla*, 130 S. Ct. at 1483 (accepting the statements of defendant and his counsel regarding counsel's omissions and misinformation, and defendant's reliance thereon in accepting a plea agreement, as sufficient to show constitutional deficiency).

and remand for a hearing solely on the issue of prejudice, *Strickland*'s second prong. *See id.* at 1483-84; (Def.'s Br. 27).

CONCLUSION

For the foregoing reasons, the appellant, Mario Reeves, respectfully requests that this Court remand for an evidentiary hearing to determine whether Reeves satisfies Strickland's second prejudice prong, so that he might be resentenced without the § 851 enhancement.

Dated: February 13, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, counsel for the Defendant-Appellant, Mario Reeves, hereby certify that I electronically filed this brief and appendix with the clerk of the Seventh Circuit Court of Appeals on February 13, 2012, which will send the filing to the person listed below.

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CERTIFICATE OF COMPLIANCE WIH FED. R. APP. P. 32(A)(7)

I, the undersigned, counsel for the Defendant-Appellant, Mario Reeves, hereby certify that this brief conforms to the rules contained in Fed. R. App. P. 32(a)(7) for a brief produced with a proportionally spaced font. This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 12-point Century Schoolbook font.

The length of this brief is 4,356 words.

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