
**In the
UNITED STATES COURT OF APPEALS
for the Seventh Circuit**

No. 11-2328

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, Eastern Division.
No. 07 CR 614 — Joan B. Gottschall, *Judge*.**

BRIEF OF THE UNITED STATES

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JURISDICTIONAL STATEMENT

Defendant-Appellant's jurisdictional statement is not complete and correct. Defendant was charged in a superseding indictment with conspiracy, in violation of 21 U.S.C. § 846, distribution of heroin, in violation of 21 U.S.C. § 841(a)(1), and using a communication facility in facilitating a conspiracy, in violation of 21 U.S.C. § 843(b). R. 336. The district court had jurisdiction over these charges pursuant to 18 U.S.C. § 3231. Defendant was found guilty of all charges after a jury trial, and was sentenced by the district court on May 20, 2011. R. 760. Defendant filed a timely notice of appeal on May 23, 2011. R. 754. This Court has appellate jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a)(2).

ISSUE PRESENTED FOR REVIEW

Whether the district court correctly concluded that the defendant's prior convictions are constitutionally valid because the Sixth Amendment right to counsel does not require a lawyer to advise a client, before he pleads guilty, of sentencing enhancements he may face in future proceedings.

STATEMENT OF THE CASE

The grand jury returned a fifteen-count superseding indictment charging defendant with conspiracy, in violation of 21 U.S.C. § 846 (Count 1), distribution of heroin, in violation of 21 U.S.C. § 841(a)(1) (Counts 3 and 5), and using a

communication facility in facilitating a conspiracy, in violation of 21 U.S.C. § 843(b) (Counts 9, 10, 12, 13 and 14). R. 336.¹ On November 30, 2007, the government filed an information stating previous drug conviction pursuant to 21 U.S.C. § 851. R. 139. On March 13, 2009, the government filed an amended information stating previous drug conviction pursuant to 21 U.S.C. § 851. R. 397. On January 12, 2010, defendant filed a response to the government's information stating previous drug conviction. R. 545.

On February 5, 2010, after a trial, the jury returned a verdict of guilty against Reeves as to all of the charges against him in the superseding indictment. R. 588. On July 21, 2010, defendant filed a supplemental response to the government's information stating previous drug conviction. R. 681. On May 20, 2011, the district court sentenced Reeves to 25 years of imprisonment on Counts 1, 3 and 5, to be served concurrently to 96 months of imprisonment on Counts 9, 10, 12, 13 and 14. R. 760.

STATEMENT OF FACTS

Reeves was charged with running the "Poison Line" heroin distribution organization along with co-defendant Aukey Williams. R. 336. Reeves and

¹ References to the record on appeal are to "R" followed by the relevant document number. References to the sentencing transcript are designated by "Tr" followed by the page number. References to defendant's brief are designated by "Br" followed by the page number. References to the appendix in defendant's brief are designated by "App" followed by the page number.

Aukey Williams led the Poison Line and directed the heroin sales of numerous co-conspirators from approximately May 2006 through September 2007. R. 336, R. 616, pp. 10-15. Reeves prepared heroin for sale by placing it into bags, packaged these bags into bundles, distributed bundles to managers and workers, collected cash proceeds of heroin sales from managers and workers, and divided the profits of the heroin sales with Aukey Williams. R. 616, pp. 11-12. On certain occasions, including the dates charged in Counts 3 and 5 of the superseding indictment, Reeves participated directly in the sale of heroin to undercover officers. *Id.* at pp. 12-13.

Evidence Presented at Sentencing

At sentencing the government presented extensive evidence of Reeves's role as a leader of the Poison Line, including testimony from co-defendant Aukey Williams and the transcripts of numerous telephone calls intercepted pursuant to court-authorized wiretaps. Tr. 21-88, 132-140, 151-172. The testimony and recordings detailed Reeves's authority over other co-conspirators, his leadership of the Poison Line, his close working relationship with Aukey Williams, and his share in the profits of the heroin sales. *Id.*

The government also presented a video recording of the murder of Sean Page on May 10, 2007. Tr. 99-114. The video depicted Reeves approaching Page and another man on a sidewalk. Tr. 101-02, 103-04. While Reeves began

beating Page's companion, Marshawn Wright (Reeve's co-defendant in this case) fired numerous shots at Page, killing him. Tr. 108, 110, 113-14. Wright was convicted of the murder of Page in the Circuit Court of Cook County. Tr. 99, 100, 105 (conviction can be inferred from Wright's counsel's statement regarding filing of appeal in state court).

The government also introduced evidence proving Reeves's participation in the murder of Phillip Gregory on May 15, 2007. Tr. 75-84, 89-99, 225-242. The government called an eye witness who identified Reeves as the person standing with a gun in his hand outside Gregory's vehicle at the time Gregory was shot and killed. Tr. 90-91.² The government also introduced other evidence proving that Reeves's set up the murder of Gregory by arranging a meeting with Gregory which led to the murder. Tr. 224-242. The district court found that the government proved Reeves was involved in the murder. Tr. 251-52.

The District Court's Rejection of Defendant's Claim That His State Court Convictions Were Obtained in Violation of the Constitution

In his supplemental response regarding 21 U.S.C. § 851, defendant argued that at the time of his guilty pleas in state court, he was not advised that his

² At sentencing the government informed the district court of the limitations of this witness's observations, including his incorrect conclusion that Reeves fired the shots that killed Gregory. Tr. 228-29. Other evidence, particularly the report of the Cook County Medical Examiner, prove that Reeves's accomplice, seated in the passenger seat of Gregory's vehicle, fired the shots that killed Gregory. Tr. 232.

convictions could be used to “enhance any sentence he may receive in the future.” App. 6; R. 681, p. 3. Therefore, Reeves argued, his pleas were “not made knowingly, intelligently and voluntarily” and “were obtained in violation of the Constitution.” *Id.* At sentencing defendant requested that the district court address his response to the government’s information pursuant to 21 U.S.C. § 851. App. 10. The district court inquired whether there was any issue other than legal argument and defense counsel responded “no.” *Id.*

The district court heard argument from defense counsel stating the legal bases for defendant’s claim that his prior convictions were constitutionally invalid. App. 11-18. Defendant argued that “all collateral consequences of conviction should be something that a defendant should have explained to him before he enters a guilty plea.” App. 12.

The district court rejected defendant’s arguments, and specifically concluded that the Supreme Court’s opinion in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), did not support defendant’s claim that failure to warn him of enhanced penalties was ineffective assistance of counsel. App. 16-18, 20-21.

Guidelines Calculations and Sentence

Based on the evidence submitted by the government, the district court found the base offense level to be 36 because Reeves was responsible for between 10 and 30 kilograms of heroin. App. 20; Tr. 215. The district court applied the

enhancement for possession of a firearm which increased the offense level to 38. App. 21; Tr. 215. The district court also found Reeves was a leader of the Poison Line which increased the offense level to 42. App. 20; Tr. 215. Finally, the district court applied the enhancement for criminal livelihood, increasing the offense level to 44. Tr. 213, 215. The district court found that Reeves had 8 criminal history points, meriting a criminal history category IV. Tr. 220-21. Based on the maximum Guideline offense level of 43 and a criminal history category IV, the advisory Guideline range for Reeves was life imprisonment. Tr. 215-16, U.S.S.G. Sentencing Table. The district court imposed a sentence of 25 years of imprisonment. App. 26-27.

SUMMARY OF ARGUMENT

The Supreme Court's opinion in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), did not replace the distinction between direct and collateral consequences as the test to determine the scope of the Sixth Amendment right to counsel. The *Padilla* opinion plainly states that the Court did not consider whether that distinction is appropriate because deportation is a unique consequence of conviction. Thus, *Padilla* was decided on other grounds and does not overrule the direct consequences test.

Defendant had no Sixth Amendment right to advice regarding enhanced penalties available in subsequent criminal proceedings because such

consequences are collateral. This Court has held that a defendant need not be advised of the general risk of a more severe sentence in the future. This Court should now hold that counsel need not advise a defendant on chapter and verse of the myriad possible enhancements under state and federal laws, of which 21 U.S.C. § 851 is merely one example. Such consequences are uncertain and contingent on defendant's future criminal conduct; in a word, collateral, and therefore outside the scope of the right to counsel.

Even assuming this Court adopts a new, *Padilla* test to determine the scope of the Sixth Amendment right to counsel, defendant fails the test. According to *Padilla*, advice regarding deportation falls within the Sixth Amendment because deportation is nearly automatic, is an important consequence of a guilty plea, and is intimately related to the criminal process. First, application of 21 U.S.C. § 851, or other sentencing enhancements, is not an automatic result of a defendant's guilty plea. The risk of enhancement is contingent upon defendant's future criminal conduct and his conviction in a subsequent proceeding at which an enhancement is actually applied to him. Second, potential penalties following a subsequent conviction are of minimal importance to an informed and voluntary guilty plea. At the time of a guilty plea, the important consequences include the risks and rewards of trial, the sentencing range faced by defendant, and whether defendant will be deported

as a result of the conviction. Planning for future criminal conduct and conviction is not the type of advice the Sixth Amendment requires of counsel. Third, sentencing enhancements in a subsequent proceeding are not intimately related to a guilty plea. Unlike deportation which results fairly directly from conviction, the causal link between the guilty plea and a sentencing enhancement in a subsequent prosecution is distant. Thus, Reeves's claim fails all three factors which can be divined from the *Padilla* opinion.

Assuming this Court finds that the district court erred in rejecting Reeves's claim as a matter of law, the case must be remanded for a full hearing to establish whether counsel's performance met an objective standard of reasonableness and, if not, whether Reeves was prejudiced as a result. Reeves's suggestion of a partial remand ignores the record. The district court never made findings of fact because, with Reeves's explicit agreement, it first addressed the legal merit of Reeves's claim. As a result, defendant never met his burden under 21 U.S.C. § 851(c)(2) to produce evidence in the district court to support his claim. Therefore, any remand must require a full hearing in which defendant may develop a record to support his claim of ineffective assistance of counsel. Only after a full hearing will the district court be able to rule on defendant's claim of ineffective assistance of counsel.

ARGUMENT

I. The District Court Did Not Err in Concluding That Defendant’s Prior Convictions Were Constitutionally Valid.

A. Standard of Review

This Court reviews *de novo* a district court’s legal determination that a defendant’s prior convictions comported with the protections of the Sixth Amendment. *United States v. Arreola-Castillo*, 539 F.3d 700, 702 (7th Cir. 2008).

B. Analysis

1. The Supreme Court Did Not Replace the Distinction Between Direct and Collateral Consequences as the Test to Determine the Scope of the Sixth Amendment Right to Counsel.

Padilla v. Kentucky, 130 S. Ct. 1473, 1486 (2010), holds that criminal defense counsel perform deficiently, rising to the level of constitutional significance under *Strickland v. Washington*, 466 U.S. 668 (1984), when they fail to advise non-citizen defendants that a guilty plea may subject them to deportation. In reaching this conclusion, the Court explicitly grounded its analysis of the scope of the Sixth Amendment right in the “unique nature of deportation.” *Id.* at 1481. The Court did not employ, nor did it reject, the “distinction between direct and collateral consequences to define the scope of

constitutionally ‘reasonable professional assistance’ required under *Strickland*, 466 U.S., at 689, 104 S.Ct. 2052.” The Court stated:

Deportation as a consequence of a criminal conviction is, because of its close connection to the criminal process, uniquely difficult to classify as either a direct or a collateral consequence. The collateral versus direct distinction is thus ill-suited to evaluating a *Strickland* claim concerning the specific risk of deportation.

Id. at 1482. This analysis leaves intact the law developed in 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.

Indeed, as this Court noted in *Chaidez v. United States*, 655 F.3d 684, 691-92, (7th Cir. 2011), lower courts which rejected *Strickland* claims based on collateral matters reasonably based their rulings on Supreme Court precedent. The *Chaidez* court stated that the Supreme Court “has long held that a plea is voluntary where the defendant is ‘fully aware of the direct consequences’ of the plea.” *Id.* at 691 (citing *Brady v. United States*, 397 U.S. 742, 747 (1970)). Prior to *Padilla*, this Court, among “at least nine Courts of Appeals, had uniformly held that the Sixth Amendment did not require counsel to provide advice concerning any collateral (as opposed to direct) consequences of a guilty plea.” *Id.* At 690. Therefore, this Court should 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.

2. Defendant Had No Sixth Amendment Right to Advice Regarding Enhanced Penalties Available in Subsequent Criminal Proceedings Because Such Consequences Are Collateral

An attorney who fails to inform his client of direct consequences of a conviction is ineffective but an attorney need not mention collateral consequences. *McDonald v. Hardy*, 359 Fed.Appx. 650, 655 (7th Cir. 2010); *Santos v. Kolb*, 880 F.2d 941, 944-45 (7th Cir. 1989)(failure to advise of deportation). In *United States v. George*, 869 F.2d 333, 337 (7th Cir.1989), this Court, stated that “actual knowledge of consequences which are collateral to the guilty plea is not a prerequisite to the entry of a knowing and intelligent plea.”³ The *George* Court went on to note that although “the Sixth Amendment assures an accused of effective assistance of counsel in ‘criminal prosecutions,’ this assurance does not extend to collateral aspects of the prosecution.” *Id.* Although the holding in *George* is overruled by *Padilla* to the extent that *George* complained he was not advised he would be deported, the court generalized its ruling, concluding that “[t]here are many collateral consequences to a criminal

³ Although *Santos* and *George* held deportation to be a collateral consequence of a plea and are thus overruled by *Padilla*, their analysis of collateral and direct consequences remains instructive.

prosecution which, if not disclosed by counsel, nonetheless do not result in an involuntary plea of guilty.” *Id.* at 338.

Direct consequences “are those that are ‘definite,’ ‘immediate,’ and ‘automatic.’” *McDonald*, 359 Fed. Appx. at 655 (citing *Wilson v. McGinnis*, 413 F.3d 196, 199 (2d Cir. 2005); *Dalton v. Battaglia*, 402 F.3d 729, 733 (7th Cir. 2005); *Steele v. Murphy*, 365 F.3d 14, 17 (1st Cir. 2004)). Collateral consequences, “even if they are “automatic,” are ‘beyond the control and responsibility’ of the sentencing court ... or are ‘in the hands of’ another government agency or the defendant himself.” *McDonald*, at 656 (citations omitted).⁴ Setting deportation aside, this analysis remains compelling. Potential sentence enhancements in future criminal proceedings need not come to pass, but if they do, they result from the defendant’s criminal activity and the fortuity of his capture and prosecution in another case. A defendant “need not know ‘all the consequences [of a plea], such as loss of the right to vote or of the right to own a gun, or the effect on future sentences.’” *Dalton v. Battaglia*, 402 F.3d 729, 733 (7th Cir. 2005). As is argued *infra*, future sentence enhancement

⁴ The *McDonald* court noted several examples of consequences held to be collateral, each of which is more directly connected to the plea than the consequence at issue in Reeves’s appeal: “[t]he possibility of civil commitment, *Steele*, 365 F.3d at 17, the loss of federal benefits, *United States v. Morse*, 36 F.3d 1070, 1072 (11th Cir.1994), deportation, *Santos*, 880 F.2d at 944-45, and the effect of a guilty plea on future convictions, *King v. Dutton*, 17 F.3d 151, 153-54 (6th Cir.1994).” *Id.* at 656.

consequences of a plea to a narcotics offense are neither definite, immediate, nor automatic. They are varied, distant and contingent.

Defendant does not identify precisely how his counsel should have advised him at the time of his guilty pleas. If Reeves is arguing that counsel failed to offer the general advice that a felony conviction will lead to more severe sentences in the future, this Court has rejected that position by holding that “defense counsel does not violate his constitutional duty of minimally adequate representation when he fails to warn the defendant that one possible consequence of a guilty plea is a more severe sentence for a future crime.” *Lewis v. United States*, 902 F.2d 576, 577 (7th Cir. 1990). The *Lewis* decision rested in part on precedent overruled by *Padilla*, however the *Lewis* Court’s rationale captures the collateral nature of advice about future convictions:

Deportation is a consequence of *this* conviction; enhancement depends on the defendant’s deciding to commit future crimes. And just as aliens know that the commission of crimes jeopardizes their right to remain in this country, so citizen defendants know that repeat offenders are punished more severely than first offenders. Guilty plea proceedings under Rule 11 are protracted enough as it is, without requiring judge and counsel to advise the defendant of the things that he already knows perhaps as well as they do.

Id. (emphasis in original).

If, on the other hand, Reeves is arguing that his counsel failed to advise him that he could be subject to a § 851 enhancement in a subsequent federal

proceeding, his argument would require advice regarding a wildly complicated laundry list of potential enhancements. Nearly two years after he pled guilty in state court, Reeves decided to engage in a heroin distribution conspiracy. Had Reeves been arrested by Illinois authorities he ran some risk of an increased sentence. If he had committed his crime in one of the other 49 states, presumably he would have faced varying risks of an enhanced sentence in those jurisdictions. Many states have “3 strikes” laws which send repeat felony offenders to prison for life. *See e.g., Ewing v. California*, 538 U.S. 11, 15-17 (2003) (explaining California’s three strikes law). Even considering only federal law, a felon with multiple drug convictions could face widely varying enhancements in a subsequent prosecution, apart from 21 U.S.C. § 851: a defendant who has three prior felony drug, or crime of violence, convictions faces a mandatory minimum 15-year sentence for carrying a weapon under 18 U.S.C. § 924(e); a Guideline calculation for a defendant with prior drug distribution convictions may result in his classification as a career offender pursuant to U.S.S.G. § 4B1.1; or he may face a judge who decides to impose a heavy sentence due to his criminal record.

The myriad possible enhancements which may be visited upon a defendant in a future prosecution resulting from new criminal conduct do not flow directly from his guilty plea – a plea which occurs long before the subsequent arrest,

conviction and sentencing of the defendant. The government has found no controlling authority holding that the Sixth Amendment requires counsel to give conjectural advice regarding the results of unknown future proceedings.

3. Even under the Standard Used by the Supreme Court in *Padilla*, Defendant Had No Sixth Amendment Right to Advice Regarding the Myriad Potential Consequences of His Subsequent Criminal Acts

Assuming this Court finds that *Padilla* created a new standard, applicable to all cases in which a defendant claims ineffective assistance of counsel at his guilty plea, defendant cannot shoehorn his claim into *Padilla*'s narrow holding. In his brief, defendant proposes a plausible three-part *Padilla* test in which courts would evaluate the relative severity, or importance, of the consequence, the interrelatedness of the consequence with the criminal process, and whether the consequence is automatic. Br. 17. However, defendant misconstrues the Court's reasoning in his application of those three factors to this case. Defendant's complaint that his counsel failed to advise him of the possibility of sentencing enhancements in subsequent cases bears no relation to the nearly automatic deportation which concerned the *Padilla* Court.

a. Application of 21 U.S.C. § 851, or Other Sentencing Enhancements, Is Not an Automatic Result of Defendant’s Guilty Pleas in State Court

The *Padilla* opinion began with an extended review of the history of the relation between a conviction and deportation, concluding that, due to changes in immigration law, “deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on non-citizen defendants.” That connection informed the Court’s conclusion that immigration law has made “removal nearly an automatic result for a broad class of non-citizen offenders.” *Padilla*, 130 S.Ct. at 1481. Unlike deportation, the consequence that defendant faced here was far from automatic.

First, unlike deportation, this consequence is not an automatic result of the plea. Rather it is the result of a subsequent conviction, and the sentencing options available to the court and prosecutor in that proceeding. Second, any consequence whatsoever is dependent upon defendant engaging in additional criminal conduct, and the fortunate chance that he is then prosecuted and convicted. Third, the future prosecution might occur in any jurisdiction and result in a wide range of more, or less, severe consequences. Each of these factors betrays the uncertainty of any future enhancement.

Furthermore, the prosecutorial discretion noted by defendant, and the use of 21 U.S.C. § 851 enhancements in only a minority of cases as cited by

defendant, serve to prove that the consequences faced by Reeves in this case were anything but automatic. Br. 23-4. The evidence cited by defendant demonstrates the many intervening causes which affected the risk defendant faced. These intervening causes refute defendant's claim that he has satisfied this *Padilla* factor.

b. Potential Penalties Following a Subsequent Conviction Are of Minimal Importance to an Informed and Voluntary Guilty Plea

At the time of a guilty plea, the important consequences are direct: the risks and rewards of trial, the sentencing range faced by defendant, and whether defendant will be deported as a result of the conviction. These considerations bear heavily on the advisability of a plea. Hypothetical future penalties, in unknown jurisdictions, for conduct which defendant has not yet committed, cannot reasonably have controlling influence over a decision to plead guilty.

When a defendant and counsel contemplate the risks and rewards of choosing trial or guilty plea, it would be irrational to assign great importance to the hypothetical impact of the contemplated conviction in a subsequent case – particularly where the defendant has not yet engaged in the conduct that might lead to his future arrest. Although such speculation might naturally occur to a career criminal contemplating a plea, such long-range criminal planning cannot be the sort of advice required by the Sixth Amendment. *Cf. Nix v. Whiteside*, 475

U.S. 157, 166 (1986) (counsel is precluded from taking steps or in any way assisting the client in presenting false evidence or otherwise violating the law); *United States v. Zolin*, 491 U.S. 554, 562–563 (1989) (attorney-client privilege does not extend to communications made for the purpose of getting advice for the commission of a crime). The right to counsel should be limited to advice regarding the core considerations of a rational defendant, namely the risks of trial, possible sentences, and deportation.

Padilla makes clear that deportation is a particularly severe penalty which nearly automatically follows conviction, and as a result a non-citizen entering into a plea is “acutely aware of the immigration consequences” of conviction. *Padilla*, 130 S.Ct. at 1481-82. Deportation is important precisely because it is nearly inevitable and is so severe. Unlike deportation, sentencing enhancements do not follow automatically from conviction and therefore cannot be characterized as difficult to “divorce” from the conviction. *Id.* at 1481. Therefore such enhancements have minimal importance to rational defendants and they fall outside the scope of the Sixth Amendment right to counsel.

c. Sentencing Enhancements in a Subsequent Proceeding Are Not Intimately Related to a Previous Guilty Plea

The analysis in *Padilla* hinged on the intimate relation between deportation and the criminal process – that is, deportation flows directly from

the conviction. Any attempt to apply *Padilla* to other consequences must adhere to this principle, which focuses on the causal relation between the underlying plea and the consequence.

The “interrelatedness” factor, as proposed by defendant, is merely tautological. Br. 21. Reeves argues that sentencing enhancements “are part and parcel of the criminal process.” *Id.* Reeves focuses on the adjective “criminal;” *Padilla* concerned itself with the noun, process. *Padilla* analyzed the close relation between the criminal plea (the process) and the resulting civil removal proceedings. The Court worried that the deportation, though a civil penalty, was “intimately related to the criminal process,” and by “process” the Court meant the guilty plea. The Court obviously was not referring to the nature of the consequence as defendant argues (a criminal one), because that would bar relief for deportation (a civil consequence). Rather, the Court focused on the causal link between the criminal case guilty plea and the consequence about which counsel misadvised the defendant.

In the case of deportation the causation is indeed intimate, a.s the Court held. In the case of § 851 enhancements, causation exists but is much more indirect. Even when the chain of events results in application of the § 851 enhancement as occurred here, the causation is not analogous to the intimate

link found in *Padilla*. Therefore, defendant has failed to establish this factor as well.

II. If the District Court Committed Reversible Error, this Case must Be Remanded for a Full *Strickland* Hearing.

In his brief defendant requests that the Court remand this case to the district court for a truncated hearing pursuant to *Strickland v. Washington*, 466 U.S. 668 (1984). Br. 27. However, a full hearing is required because the district court made no findings of fact and defendant never offered any evidence to support his *Strickland* claim. If this Court orders a remand, it should order a complete hearing pursuant 21 U.S.C. § 851, at which defendant must meet his burden to prove the facts he alleges.

A. Background

21 U.S.C. § 851(c)(2) requires that a defendant who claims a prior conviction is constitutionally invalid “shall set forth the basis of his claim, and the factual basis therefor, with particularity in his response to the information. The [defendant] shall have the burden of proof by a preponderance of the evidence on any issue of fact raised by the response.” Defendant’s supplemental response to the government’s information stating previous drug conviction alleged that Reeves “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.” App. 6. Defendant did not offer any evidence, by affidavit or testimony, to prove these allegations.

Rather than seek a hearing or otherwise offer evidence to meet his burden to establish the facts of his claim by a preponderance of the evidence, defendant elected to commence with legal argument regarding the validity of his claim. App. 10. The district court did not conduct a hearing and made no findings of fact. App. 10-18. The district court promptly rejected defendant’s claim as a matter of law and as a result no hearing was necessary. *Id.*

B. Analysis

To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel’s performance, measured by “an objective standard of reasonableness,” was “deficient” and that counsel “made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). “The reasonableness of counsel’s performance is to be evaluated from counsel’s perspective at the time of the alleged error and in light of all the circumstances, and the standard of review is highly deferential.” *Kimmelman v. Morrison*, 477 U.S. 365, 381 (1986). Further, the defendant must also show a reasonable

probability that, absent counsel's errors, the outcome of the proceeding would have been different. *See id.* at 375; *Strickland*, 466 U.S. at 687-88.

In this case there is no factual record on which the Court may resolve Reeves's ineffective assistance claim. When presented with a claim of ineffective assistance on direct appeal, the Court often remands for a hearing in the district court. In fact, "only the rarest and most patently egregious of ineffective assistance claims are appropriately brought on direct appeal because there is no risk to delaying until a fully developed record is made." *United States v. Persfull*, 660 F.3d 286, 299 (7th Cir. 2011) (quoting *United States v. Harris*, 394 F.3d 543, 558 (7th Cir. 2005)). This Court cannot fully evaluate Reeves's claims because "[a]n adequate record is imperative to properly evaluate ineffective assistance claims." *Matheney v. Anderson*, 253 F.3d 1025, 1040 (7th Cir. 2001); *United States v. Meyer*, 234 F.3d 319, 325 (7th Cir. 2000) (ineffectiveness claims are not normally suited to resolution on direct appeal). As is often the case in ineffective assistance claims raised on direct appeal, the record here has not been developed and indeed defendant made no effort to develop it in the district court. Instead, in the proceedings below, defendant treated his claim as purely a legal issue for the district court to resolve. If he succeeds in convincing this Court that he may make such a claim as a matter of law, this Court should remand the matter for a full hearing on both prongs of the *Strickland* analysis; whether counsel's

performance met an objective standard of reasonableness and, if not, whether Reeves was prejudiced as a result.

Defendant suggests that he has already satisfied the first prong of the *Strickland* analysis. Br. 24. Thus he invites the Court to narrow the scope of a remand to the second half of a *Strickland* hearing. Br.27. However, the district court never made findings of fact because it rejected defendant's claim as a matter of law. Moreover, defendant offered no evidence in the district court to support his claim. After Reeves explicitly directed the district court to limit its ruling to a pure legal issue, he may not merely assume what he failed to prove in that proceeding. Defendant has not met his burden under 21 U.S.C. § 851(c)(2) and therefore, if a remand is ordered, the Court should order a full hearing in which defendant must meet his statutory burden and develop a full record to support his claim of ineffective assistance of counsel.

CONCLUSION

For the foregoing reasons, the United States respectfully requests that this Court affirm the sentence imposed by the district court.

Respectfully Submitted,

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RULE 32 CERTIFICATION

I hereby certify that this brief complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 32(a)(5), 32(a)(6), and Circuit Rule 32(b), because it has been prepared using the WordPerfect X3 proportionally-spaced typeface of Century Schoolbook with 13-point font in the text and 12-point font in the footnotes.

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,)	No. 11-2328
)	
Plaintiff-Appellee,)	Appeal from the United States
v.)	District Court for the
)	Northern District of Illinois,
MARIO REEVES)	Eastern Division
)	
Defendant-Appellant.)	07 CR 614
)	Honorable Joan B. Gottschall

CERTIFICATE OF SERVICE

I hereby certify that on January 30, 2012, I electronically filed the foregoing BRIEF OF THE UNITED STATES with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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