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United States Court of Appeals
Tenth Circuit

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Christopher M. Wolpert
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PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

NANCY MARTIN,

Defendant - Appellant.

No. 24-3140

Appeal from the United States District Court for the District of Kansas (D.C. No. 6:23-CV-01108-EFM & 6:21-CR-10018-EFM-1)

Branden A. Bell of The Bell Firm, Lawrence, Kansas, for Defendant-Appellant.

James A. Brown, Assistant United States Attorney (Duston J. Slinkard, Acting United States Attorney, with him on the brief), Topeka, Kansas, for Plaintiff-Appellee.

Before **BACHARACH**, **MORITZ**, and **FEDERICO**, Circuit Judges.

FEDERICO, Circuit Judge.

Nancy Martin embezzled millions of dollars from her employers over the course of years. When they discovered the scheme, those employers sued her in Kansas state court. Martin never appeared in court on the apparent advice of counsel, and the employers were awarded a default judgment of more than $11 million. Not long after, the federal government indicted Martin, accusing her of committing bank fraud and failing to report the embezzled money on her tax returns. Pursuant to the advice of counsel, Martin pleaded guilty to two counts, one for each offense charged. The federal court sentenced her to prison and ordered that she pay restitution to the victims.

Martin later retained new counsel and returned to the district court to argue via a motion for habeas corpus under 28 U.S.C. § 2255 that her conduct did not in fact constitute the crimes to which she pleaded guilty. She claimed that her attorney had failed to inform her about a possible defense that the checks she wrote against her employers' accounts were not sufficient to prove bank fraud. She also alleged that her attorney did not tell her that she could only be convicted of the tax crime if she acted willfully, or that she had the specific intent to violate the law when she filed her tax documents. As a result, she argued that her counsel's assistance was constitutionally ineffective so her convictions and sentence should be vacated.

The district court denied Martin's motion to vacate her convictions. She now appeals that denial to this court. We reverse and remand for further proceedings before the district court.

I

This appeal arises from Nancy Martin's conviction on a single count each of bank fraud, 18 U.S.C. § 1344(2), and aiding or assisting in filing a false tax document, 26 U.S.C. § 7206(2). The criminal proceedings leading to those convictions began when the United States charged Martin pursuant to a five-count indictment: one count of bank fraud, 18 U.S.C. § 1344(2), and four counts of aiding or assisting in the filing of false tax documents, 26 U.S.C. § 7206(2). She was represented by and consulted with counsel before entering into a plea agreement with the Government. The agreement called for Martin to plead guilty to the bank fraud count (Count One) and one count of filing a false tax document (Count Four). It also required Martin to waive her right to appeal her conviction and sentence. In exchange, the Government agreed to dismiss the remaining three counts and to recommend the district court sentence Martin to the low end of the advisory sentencing guidelines range.

The district court accepted Martin's pleas and thereafter calculated the advisory sentencing guidelines range as 63 to 78 months of imprisonment. Consistent with its promise in the plea agreement, the Government recommended a sentence of 63 months' imprisonment. Martin requested a sentence to a term of probation. Her attorney argued that

Martin's lack of criminal history, medical issues, and advanced age – 78 years, at the time of sentencing – all counseled in favor of probation.

The court found Martin's arguments unavailing. But it also found the Government's requested term of imprisonment too lengthy. The court varied below the advisory guidelines range and sentenced Martin to 48 months' imprisonment on the bank fraud count and 36 months' imprisonment on the tax count, both sentences to run concurrent with one another. The court also ordered Martin to pay $3.9 million in restitution: $3.2 million to her former employer and $700,000 to the IRS. [1]

II

Martin then appealed from her judgment and sentence. *See United States v. Martin*, No. 23-3045, 2023 WL 4858015 (10th Cir. July 31, 2023) (per curiam). In that initial direct appeal, Martin sought to challenge the factual basis for her convictions as well as the amount of loss and restitution calculated by the district court. *See id.* at *1. The Government moved to enforce the appeal waiver in the plea agreement. *Id.* at *4. This court granted the Government's motion and dismissed the appeal without reaching the merits. *Id.*

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[1] Although Martin defrauded two distinct legal entities, Mid-Kansas Wound Specialists has assigned its recovery entitlement to Emergency Services P.A.

After the previous panel of this Court found Martin's direct appeal of her judgment and sentence barred by the waiver in her plea agreement, Martin returned to the district court. She collaterally attacked her conviction with a motion brought under the federal habeas statute, 28 U.S.C. § 2255. As relevant to this appeal, she argued that trial defense counsel had provided constitutionally deficient advice that induced her to plead guilty rather than go to trial. That is, she argued that her attorney violated her Sixth Amendment right to effective assistance of counsel.

In particular, Martin alleged in her § 2255 motion – sworn under penalty of perjury – that counsel:

> [D]id not inform Ms. Martin that the statute required the United States to prove that [she] had used deception as the way to obtain bank property. While advising [her] about the elements of tax fraud, [counsel] did not inform Ms. Martin that the statute required the United States to prove that Ms. Martin knew that [she] had a legal obligation to report, as income on her taxes, the amounts of money [she] had taken from her employers.

Aplt. App. I at 80–81.

The district court then ordered Martin's trial defense counsel to provide an affidavit responsive to the allegations. Counsel provided the affidavit, which the Government attached to its filing opposing Martin's § 2255 motion. The affidavit, however, did not directly rebut many of the specific allegations in Martin's verified motion. Rather, it described the representation in more general terms. For example:

> We met in my office numerous times and discussed the case over the phone. We discussed the crimes charged and the elements of the same. Other than the pleadings and discussions, though, Ms. Martin and I did not review case law together or review the applicable PIK instructions. That said, I had a good faith impression that Ms. Martin understood the charges against her and the proof needed to establish her guilt.

Id. at 164.

On close of the briefing, the district court acknowledged the statutory requirement that it hold an evidentiary hearing "[u]nless the motion and the files and records of the case conclusively show" the movant is not entitled to relief, 28 U.S.C. § 2255(b). It correctly noted that an evidentiary hearing is unnecessary where either: the movant has failed to allege facts that could warrant relief; or where the factual allegations are contradicted by the record. The district court declined to hold an evidentiary hearing. It did not, however, specify its reasons for not holding a hearing or whether this decision rested on a determination of fact or a determination of law.

On the merits, the district court ruled against Martin. Beginning with the challenge to the bank fraud count, the district court ruled that – contrary to Martin's read of the law – the Government could prove a false statement for the purposes of § 1344(2) bank fraud via an implicit assertion of authority. The district court concluded that "[b]y writing checks from her employers to pay her personal expenses, [Martin] falsely represented to the banks that she had authority to make those payments." Aplt. App. I at 203. Thus, Martin's legal theory failed on its own merits. And the district court reasoned that the alleged failure to advise Martin of this losing legal theory could not constitute deficient performance.

The district court then turned to the tax count. It found that counsel had performed deficiently because she told her client, on the record, that the Government need not prove one of the necessary elements of conviction. But the court concluded this did not prejudice Martin. It reasoned:

> With broad, conclusory language, Defendant argues that the Government could not have proven [the tax count] at trial.
>
> * * *
>
> To meet its burden, the Government must have overcome Defendant's assertion that she had a "good faith belief that she was not violating any provisions of the tax laws." The problem with Defendant's argument is that she has not asserted and cannot articulate how she had a good faith belief that she was not violating the law by willfully failing to report her income.

Id. at 204 (alteration adopted and footnote omitted).

Because the district court denied Martin's § 2255 motion, she must be authorized by a certificate of appealability (COA) to appeal. *See* 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b)(1). A COA should issue where "the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). A substantial showing has been made if the petitioner "demonstrate[s] that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Saiz v. Ortiz*, 392 F.3d 1166, 1171 n.3 (10th Cir. 2004) (quoting *Tennard v. Dretke*, 542 U.S. 274, 282 (2004)). This is neither a simple preview nor rehashing of the merits. "Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003). Here, the district court held, "[f]or the reasons explained [elsewhere in the order], Defendant has not made a substantial showing of the denial of a constitutional right." Aplt. App. I at 209–10.

With the final § 2255 order in hand, Martin timely appealed to this court. Her opening brief asked this court to issue a COA that would allow the appeal to proceed. *See* 28 U.S.C. § 2253(c)(1)(B). This court granted Martin a COA on two issues:

> 1. On the bank fraud conviction, was the performance of Ms. Martin's counsel deficient? If so, should the Court of Appeals remand the claim of ineffective assistance of counsel on the bank fraud conviction for the district court to determine whether Ms. Martin was prejudiced by the deficient performance of her counsel?
>
> 2. On the conviction for assisting in the filing of a false tax return, should the Court of Appeals remand the claim of ineffective of counsel claim for a determination of prejudice?

Doc. 20.

Having granted Martin a COA, this court now exercises jurisdiction under 28 U.S.C. § 1291. We remand for the district court to conduct further proceedings on both the bank fraud and tax counts.

III

A

On appeal, Martin alleges that during the plea phase her counsel was ineffective, in violation of her constitutional rights. The Sixth Amendment secures for criminal defendants the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685–86 (1984). This right "applies to certain steps before trial," including plea bargaining. *Missouri v. Frye*, 566 U.S. 134, 140 (2012). Courts apply a familiar two-part test to determine whether counsel provided "assistance [] so defective as to require reversal." *Strickland*, 466 U.S. at 687. First, we ask whether counsel performed in a constitutionally deficient manner. *United States v. Watson*, 766 F.3d 1219, 1225 (10th Cir. 2014). Second, we ask whether that deficient performance resulted in prejudice to the defendant. *Id.*

The first prong – the deficient performance prong – "requires a defendant to show that counsel's representation fell below an objective standard of reasonableness." *Id.* (quoting *Lafler v. Cooper*, 566 U.S. 156, 163 (2012)). Our review of counsel's performance is "highly deferential." *Byrd v. Workman*, 645 F.3d 1159, 1168 (10th Cir. 2011) (quoting *Hooks v.*

Workman, 606 F.3d 715, 723 (10th Cir. 2010)). So that we might "eliminate the distorting effects of hindsight," we "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Dever v. Kansas State Penitentiary*, 36 F.3d 1531, 1537 (10th Cir. 1994) (quoting *Strickland*, 466 U.S. at 689). So long as counsel's performance is not "completely unreasonable," it is not constitutionally deficient. *Welch v. Workman*, 639 F.3d 980, 1011 (10th Cir. 2011) (quoting *Hoxsie v. Kerby*, 108 F.3d 1239, 1246 (10th Cir. 1997)).

Demonstrating deficiency is not enough on its own to merit relief. A movant must still surmount the second prong: prejudice. Here, a movant must show "that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Watson*, 766 F.3d at 1225 (quoting *Lafler*, 566 U.S. at 163). In the plea context, this means that the movant must show that there is a reasonable probability that, but for counsel's errors, she "would not have pleaded guilty and would have insisted on going to trial." *Heard v. Addison*, 728 F.3d 1170, 1176 (10th Cir. 2013) (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)). To determine the existence of prejudice, courts "make a holistic inquiry into all of the 'factual circumstances surrounding the plea.'" *Id.* at 1183 (quoting *Miller v. Champion*, 262 F.3d 1066, 1072 (10th Cir. 2001)). This standard cannot be met by movant's "bald, post hoc and unsupported statements." *Id.* at 1184.

Instead, we are called to "look to contemporaneous evidence to substantiate a defendant's expressed preferences." *Lee v. United States*, 582 U.S. 357, 369 (2017).

On appeal, "we review de novo whether counsel's performance was legally deficient and whether any deficiencies prejudiced the defendant." *Watson*, 766 F.3d at 1226 (quoting *United States v. Rodriguez-Rivera*, 518 F.3d 1208, 1216 (10th Cir. 2008)). We typically would review the district court's underlying factual findings for clear error. *Id*. However, because the district court did not conduct an evidentiary hearing, we review de novo the entirety of its order on the § 2255 motion – including any factual findings. *United States v. Barrett*, 797 F.3d 1207, 1213 (10th Cir. 2015) (citing *United States v. Rushin*, 642 F.3d 1299, 1302 (10th Cir. 2011)); *but see United States v. Sandoval-Flores*, 168 F.4th 1330, 1333 n.2 (10th Cir. 2026).

B

Martin's first claim pertains to the bank fraud conviction. She argues that her attorney at the plea-bargaining phase failed to advise her that bank fraud required the Government to prove she had made a false statement to a bank. She alleges that she never made such a statement. Thus, she argues, her attorney advised her to plead guilty to a crime that she did not commit. The Government resists this characterization. It argues that Martin's conduct is properly captured by the statute.

The parties have thus teed up what is – at least facially – a legal question of statutory construction. The bank fraud statute states:

> Whoever knowingly executes, or attempts to execute, a scheme or artifice –
>
> * * *
>
> to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises [commits a crime against the United States].

18 U.S.C. § 1344(2).

The dispute here turns on the construction of "means of false or fraudulent pretenses, representations, or promises." The Supreme Court has interpreted this clause in recent memory. *See Loughrin v. United States*, 573 U.S. 351, 356, 361–66 (2014). In *Loughrin*, the Court considered a defense argument that the statute requires specific intent to defraud a bank. *Id.* at 354–55. The Court rejected the challenge, noting that the statute already contains a "significant textual limitation on [its] reach" – the means clause at issue in this case. *See id.* at 362 (emphasis omitted).

The Court interpreted the means clause to be satisfied when "the defendant's false statement is the mechanism naturally inducing a bank (or custodian of bank property) to part with money in its control." *Id.* at 363. Where a person forges a check and presents it to a bank teller, the means clause is satisfied. *Id.* Where a person forges a check and presents it to a third-party merchant, the clause is still satisfied. In either instance, "the forged or altered check – *i.e.*, the false statement – serves in the ordinary course as the means (or to use other words, the mechanism or instrumentality) of obtaining bank property." *Id.* at 364. But where a person induces their victim to purchase a counterfeit handbag with a valid check, there is no bank fraud. This is because "the lie that a knock-off is a Louis Vuitton" is not the means that convinced the bank to part with its property. *Id.* at 364–65. Indeed, in such circumstances, no false statement was made to a financial institution.

Here, there was no fraudulent check written, which favors Martin's *Loughrin* argument. However, there is also no case from this circuit applying *Loughrin* as expansively as Martin advocates.

The Government responds that the checks Martin presented to the banks violated the bank fraud statute because they contained an "implied misrepresentation" sufficient to satisfy the means clause. Resp. Br. at 24. That is, the Government does not argue that Martin lacked general authority to write checks against her employers' accounts. Rather, it argues that Martin implied to the bank when she presented the checks that she had particularized authority to direct the transactions via checks that transferred money to her accounts and those of her creditors. The obstacle for the Government is that the Supreme Court has previously knocked down a similar theory.

In *Williams v. United States*, the Court held that valid checks written against insufficient accounts do not contain false statements. 458 U.S. 279, 290 (1982). There, the Court did not credit an argument that the checks contain an implied representation that the account owner "currently has funds on deposit sufficient to cover the face value of the check." *Id.* at 285. There is no false statement "for a simple reason: technically speaking, a check is not a factual assertion at all." *Id.* at 284.

Although *Williams* dealt with a different statute containing different language, its reasoning may also be superimposed on *Loughrin*. *See United States v. Doherty*, 969 F.2d 425, 427–428 (7th Cir. 1992) (concluding that *Williams* "applies with equal force" to § 1344(2)). Indeed, in *Loughrin*, the Supreme Court favorably credited the consensus of our sister circuits that the Government may not prosecute check kiting – that is, intentionally writing checks against empty accounts – under § 1344(2) because "such schemes do not involve any false representations." 573 U.S. at 358 n.4 (citing *Doherty*, 969 F.2d at 427–428; and *Williams*, 458 U.S. at 284–285); *see also Doherty*, 969 F.2d at 428 (collecting cases). We read this *Loughrin* footnote to indicate that so-called "implied misrepresentations," without more, may not be prosecuted under § 1344(2).

In any event, Martin does not necessarily need her proffered legal theory to prevail at this point to be afforded relief for her ineffective assistance claim. Rather, because her claim alleges ineffective assistance of counsel, she needs to show that counsel performed in a deficient manner. *Strickland*, 466 U.S. at 690–91. And counsel "has a duty to conduct reasonable investigations," including the research of "'relevant law to make an informed decision whether certain avenues will prove fruitful.'" *Heard*, 728 F.3d at 1179 (quoting *United States v. Demeree*, 108 F. App'x 602, 605 (10th Cir. 2004)).

We have previously held that minimally competent counsel would recognize a "likely defense based on the statute's text" and prior cases suggesting "the possibility of asserting viable defenses to culpability." *Id.* at 1180. So, although a defense attorney is "generally not obligated to anticipate changes in the law," they may be obligated to at least consider "an argument that is sufficiently foreshadowed in existing case law." *Bridges v. United States*, 991 F.3d 793, 804 (7th Cir. 2021); *accord United States v. Carthorne*, 878 F.3d 458, 465–66 (4th Cir. 2017); *United States v. Juarez*, 672 F.3d 381, 387 (5th Cir. 2012). And because we do not apply hindsight in this analysis, an attorney may perform deficiently by failing to disclose to the client a credible defense that may ultimately be a losing argument. *Heard*, 728 F.3d at 1178, 1183. As a general matter, we "show heightened deference to an attorney's strategic decisions supported by professional judgment." *Id.* at 1183 (quotation omitted). But where "a failure to disclose a defense does not reflect sound professional judgment, such deference is not appropriate." *Id.* (alterations adopted) (quoting *Dando v. Yukins*, 461 F.3d 791, 799 (6th Cir. 2006)).

Setting aside any benefits that could flow from hindsight, we first ask: was the *Loughrin* argument or possible defense sufficiently foreshadowed or knowable during the time of the plea bargaining in this case? We conclude the answer is yes. A diligent defense attorney should have discovered that the statutory text and the Supreme Court's interpretation of it, which predated Martin's guilty plea, would have presented a possible path to acquittal for their client. At the time of Martin's plea, the most recent Supreme Court interpretation of bank fraud – in *Loughrin* – held that the statute had a "significant textual limitation" that applies where a false statement does not induce the victim bank to part with its money. And, in the same opinion, the Court cited to a line of caselaw holding that – in a closely related context – checks do not contain implicit representations.

To counter this point, the Government points us to *United States v. McDonald*, where we affirmed a § 1344(2) conviction on a theory of "implied false representation." *See* 209 F. App'x 748, 751 (10th Cir. 2006). But *McDonald* predated *Loughrin* and – as an unpublished case – was never binding on this court or the district court. Indeed, we question whether *McDonald* can even be squared with *Williams*' holding that checks do not make factual assertions in and of themselves. But again, we do not need to decide definitively at this point that Martin's reading of § 1344(2) is correct. Nonetheless, we conclude that, at the very least, Martin has put forth a strong argument or theory of defense that existed at the time she pleaded guilty to bank fraud.[2]

The dissent maintains that the implied misrepresentation theory still applies in this circuit. And it is right that we lack any precedents adopting Ms. Martin's underlying theory. *See* Dissent at 9. But the Supreme Court does not. In *Loughrin*, the defense argued that the Supreme Court's reading

[2] Martin has directed us to out-of-circuit cases decided after the time of her plea bargaining in which courts have applied her theory. *See United States v. Robinson*, 161 F.4th 1069, 1075–76 (7th Cir. 2025) (as amended Jan. 28, 2026) (remanding for acquittal on an implied misrepresentation theory because "a check is not a factual assertion at all") (quoting *Williams v. United States*, 458 U.S. 279, 284 (1982)); *United States v. McDonald*, No. 5:21-CR-00012, 2024 WL 244941, at *7–8 (W.D. Va. Jan. 23, 2024) (granting judgment of acquittal to employee who wrote checks outside the scope of her employer's authorization). Were we deciding the issue in a direct appeal, we would consider the reasoning of *Robinson* and *McDonald* persuasive. But because we disavow hindsight in this procedural posture, the usefulness of such authority is limited. However, it does have some weight in demonstrating that the foregone argument was reasonably available to Martin's counsel; after all, other defense attorneys were contemporaneously presenting it.

of the statute would render § 1344(2) overly broad. *See* 573 U.S. at 358 n.4. The Court, though, rebutted this argument:

> But that is not right. The Courts of Appeals, for example, have unanimously agreed that the Government can prosecute check kiting (*i.e.*, writing checks against an account with insufficient funds in a way designed to keep them from bouncing) only under Clause (1), because such schemes do not involve any false representations.

Id. (citations omitted).

In support of this point, the Court cited *Doherty*, 969 F.2d at 427–428 and noted that case's citation of *Williams*, 458 U.S. at 284–285. And, in *Doherty* itself, the Seventh Circuit squarely held that *Williams*' holding "applies with equal force to § 1344(2)." 969 F.2d at 428. Whether or not the Supreme Court meant to adopt *Doherty* whole cloth, the best reading of *Loughrin* is that check kiting does not involve false representations because its holding in *Williams* also applies to § 1344(2).

Also, the dissent points out that "*Loughrin* itself didn't address whether bank fraud could be committed by concealment or implied misrepresentations," Dissent at 11. But it makes no difference that the question presented in *Loughrin* differs from the precise point at issue here. *Loughrin* spoke about this issue, even if not in a directly dispositive holding. We are bound by all the Supreme Court's published statements of law, no matter whether they are "outright holdings" or purported "dicta." *See, e.g.*, *United States v. Serawop*, 505 F.3d 1112, 1122 (10th Cir. 2007).

The dissent places significant weight on this court's decision in *United States v. Bonnett*, 877 F.2d 1450 (10th Cir. 1989). To the extent that the dissent is correct to read *Bonnett* to hold that *Williams* does not apply to the bank fraud statute, *see* Dissent at 9-10, the Supreme Court's reasoning in *Loughrin* has abrogated that holding.[3]

But that is not the best reading of *Bonnett* in any event. In *Bonnett*, the defendants engaged in a classic check kiting scheme, bolstered by a larger fraudulent scheme that included the knowledge and actions of bank insiders – the bank's Chief Executive Officer and a cashier. *See* 877 F.2d at 1453, 1457. Thus, the misrepresentations were "not an implied representation that the checks were good, as in *Williams*; rather it was the conduct of the conspirators in acting as if the checks were good and treating the checks in all respects as if they were drawn on collectable funds, with the knowledge the [] checks were worthless." *Id.* at 1457. In *Bonnett*, the

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[3] The dissent seeks to bolster its reading of *Bonnett* with citation to mail and wire fraud cases from our sister circuits that have resulted in convictions for misrepresentations by conduct. *See* Dissent at 7 n.3 (citing cases). But we have previously applied *Williams* in the mail fraud context to hold that a check cannot itself create a false representation. *See United States v. Cronic*, 900 F.2d 1511, 1516–17 (10th Cir. 1990), *overruled on other grounds by Cleveland v. United States*, 531 U.S. 12, 25–26 (2000).

defendants knew the checks would "be dishonored by the payor banks upon presentment" and their scheme sought to benefit from the time that it would take the victim bank to realize that the checks were worthless. *Id.* Thus, the banks were induced to part with their property by ongoing conduct that would "artificially inflate Mr. Bonnett's bank balances" and convince them to honor checks that would otherwise be refused. *Id. Bonnett* has vastly different facts than *Loughrin*. However, to the extent that *Bonnett* can be squared with *Loughrin*, it must be read to require that conduct and false communications that induce the bank to part with its property must be more than simply presenting a check. That is, the mere writing and depositing of valid checks will not suffice.

This conclusion does not end the analysis, however. We still must determine whether counsel exercised sound professional judgment in failing to disclose the argument or defense theory to Martin, noting again that we must begin with a presumption that counsel's conduct was reasonable. Because of the undeveloped factual record, the answer to this question is unclear. Given the uncertainty of the record on this point, and the strength of Martin's argument that a viable defense theory was available to be discovered and employed at the time of her guilty plea, Martin has sufficiently alleged deficient performance to entitle her to an evidentiary hearing on the issue.

In her motion to vacate, Martin alleged that her attorney at the plea-bargaining stage "did not inform Ms. Martin that the statute required the United States to prove that Ms. Martin had used deception as the way to obtain bank property." Aplt. App. I at 80–81. In so many words, Martin has averred that she was not made aware of the *Loughrin* argument now presented.

Counsel's affidavit does not give any indication that she knew about or had a strategic reason for failing to disclose the *Loughrin* defense to Martin. It does, however, provide some information that would bear on deficiency. It states that counsel reviewed discovery with her client, made an accounting expert available to the client, and discussed the Government's case with her client. The affidavit also provides that Martin and her attorney "discussed the crimes charged and the elements of the same." Aplt. App. I at 164. This is not enough to resolve the question of deficiency. Martin's argument centers on the elements of the crime charged. That the attorney discussed the elements does not tell us whether the attorney explored the possibility that the elements were not met based on the *Loughrin* theory of defense.

We also disagree with the dissent's view that there is no evidence to show that Martin's lawyer "fail[ed] to research a line of attack," *see* Dissent at 4, which the dissent finds to be "conclusory." *Id.* Counsel's affidavit provides some evidence; it states that "Ms. Martin and I did not review case law together or review the applicable PIK instructions." *Id.* Although counsel does not define "PIK" in her affidavit, this abbreviation surely references the Pattern Instructions for Kansas. However, Martin was charged with a federal crime, so the state-law pattern instructions would shed no light on the elements of the federal bank fraud statute. A misunderstanding of this type, which is reasonably inferred from counsel's affidavit, weighs in favor of Martin's argument that she received constitutionally ineffective assistance of counsel. But, because the affidavit and sworn pleading do not make clear the totality of the facts bearing on the issue, an evidentiary hearing is necessary to resolve it.

The dissent reasons that remand is unnecessary and it would be appropriate to decide the case on the evidentiary record already developed. But our review is de novo. *Barrett*, 797 F.3d at 1213. And in the district court, Martin was entitled to an evidentiary hearing "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255(b). Based on the existing record, we cannot conclude that relief was conclusively unavailable. Martin is thus entitled to an evidentiary hearing. *See United States v. Aguayo-Montes*, 169 F.4th 1205, 1216–17 (10th Cir. 2026).

We therefore remand for the district court to hold an evidentiary hearing to determine: 1) whether counsel considered this highly plausible defense at all; 2) whether she discussed it with the client; and 3) whether this would have affected the client's decision to go to trial (*i.e.*, prejudice).

C

Next, we turn to the tax count. The challenge again arises on an ineffective assistance of counsel claim under § 2255, so we again apply *Strickland*'s two prongs, the first of which is deficiency. The district court held that counsel's performance was constitutionally deficient, and the parties do not contest this finding on appeal. Nonetheless, because our review is de novo, we will consider the first *Strickland* prong of deficiency.

Before a person may be convicted of aiding or assisting in the preparation of a false tax return, the Government must prove, *inter alia*, that the person acted "[w]illfully." 26 U.S.C. § 7206(2). This "requires the Government to prove that the law imposed a duty on the defendant, that the defendant knew of this duty, and that [s]he voluntarily and intentionally violated that duty." *United States v. Ambort*, 405 F.3d 1109, 1114 (10th Cir. 2005) (quoting *Cheek v. United States*, 498 U.S. 192, 201 (1991)).

In this case, Martin signed a written plea agreement that did not detail the elements of the crimes of conviction. Then, at the change of plea hearing, the court elicited admissions from Martin to support the elements of the crime. However, Martin was unable to admit to willfulness. Instead, she told the court: "[A]t the time I did it, I didn't know it was illegal." Aplt. App. II at 117. Government counsel soon interjected:

> I think that if the intent to commit those acts or committing those acts intentionally was present and is admitted, then that covers the knowledge element without using the specific verbiage of knowing it's illegal, which is a little bit more colloquial I guess.

Id. at 118.

Defense counsel agreed with the Government that intentionally committing the acts would suffice. After counsel conferred with Martin, the court proceeded as if intent to commit the acts alone was sufficient to meet the element and accepted the plea. But it is not. Congress drafted § 7206(2) such that a conviction could only be won on proof of "specific intent to violate the law." *Cheek*, 498 U.S. at 200. Thus, the government must prove "actual knowledge of the pertinent legal duty" as well as the voluntary and intentional violation of that duty. *Id.* at 201–02. If a criminal defendant "didn't know it was illegal" to undertake a certain action, Aplt. App. II at 117, then they have not acted willfully and thus have not violated § 7206(2), *see Ambort*, 405 F.3d at 1114.

In her motion before the district court, Martin alleged that her attorney failed to advise her that the Government would need to prove this element of willfulness. The district court ruled for Martin on the first *Strickland* prong, finding that counsel's statements at the change-of-plea hearing indicated she had not advised Martin of the willfulness element. The court rightly found that this could not be a reasonable strategic decision. We have no occasion to disturb the district court's finding of deficiency regarding the tax count.

As to the second *Strickland* prong, the district court held that Martin had not met her burden to show prejudice. It reasoned that Martin had not put forth a good faith belief that could support a theory that she did not know she was violating the law by failing to report income. And the court further reasoned: Martin had prepared the tax returns; she had experience as a bookkeeper; she handled the family's finances; she maintained the tax documents; and she prepared the documents in a manner that would prevent her husband and an accountant from knowing about the funds taken from her employer. These facts, the court concluded, "would likely lead a jury to find that Defendant knew of her obligation to report her income." Aplt. App. I at 204.

Although the district court's prejudice analysis is mostly sound, it also contained a legal error. As a result, we cannot conclude whether the elements of the crime were satisfied. This is because willfulness is an element of the charged count of aiding or assisting in the filing of a false tax return. *See* 26 U.S.C. § 7206(2). And, because it is an element, the Government must prove willfulness "beyond a reasonable doubt, as an element of its case" to convict a person of the crime. *United States v. Taylor*, 596 U.S. 845, 850 (2022). Thus, the Government's case in chief requires proof beyond a reasonable doubt that "the law imposed a duty on the defendant, that the defendant knew of this duty, and that [s]he voluntarily and intentionally violated that duty." *Ambort*, 405 F.3d at 1114 (quoting *Cheek*, 498 U.S. at 201); *see also* Tenth Circuit Criminal Pattern Jury Instruction 2.94 (stating as an element of § 7206(2) that "the defendant acted willfully, that is, with the voluntary intent to violate a known legal duty").

This definition of willfulness carries with it a particularly heavy burden. *United States v. Winchell*, 129 F.3d 1093, 1096 n.7 (10th Cir. 1997). Congress has sought to ensure that a person not be deemed a criminal for their "bona fide misunderstanding" of the tax code's complexities. *Cheek*, 498 U.S. at 200 (quoting *United States v. Murdock*, 290 U.S. 389, 396 (1933)); *but see United States v. Mousavi*, 604 F.3d 1084, 1092 (9th Cir. 2010) (questioning the "practical effect, if any, of this heightened standard"). At the very least, the Government must prove that the defendant had a "specific intent to evade taxes." *United States v. Yurek*, 925

F.3d 423, 433 (10th Cir. 2019) (citing *United States v. Payne*, 978 F.2d 1177, 1182 (10th Cir. 1992)).

The district court's analysis here, however, indicated that the Government needed only to overcome an asserted defense of good faith. This is incorrect as a matter of law. To the extent that the Government would have us find this error harmless, we think it misunderstands the inquiry. The district court must determine whether, under the circumstances, Martin can show to a reasonable probability that, "but for counsel's errors [s]he would not have pleaded guilty." *Aguayo-Montes*, 169 F.4th at 1216 (quoting *Lee*, 582 U.S. at 364–65). This is a "'holistic inquiry'" that should consider "'all' of the facts" bearing on the defendant's decision. *United States v. Dominguez*, 998 F.3d 1094, 1111 (10th Cir. 2021) (quoting *Heard*, 728 F.3d at 1183). There is not a requirement for Martin to show that "everyone in [the defendant's] position would make the choice to reject the plea." *Lee*, 582 U.S. at 371. Instead, it could suffice to show that the deficient advice bore on a "determinative issue," and that with the advice of constitutionally effective counsel there is a "reasonable probability" that Martin would have exercised her right to a jury trial. *Id.*

This determination requires the court to at least consider the elements of the crime and the proof in the government's possession. If the court does find that Martin's expressed preferences could have rationally been served by a decision to go to trial, and Martin proves to a reasonable probability that she would in fact have done so, then she will have demonstrated prejudice. Because the district court did not apply the correct substantive standard of law, though, it did not properly resolve the prejudice inquiry.

We thus remand to the district court to determine prejudice in light of the Government's burden to prove beyond a reasonable doubt that "the law imposed a duty on the defendant, that the defendant knew of this duty, and that [s]he voluntarily and intentionally violated that duty." *Cheek*, 498 U.S. at 201. In undertaking this analysis, the district court may consider that Martin has also alleged that she would not have undertaken any defense strategy that would result in a realistic possibility of a term of imprisonment. So, Martin's prejudice arguments are necessarily linked. Because she thought her plea agreement could result in a sentence of probation, she is unlikely to have proceeded to trial with an argument for acquittal on only one count. Or, in other words, if she did not suffer prejudice on the tax count, she may not have suffered prejudice on the bank fraud count. We will leave it to the district court to ultimately determine whether the prejudice analyses on the two counts will rise and fall together.

* * *

We REVERSE the district court's denial of Martin's § 2255 motion and REMAND for further proceedings consistent with this opinion.

No. 24-3140, *United States of America v. Martin*
BACHARACH, J., dissenting.

I respectfully dissent.

This appeal grows out of the government's contention that Ms. Nancy Martin embezzled from her employer by writing checks on her employer's account to pay for her own personal expenses, presented the checks for payment, falsified records to conceal her scheme, and failed to pay taxes on what she had embezzled. In district court, Ms. Martin acknowledged guilt and the parties entered a plea agreement. Under this agreement, Ms. Martin pleaded guilty to bank fraud (18 U.S.C. § 1344(2)) and tax fraud (26 U.S.C. § 7206(2)).

In a motion to vacate, however, Ms. Martin claimed that her trial attorney had been deficient by failing to advise that

- a strong defense existed on the bank-fraud charge because Ms. Martin hadn't lied to the bank and

- the failure to pay taxes on the proceeds would constitute tax fraud only if she had acted willfully.

The district court rejected these claims, and Ms. Martin appeals.

For the conviction of bank fraud, the majority reverses on the ground that the district court should have granted an evidentiary hearing. Given the absence of an evidentiary hearing, the majority reasons that the district court couldn't adequately assess the performance of counsel. But

Ms. Martin doesn't argue that she should have had an evidentiary hearing.[1] She instead

- relies on the existing record to argue that the attorney was deficient in providing advice and

- requests a remand for the district court to address the issue of prejudice.

I would confine our decision to the argument that Ms. Martin presented.

On this argument, Ms. Martin bore the burden of proving a deficiency in her attorney's performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). She contends that she satisfied her burden rather than question the absence of an evidentiary hearing. Despite that contention, the record contains no evidence of shortcomings in the lawyer's research and Ms. Martin's proposed line of attack lacks any supporting precedent.

For the conviction of tax fraud, the district court ruled that Ms. Martin hadn't shown prejudice from the attorney's deficient performance. The government urges us to affirm based on harmlessness, arguing that the evidence of guilt was overwhelming and that Ms. Martin pleaded guilty because she had obtained an attractive plea bargain. She

[1] The term *evidentiary hearing* does not appear in any of the appellate briefs.

doesn't address these arguments, and they bear no obvious defects. So I would affirm the conviction of tax fraud based on harmlessness.

1. We must independently consider the claim of ineffective assistance based on the existing record.

We conduct de novo review of the district court's ruling, using the same legal standards that applied in district court. *United States v. Kearn*, 90 F.4th 1301, 1306 (10th Cir. 2024). These standards involved a claim of ineffective assistance of counsel. For that claim, Ms. Martin needed to show that her trial counsel had acted deficiently and that the deficient representation had been prejudicial. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). For both deficient representation and prejudice, Ms. Martin bore the burden of proof based on a preponderance of the evidence. *Menzies v. Powell*, 52 F.4th 1178, 1210 (10th Cir. 2022).

2. Bank Fraud: Ms. Martin hasn't shown a deficiency by a preponderance of the evidence.

Ms. Martin argues that she should have been told that writing valid checks for her personal expenses wouldn't constitute bank fraud. This argument cloaks two assumptions:

1. The trial lawyer didn't research or know about this argument.

2. This argument would have been so strong that the failure to tell Ms. Martin about it would have been unreasonable.

The record doesn't support either assumption.

a. Assumption 1: that the trial lawyer didn't research or know about this argument.

For the first assumption, Ms. Martin's only evidence is what she submitted in her habeas petition. On appeal, she argues that her lawyer was ineffective by failing to research a line of attack.

But in district court, Ms. Martin provided only one sentence about her lawyer's research: "[T]rial counsel did not inform Ms. Martin about bank fraud's causation element—because she either did not know about it or failed to perform basic research on it." Appellant's App'x vol. 1, at 99. With respect to the lawyer's research or legal knowledge, Ms. Martin provides the kind of conclusory allegation that we ordinarily reject. *Lasiter v. Thomas*, 89 F.3d 699, 702–703 (10th Cir. 1996); *United States v. Moya*, 676 F.3d 1211, 1213 (10th Cir. 2012); *accord Palmer v. Hendricks*, 592 F.3d 386, 393 (3d Cir. 2010) ("[A] habeas petitioner's nonspecific or conclusory allegations of ineffective assistance of counsel do not compel district courts . . . to delve into the unelaborated factual basis of a habeas petition.").

Apart from that bare-bones allegation, Ms. Martin lacks evidence that her lawyer failed to research the proposed line of attack. The majority allows Ms. Martin to overcome that evidentiary gap through an evidentiary hearing. But Ms. Martin doesn't argue that the district court should have ordered an evidentiary hearing; and we don't typically reverse the district court on grounds that the appellant hasn't raised, particularly without notice to the parties or a chance for them to submit supplemental briefs. *United States v. Tee*, 881 F.3d 1258, 1269 (10th Cir. 2018). Absent evidence about the lawyer's failure to research a proposed line of attack, Ms. Martin failed to satisfy her burden based on a preponderance of the evidence.[2]

b. Assumption 2: that the proposed line of attack was so strong that the failure to tell Ms. Martin about it would have been unreasonable

Ms. Martin's motion assumes not only that her lawyer didn't research the proposed line of attack, but also that this line of attack would have been so strong that the failure to tell her about it would have shown a deficiency in the representation. To prove this assumption, Ms. Martin needed to show that her counsel's failure to develop this argument had been serious enough to prevent a fair trial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In assessing that showing, we give great deference to trial counsel. *Id.* at 689. For example, we don't require an attorney to conceive of every possible defense. *United States v. Harms*, 371 F.3d 1208,

[2] The majority says that the district court needed to conduct an evidentiary hearing unless the record conclusively showed that she wasn't entitled to relief. Maj. Op. at 22. But Ms. Martin still needed to present an argument for reversal based on the absence of an evidentiary hearing. "After all, there are many mandatory requirements that have been considered 'waived.'" *United States v. Rodebaugh*, 798 F.3d 1281, 1316 (10th Cir. 2015).

1212 (10th Cir. 2004). So we must decide whether Ms. Martin's proposed line of attack was so strong that the failure to tell her about it would overcome the great deference accorded to trial counsel.

The proposed line of attack is that the fraud was directed against the employer, rather than the bank, because the checks themselves didn't contain any forgeries. For this line of attack, Ms. Martin admits that she embezzled from her employer; but she points out that the conviction involved bank fraud rather than embezzlement. The underlying question is thus whether Ms. Martin used fraudulent means by submitting checks on her employer's account for personal expenses without disclosing that she was using the checks to embezzle from her employer. To answer that question, we should consider what it means to use *fraudulent means* under the bank-fraud statute.

This statute applies if a defendant knowingly executes a scheme to obtain money from a bank account "by means of"

- a "concealment of material fact," *United States v. Gregory*, 54 F.4th 1183, 1192–93 (10th Cir. 2022) (quoting *United States v. Flanders*, 491 F.3d 1197, 1212 (10th Cir. 2007) (emphasis omitted)), or

- an implied misrepresentation through a pattern of conduct, *see United States v. Bonnett*, 877 F.2d 1450, 1456–57 (10th Cir. 1989) ("A representation," like those criminalized by the bank fraud statute, "has long been held to consist of words . . . *or* other *conduct* manifesting to another the existence of a material . . . fact."); *see also United States v. Morgenstern*, 933 F.2d 1108, 1113 (2d Cir. 1991) (concluding that the defendant had made a misrepresentation to the bank by conveying a

> misleading impression (that the defendant had been acting within the scope of his authority in depositing checks)); *United States v. Briggs*, 965 F.2d 10, 12 (5th Cir. 1992) (stating that the defendant had "falsely held herself out to have authority, which she in fact did not have [and that] constitutes a false pretense within the meaning of the" bank-fraud statute).[3]

So the only question is whether Ms. Martin's scheme involved concealment of a material fact or an implied misrepresentation to the bank when obtaining money from the employer's account.

Strong evidence existed of concealment and implied misrepresentations. For example, the presentence report says that Ms. Martin's embezzlement scheme involved 261 checks during the relevant period (2012–2017). Appellant's App'x vol. 3, at 18–22.[4] And the plea agreement states that the embezzlement scheme lasted roughly 5 years. Appellant's App'x vol. 1, at 46. Given the volume of checks and the duration of the scheme, virtually any jury would

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[3] Congress modeled the bank-fraud statute on the wire- and mail-fraud statutes. *See United States v. Bonnett*, 877 F.2d 1450, 1454–55 (10th Cir. 1989); *see also United States v. Williams*, 865 F.3d 1302, 1309 (10th Cir. 2017) ("[O]ur analysis of bank fraud under § 1344 often draws on mail and wire fraud cases . . . ."). And courts have interpreted those statutes to criminalize misrepresentations by conduct or concealment of material facts. *See, e.g.*, *United States v. Woods*, 335 F.3d 993, 997–98 (9th Cir. 2003) ("Under the mail fraud statute the government is not required to prove any particular false statement was made." (quoting *United States v. Munoz*, 233 F.3d 1117, 1131 (9th Cir. 2000))); *United States v. Chanu*, 40 F.4th 528, 541 (7th Cir. 2022) (stating that a scheme to order commodities and then cancel the orders constituted an implied misrepresentation under the wire-fraud statute).

[4] Ms. Martin hasn't objected to the accuracy of this calculation.

- find that Ms. Martin had concealed a material fact or falsely implied that she had the authority to write checks for her own personal expenses, *see United States v. Bonnett*, 877 F.2d 1450, 1456–57 (10th Cir. 1989) (stating that a pattern of conduct constituted an implied misrepresentation under the bank-fraud statute even when the transactions themselves didn't contain false statements), and

- view the 5-year scheme as "ongoing conduct" creating an implied "false communication" going "to the bank" and inducing it to part with its property, Maj. Op. at 20.

Granted, a defendant must obtain bank property "by means of" fraudulent concealment or an implied representation. *Loughrin v. United States*, 573 U.S. 351, 362–63 (2014). Based on this requirement, Ms. Martin argues that

- any misrepresentation was to her employer rather than the bank and

- the checks themselves did not contain any misrepresentations.

First, Ms. Martin argues that any misrepresentation was to her employer rather than the bank. This argument acknowledges that Ms. Martin made misrepresentations to get money from her employer's account. But she could get that money only if she were to conceal her misrepresentations from the bank. After all, the bank presumably wouldn't have paid Ms. Martin if she had disclosed that she was using the checks to embezzle from her employer. So Ms. Martin's admitted misrepresentations to her employer would presumably entail the concealment of a material fact from the bank. *See United States v. Morgenstern*, 933 F.2d 1108, 1110–14

(2d Cir. 1991) (concluding that an accountant's unauthorized deposits of the employer's money into a personal account constituted bank fraud).[5]

Second, Ms. Martin argues that she didn't make a misrepresentation to the bank, pointing to *Williams v. United States*, 458 U.S. 279 (1982). There the Court had applied a different statute criminalizing *false statements* to a bank. *Id.* at 284–85; *see* 18 U.S.C. § 1014. The question under that statute was whether a false statement existed when the bank account hadn't contained enough money to pay the check. The Supreme Court answered *no*. *Williams*, 458 U.S. at 284–85.

Congress responded to the opinion by expanding the statute on bank fraud (18 U.S.C. § 1344(2)). The new version covered not only *false statements*, but also *false pretenses, representations, or promises* as means of obtaining bank property. *See United States v. Young*, 952 F.2d 1252, 1255–56 & n.3 (10th Cir. 1991). *False pretenses* "may be implied from conduct." *Black's Law Dictionary* 602 (6th ed. 1990). We have thus declined to hold that *Williams* prohibits a bank-fraud conviction based

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[5] Ms. Martin relies on *Loughrin v. United States*, 573 U.S. 351 (2014). There the Court addressed the required relationship between a misrepresentation and the acquisition of money from a bank. *Id.* at 362–66. But there the defendant had admitted making a false statement to the bank; so the Supreme Court didn't need to address whether the defendant had concealed a material fact or made a misrepresentation. *Id.* at 355–56 (noting that the defendant hadn't contested the element involving the use of "false or fraudulent pretenses, representations or promises").

solely on the use of a check to commit bank fraud. *United States v. Bonnett*, 877 F.2d 1450, 1456–57 (10th Cir. 1989).

Neither the Supreme Court nor our court has adopted Ms. Martin's underlying theory. To the contrary, we have suggested the opposite in an unpublished opinion, *United States v. McDonald*, 209 F. App'x 748 (10th Cir. 2006). There the defendant obtained cashier's checks from an investor and said that they would go into an escrow account. *Id.* at 749–50. But the defendant put the cashier's checks into her personal account and used the money for her personal expenses. *Id.*

The defendant in *McDonald* made the same argument that Ms. Martin makes here, pointing out that the cashier's checks were facially valid and that the defendant hadn't explicitly misrepresented anything to the financial institution. *Id.* at 750–51. We rejected the argument, reasoning that the defendant had implicitly misrepresented to the financial institution that she had authority to deposit the cashier's checks into her personal account. *Id.* at 751.

In *McDonald*, no explicit misrepresentations existed in the checks themselves. The problem, however, was that the defendant hadn't told the financial institution that she lacked authority to deposit the funds into her personal account. *Id.* Here too, Ms. Martin's checks didn't contain any forgeries. But she concealed her scheme from the financial institution (just as the defendant had done in *McDonald*).

Granted, *McDonald* isn't precedential and the Supreme Court later addressed the bank-fraud statute in *Loughrin v. United States*, 573 U.S. 351 (2014). But we had previously held that implied misrepresentations could violate the bank-fraud statute. *United States v. Bonnett*, 877 F.2d 1450, 1456–57 (10th Cir. 1989). And we are bound by that holding until it's "indisputably" and "pellucidly" abrogated. *Fed. Trade Comm'n v. Elite IT Partners, Inc.*, 91 F.4th 1042, 1051 (10th Cir. 2024).

The Supreme Court's opinion in *Loughrin* didn't abrogate our holding. Indeed, *Loughrin* itself didn't address whether bank fraud could be committed by concealment or implied misrepresentations. *Cf. Loughrin v. United States*, 573 U.S. 351, 356 (2014) ("The single question presented is whether the Government must prove . . . that the defendant intended to defraud a bank."). In fact, the majority acknowledges that "there is . . . no case from this circuit applying *Loughrin* as expansively as [Ms.] Martin advocates." Maj. Op. at 13. And under our holding, bank fraud can consist of a defendant's concealment of a material fact (like the writing of 261 checks to embezzle from an employer). *United States v. Bonnett*, 877 F.2d 1450, 1456–57 (10th Cir. 1989).[6]

[6] The majority reads *Loughrin* to "indicate that so-called 'implied misrepresentations,' without more, may not be prosecuted under [18 U.S.C.] § 1344(2)." Maj. Op. at 14; *see also id.* at 18 (arguing that "the implied misrepresentation theory" does not "still apply[] in this circuit"). Ms. Martin didn't interpret *Loughrin* this broadly, and the opinion never discussed a theory of implied misrepresentation.

Given this holding, defense counsel could safely assume that a jury would likely find that Ms. Martin had obtained money from the bank by (1) concealing a material fact (the embezzlement scheme) or (2) making an implied misrepresentation (authority to write checks out of her employer's account for her personal expenses).

* * *

We must assess the claim of ineffective assistance on the bank-fraud charge based on the existing record and precedent.

The record is silent on whether trial counsel knew about the proposed line of attack. The majority would fill that void in the record by reversing and remanding for an evidentiary hearing. But Ms. Martin hasn't urged reversal based on the failure to conduct such a hearing. She instead urges reversal based on the existing factual record. Rather than accept Ms. Martin's framing of the argument as the appellant, the majority sua sponte reverses based on its perception that the record is incomplete. The incomplete factual record, however, shows that Ms. Martin didn't satisfy

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Despite the absence of any such discussion, the majority relies on a footnote in *Loughrin*, which noted unanimity among the Courts of Appeals in concluding that check kiting doesn't involve false representations. 573 U.S. 351, 358 n.4 (2014). But *Loughrin* never used the term *implied misrepresentation* or said anything to suggest a change in the case law on implied misrepresentations under 18 U.S.C. § 1344(2).

her burden to show ineffectiveness of counsel by a preponderance of the evidence.

Moreover, trial counsel could reasonably advise Ms. Martin without framing her embezzlement as a misrepresentation confined to her employer. Our precedent clarifies that a defendant can use fraudulent means by concealing or implying facts as well as making misrepresentations in the checks themselves. Given that precedent, a competent attorney could reasonably predict that a jury would find bank fraud based on Ms. Martin's concealment of her embezzlement scheme or her implied misrepresentation of authority to pay her personal expenses out of her employer's account.

Given the record and existing precedent, Ms. Martin didn't show by a preponderance of the evidence that her trial lawyer had been ineffective in providing legal advice on the charge of bank fraud.

3. **Tax fraud: The government's argument on harmlessness is not obviously defective.**

Ms. Martin was also convicted of tax fraud. For this crime, the government needed to prove that Ms. Martin had willfully failed to pay taxes. *See United States v. Cox*, 906 F.3d 1170, 1194 (10th Cir. 2018) (stating that the government must prove that the defendant acted with intent to violate the law). But defense counsel mistakenly told Ms. Martin that willfulness wasn't required. Given this mistake, the parties agree that trial counsel was deficient in advising Ms. Martin on the charge of tax fraud.

But Ms. Martin needed to show prejudice as well as a deficiency in the representation. *See Strickland v. Washington*, 466 U.S. 682, 694 (1984). The district court concluded that Ms. Martin hadn't shown prejudice. In drawing this conclusion, however, the court said that Ms. Martin had the burden to show a good faith belief that she was not violating a tax law. That statement was incorrect because the government had the burden to show that Ms. Martin had acted willfully. *United States v. Ambort*, 405 F.3d 1109, 1114 (10th Cir. 2005).

Despite the district court's mistake, the government argues that we should affirm based on harmlessness because no rational defendant would have rejected the plea bargain.[7] We can consider this ground because harmlessness involves a question of law, the record is developed, the government briefed the issue, and Ms. Martin had an opportunity to address harmlessness in her reply brief. *United States v. Damato*, 672 F.3d 832, 844–45 (10th Cir. 2012); *see also United States v. Edward J.*, 224 F.3d 1216, 1223–24 (10th Cir. 2000) (affirming on the alternative ground of harmlessness).

[7] The government separately argued that the mistake was harmless because it didn't affect the court's reasoning on prejudice.

For prejudice, Ms. Martin needed to show that "a decision to reject the plea bargain would have been rational under the circumstances." *Padilla v. Kentucky*, 559 U.S. 356, 372 (2010). To assess that showing, we consider the plea agreement. Under that agreement, the government

- dropped three other counts of tax fraud,
- agreed to recommend a sentence at the low end of the guideline range,
- agreed that Ms. Martin could request a downward variance for the sentence, and
- promised to recommend a three-level reduction in the offense level.

Given these features of the agreement, we must consider whether it would have been rational for Ms. Martin to insist on going to trial.

The district court pointed out that Ms. Martin had

- worked as a bookkeeper,
- prepared tax returns for herself and her husband, and
- hid the embezzlement for many years.

These facts led the district court to conclude that it would have been irrational to contest the charge of tax fraud. Based on this conclusion, the government argues that the error on the prejudice element is harmless.

Ms. Martin had a chance to respond in her reply brief, but she didn't.[8] By failing to respond, Ms. Martin waived any non-obvious defects in the government's argument on harmlessness. *See Eaton v. Pacheco*, 931 F.3d 1009, 1031 (10th Cir. 2019). I see no defects, obvious or otherwise, in the government's argument on harmlessness. Given the record, it's not obvious that a rational defendant would have insisted on going to trial on the charge of tax fraud. So I would affirm this conviction.

4. **Conclusion**

I would affirm the denial of relief to Ms. Martin.

She didn't show by a preponderance of the evidence that her trial lawyer had been deficient in providing advice on the charge of bank fraud. The record is silent about the advice itself, and Ms. Martin hasn't requested an evidentiary hearing. Moreover, her proposed line of attack lacks support in a precedential opinion. So I would affirm the denial of relief on the bank-fraud conviction.

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8 After recounting the government's harmlessness argument, Ms. Martin wrote: "Again, this misreads the law. Good faith is not a defense. It is something that the United States must disprove by proving willfulness. By presuming a defendant innocent, a jury must begin a trial by believing a defendant acted in good faith. Only by proving that a defendant acted willfully does the United States overcome that presumption." Appellant's Reply Br. at 12–13. But this argument serves only to explain how the district court erred, not how the error affected the outcome.

On the tax-fraud conviction, the district court erred in concluding that willfulness was not an element of the charge. But the government argues harmlessness based on the compelling evidence of willfulness; and Ms. Martin fails to respond, waving any non-obvious defects in the government's argument. No obvious defects exist; so I would affirm the denial of relief on the tax-fraud conviction.