No. _____

In the
Supreme Court of the United States

RUBEN DELHORNO,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

Gerardo S. Gutierrez
Counsel of Record
53 W. Jackson Boulevard
Suite 1651
Chicago, IL 60604
(312) 786-9970 fax
(312) 786-9972
g8370172@sbcglobal.net

Counsel for Petitioner

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

In *Padilla v. Kentucky*, 559 U.S. 356 (2010), this Court held that the Sixth Amendment imposes on attorneys representing non-citizen criminal defendants a constitutional duty to advise the defendants about the potential removal consequences arising from a guilty plea.

The question presented is whether a *Padilla* constitutional waiver may be inferred without an evidentiary hearing by mere passage of time where defendant sought neither a direct appeal nor habeas relief, filing a writ of error *coram nobis* only after immigration proceedings had commenced several years after pleading guilty and after completion of his five-year sentence of incarceration.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a – 12a) *United States v. Ruben Delhorno*, Slip Op 18-1707 (7th Cir. Decided 2/08/2019) is unpublished. The memorandum opinion and order of the district court denying petitioner's petition for writ of error *coram nobis* (Pet. App. 13a – 22a) is unpublished but can be found at *United States v. Ruben Delhorno*, 11-CR-46 (EDWI, (E.D.WI, 3/30/2018).

JURISDICTION

The judgment of the court of appeals was entered on February 8, 2019. (Pet. App.1a). The Petition for Writ of Certiorari was timely filed on March 31, 2019. The jurisdiction of this court is invoked under 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL PROVISION

U.S. Const. Amend. VI

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

Ruben Delhorno is a 42-year-old man born in Mexico who came to the United States when he was three years old. In 2011 sheriff's police stopped him for speeding. A dog sniffed his car and 4 kilos of cocaine were found inside. He was indicted in the Eastern District of Wisconsin with possession with intent to distribute a kilogram or more of cocaine in violation of 21 U.S.C. § 841(a)(1).

Following a guilty plea, petitioner was convicted of one count of possession with intent to distribute and distribution of a controlled substance in violation of 21 U.S.C. § 841(a)(1). He was sentenced on October 5, 2012 to five years imprisonment, followed by a term of four years supervised release. On May 1, 2017, after completing his prison sentence, Delhorno was transferred to the custody of the U.S. Immigration and Customs Enforcement ("ICE") for removal proceedings. During discovery it was learned that Mr. Delhorno, a non-U.S. citizen, had pleaded guilty without the constitutional benefit of his *Padilla* advisals, neither by his attorney nor by the district court. *United States of America v. Delhorno*, Slip Op 18-1707 *5 (7th Cir. 2019)

Specifically, after his five year term of incarceration and being transferred to ICE custody for removal proceedings, Delhorno filed for coram nobis relief based upon this Court's decision in *Lee v. United States*, _____U.S.____ , 137 S. Ct. 1958 (2017), *Padilla v. Kentucky*, 559 U.S. 356 (2010), and *Hill v. Lockhart*, 474 U.S. 52, 59 (1985) alleging that his attorney was ineffective in failing to advise him of the mandatory nature of his deportation if he pleaded guilty. *Delhorno*,

Slip Op 18-1707 *5. And, that neither the district court nor his attorney informed him that by pleading guilty to the offense, he would be left without any form of relief, pursuant to 8 U.S.C. §§ 1101(a)(43)(B), 1227(a)(2)(A)(iii); and *Calcano-Martinez v. INS*, 533 U. S. 348, 350, n. 1 (2001).

Following the filing of his writ of *coram nobis*, the government weighed in and agreed that the record lacked evidence of specific *Padilla* advisals. However, based on the totality of the record the district court rejected the argument, denied the hearing and dismissed the petition. *United States v. Delhorno*, 11-CR-46 (EDWI 2018) In affirming the district court's decision, the Seventh Circuit applied *United States v. Fuller*, 86 F.3d 105, 107 (7th Cir. 1996) for the proposition that a judge "has no duty to conduct an evidentiary hearing if, by analogy to summary judgment, he could determine on the basis of affidavits, depositions, or other documentary materials of evidentiary quality that there was no genuinely contestable issue of fact." *Delhorno*, Slip Op 18-1707 *5. However, the only affidavit filed in this case was by Petitioner Delhorno who claimed that neither his lawyer nor the district court had advised him that in pleading guilty to the charges he would be deported, more importantly, that he would rather have gone to trial than plead guilty and face certain deportation. On May 27, 2018, Delhorno was deported. On February 8, 2019, the Seventh Circuit affirmed the denial of his petition for *coram nobis*.

REASONS FOR GRANTING THE PETITION

The Court must decide if the lack of a *Padilla* warning at the change of plea hearing can be cured by the simple passage of time in custody, where defendant was neither advised by counsel nor by the district court that by accepting a plea of guilty, he would be removed from the United States, especially where no hearing was conducted to determine if he understood the full consequences of his plea of guilty and he has claimed he would rather have gone to trial had he known he would be deported.

The Seventh Circuit noted that his presentence investigation report said Delhorno told U.S. Probation he understood that lack of citizenship "*may present problems for him, but he is trying to make arrangements to remain in the United States*." *Delhorno*, Slip Op 18-1707 *3 (emphasis in the original). And, in the same presentence report, ICE had informed, "Delhorno was granted legal permanent resident status on 4/29/89. At this time, *the defendant is not under investigation for deportation, but upon entry of judgment, the matter will be investigated*." *Delhorno*, *3 (emphasis in the original).

Both of these references, while no doubt insightful, fail to yield a meaningful understanding of *Padilla* and its progeny. The *Padilla* warning is akin to Miranda warnings, aimed almost entirely at counsel's performance. See, *Miranda v. Arizona,* 384 U.S. 436 (1966). Padilla introduced a new law. *Chaidez v. United States*, 568 U.S. 342 (2013). This case is fundamental to our immigration laws and our sixth amendment right to effective representation, much in the way

Miranda warnings are critical to our fourth amendment right of unreasonable searches or seizures. Padilla informs that criminal defense lawyers have an affirmative duty to tell their clients that the anticipated plea might get them deported.

The court of appeals placed way too much emphasis on a results-oriented analysis of whether or not it would have done Delhorno any good to go to trial. This Court has instructed however that the certainty of a conviction need not enter the analysis because our pleas of guilty would be compromised by not knowing if the defendant's attorney gave competent advice, not whether he had gone to trial he would have been found guilty anyway. *Lee v. United States*, 137 S. Ct. 1958.

"We conclude that Delhorno continues to suffer from his conviction, but he likely cannot demonstrate fundamental error, and he certainly cannot justify his failure to seek earlier relief" *Delhorno*, *3 But, "We are not convinced . . . that [prior attorney's] deficient performance prejudiced Delhorno." *Id*, * 9

Here the Seventh Circuit's proposition is as straightforward as it is mistaken. They simply did not believe Delhorno would have proceeded to trial even if he had been given a proper *Padilla* warning. This is akin to saying the person being interrogated would have confessed even if he had been read the *Miranda* warnings. So no harm no foul. The court of appeals distinguishes this case with this Court's ruling in *Lee,* 137 S. Ct. 1958 (2017). But for the filing of a Section 2255 collateral attack, *Lee* is indistinguishable from Delhorno, albeit worse since no hearing was actually conducted in Delhorno's case. *Id*., C.f., 28 U.S.C. Sec.

2255. Additionally, the court of appeals would add additional constraints on an incarcerated non-citizen to "produce[] contemporaneous evidence showing that he would not have pleaded guilty" and not mere "post hoc assertions." *Delhorno*, *10.

Here we have a decision, which if fairly read, shows an improper *Lee* basis to reject the writ, i.e. the lack of a good chance for success at trial, as well as a new time limit constraint on an incarcerated individual awaiting actual deportation, without so much as a single *Padilla* warning.

This is no mere exercise. Ruben Del Horno is one of eight children born to naturalized citizen parents; both of whom live in the United States with his seven siblings, five of whom are U.S. citizens and two are lawful permanent residents. Del Horno also has two young U.S. citizen children and a fiancé Erika, who is also a U.S. citizen living in the United States. Simply stated, Ruben has no close ties to Mexico.

The Court must answer this all too important question and determine whether a *Padilla* constitutional warning may be waived without an evidentiary hearing by the mere passage of time? We submit it may not where as here the non-citizen detainee was never informed of his rights under *Padilla* and had been continuously incarcerated before fully realizing he was *per se* removable.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Gerardo S. Gutierrez
Counsel of Record
53 W. Jackson Boulevard
Suite 1651
Chicago, IL 60604
(312) 786-9970 fax
(312) 786-9972
g8370172@sbcglobal.net

Counsel for Petitioner