APPENDIX

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APPENDIX A

In the
United States Court of Appeals
For the Seventh Circuit

No. 18-1707

[Filed February 8, 2019]

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

RUBEN DELHORNO,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Wisconsin.
No. 11-CR-46 — **J.P. Stadtmueller**, *Judge*.

ARGUED OCTOBER 23, 2018 —
DECIDED FEBRUARY 8, 2019

Before KANNE, HAMILTON, and ST. EVE, *Circuit Judges*.

HAMILTON, *Circuit Judge*. Defendant-appellant Ruben Delhorno filed a petition for a writ of coram nobis, a rare form of collateral attack on a criminal judgment. This ancient common-law remedy is available to correct errors of fact and law in criminal

cases, but only when: "(1) the error alleged is 'of the most fundamental character' as to render the criminal conviction 'invalid'; (2) there are 'sound reasons' for the defendant's 'failure to seek earlier relief'; and (3) 'the defendant continues to suffer from his conviction even though he is out of custody.'" *United States v. Wilkozek*, 822 F.3d 364, 368 (7th Cir. 2016), citing *United States v. Sloan*, 505 F.3d 685, 697 (7th Cir. 2007), and *United States v. Keane*, 852 F.2d 199, 203 (7th Cir. 1988). Delhorno fails the second requirement. He cannot offer "sound reasons" for failing to seek earlier relief through a direct appeal or habeas corpus petition. We therefore affirm the district court's decision denying Delhorno's writ of coram nobis.

I. *Factual and Procedural Background*

Delhorno, age 42, was born in Mexico but came to the United States with his parents when he was just three years old. He was living in the United States as a lawful permanent resident. (He could have applied for citizenship but never did.) In 2011, Delhorno was pulled over for speeding. While the officer was writing a speeding ticket, another officer arrived with his drug-detection canine. The dog sniffed the vehicle and alerted to the presence of drugs. Another officer at the scene had been instructed in the installation of "trap" compartments in vehicles and noticed that Delhorno's vehicle contained unusual wiring. The officers discovered four kilograms of cocaine in a trap compartment in Delhorno's vehicle.

Delhorno was indicted by a grand jury in the Eastern District of Wisconsin for one count of possessing cocaine with intent to distribute in violation

of 21 U.S.C. §§ 841(a)(1) & 841(b)(1)(B). Delhorno pleaded guilty to the indictment on January 26, 2012. At the change of plea hearing, Delhorno stated that he was born in Mexico and was a permanent resident of the United States. However, there was no discussion about the immigration consequences of his guilty plea, even though the hearing took place more than a year after the Supreme Court held in *Padilla v. Kentucky*, 559 U.S. 356 (2010), that a criminal defense lawyer provided ineffective assistance of counsel by failing to advise his client that his guilty plea would subject him to automatic deportation.

Following the change of plea hearing, the United States Probation Office prepared a presentence report that included this passage:

> 49. Mr. Delhorno explains he was born in Mexico, but came with his parents to the United States when he was three years old. His family settled in Chicago Heights, Illinois. Mr. Delhorno notes his parents came to the United States illegally, seeking better opportunities for themselves and their children. In 1988, his parents were able to take advantage of an amnesty program and were granted legal residency status. Mr. Delhorno notes at that time he also was granted legal resident status. He acknowledges at the age of 18, he could have applied for citizenship, but he has not done so. Mr. Delhorno understood all his friends were born in the United States so he never thought of himself differently, so he did not pursue citizenship. *Mr. Delhorno understands this may*

> *present problems for him, but he is trying to make arrangements to remain in the United States.*
>
> 50. Bureau of Immigrations and Customs Enforcement confirmed Mr. 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 judgement, the matter will be investigated.*

Presentence Report ¶¶ 49–50 (emphasis added).

Delhorno was sentenced on October 5, 2012. His lawyer told the judge that Delhorno was seeking a "visa to remain in the United States because he is a resident alien and never sought citizenship[.]" Delhorno's Sentencing Guideline range was 78 to 97 months in prison. He was sentenced to 60 months in prison, followed by a supervised release term of four years. The court entered the written judgment and commitment order that same day. Delhorno never filed a direct appeal or a habeas corpus petition.

On February 26, 2015, while Delhorno was in prison, he filed a motion to modify his term of imprisonment pursuant to 18 U.S.C. § 3582(c)(2), based on a retroactive change to the Sentencing Guidelines. After briefing, this motion was denied. On May 26, 2016, Delhorno filed an amended motion to modify his term of imprisonment pursuant to § 3582, which was also denied.

On approximately May 1, 2017, Delhorno completed his prison sentence and was transferred to the custody of the U.S. Immigration and Customs Enforcement

("ICE") for removal procedures. On October 13, 2017, Delhorno filed his petition for a writ of coram nobis. In the petition and attached affidavit, Delhorno argued that he received ineffective assistance of counsel in his criminal case because his lawyer failed to advise him that pleading guilty subjected him to mandatory deportation. He contended that if he had known this, he would never have pleaded guilty. Delhorno referenced and included the transcript from his change of plea hearing which shows that the court also failed to address the immigration consequences of his guilty plea. In support of his arguments, he cited *Lee v. United States*, 137 S. Ct. 1958 (2017), *Padilla v. Kentucky*, 559 U.S. 356 (2010), and *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

The government responded, stating that it believed the record needed to be developed further through a hearing before the court ruled on the petition. The district court disagreed and denied Delhorno's petition without a hearing. Delhorno argues on appeal that this was a mistake. We review the district court's decision to deny an evidentiary hearing for an abuse of discretion. See *Blanton v. United States*, 94 F.3d 227, 235 (6th Cir. 1996), citing *Green v. United States*, 65 F.3d 546, 548 (6th Cir. 1995); see also *United States v. Fuller*, 86 F.3d 105, 107 (7th Cir. 1996) (judge "had 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"). As we explain below, the record here provided a sufficient basis to deny the

petition without a hearing, so the district court acted within its discretion in denying a hearing.

Delhorno filed a timely notice of appeal on April 2, 2018. He also filed a motion in the Eleventh Circuit for a stay of removal. That motion was denied on May 27, 2018, and Delhorno was deported to Mexico.

II. *Analysis*

The writ of coram nobis is a means for a collateral attack on a criminal conviction alleging errors of law or fact that affect the fundamental character of the conviction, including inadequate counsel. *Chaidez v. United States*, 568 U.S. 342 (2013). It is similar to a habeas corpus petition and affords the same type of relief, *United States v. Bonansinga*, 855 F.2d 476, 478 (7th Cir. 1988), but it is available only when a defendant is no longer in custody and thus can no longer take advantage of habeas corpus relief. *Stanbridge v. Scott*, 791 F.3d 715, 720 n.3 (7th Cir. 2015). According to the Supreme Court, the writ of coram nobis is to be used only in "extraordinary cases presenting circumstances compelling its use to achieve justice," where alternative remedies are not available. *United States v. Denedo*, 556 U.S. 904, 911 (2009), citing *United States v. Morgan*, 346 U.S. 502, 511 (1954) (internal quotation marks omitted). We have explained that a successful coram nobis petition must satisfy three prongs: "(1) the error alleged is 'of the most fundamental character' as to render the criminal conviction 'invalid'; (2) there are 'sound reasons' for the defendant's 'failure to seek earlier relief'; and (3) 'the defendant continues to suffer from his conviction even

though he is out of custody.'" *United States v. Wilkozek*, 822 F.3d 364, 368 (7th Cir. 2016).

In reviewing a district court's denial of a writ of coram nobis without a hearing, this court conducts a *de novo* analysis of the legal conclusions and a factual review for clear error. *Id.* We consider the three factors in a different order here than set forth above. 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. We affirm the denial of his petition for a writ of coram nobis.

1. *Continued Suffering*

First, we have no doubt that Delhorno continues to suffer from his conviction even though he is out of custody. We have explained that coram nobis is

> a postconviction remedy, equivalent to habeas corpus or (for persons convicted in federal court) section 2255, for petitioners who have served their sentences and so cannot invoke either of those remedies but who as a result of having been convicted are laboring under some serious civil disability that they'd like to eliminate by setting aside their conviction—and removal from the United States is serious, civil, and a consequence of the petitioner's conviction.

Clarke v. United States, 703 F.3d 1098, 1101 (7th Cir. 2013); see also *Martignoni v. United States*, No. 10 Civ. 6671 JFK, 2011 WL 4834217, at *12 (S.D.N.Y. Oct. 12, 2011) ("Deportation is clearly a legal consequence of conviction sufficient to warrant *coram nobis* relief

where all other requirements are satisfied[.]"). Delhorno is no longer in prison and is not on supervised release, so a writ of coram nobis is an appropriate means to challenge the immigration consequences of his conviction. See *Clarke*, 703 F.3d at 1101–02 (defendant on supervised release is in custody for purposes of habeas corpus and therefore cannot seek a writ of coram nobis).

Delhorno has been deported from the country where he lived since he was three years old, back to a country where he likely has minimal ties. His children and fiancée live in the United States, and he will not be able to return unless his conviction is vacated. This is a significant additional penalty that followed his term of imprisonment. These continuing effects satisfy this prong of the coram nobis analysis.

2. *Fundamental Error*

To secure a writ of coram nobis, the error in the defendant's criminal conviction must be "of the most fundamental character" so as to render the conviction "invalid." *Wilkozek*, 822 F.3d at 368. Delhorno attempts to satisfy this prong through a claim for ineffective assistance of counsel pursuant to *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984). To do this, he must demonstrate that counsel's performance was objectively unreasonable and that the deficient performance prejudiced the defense. *Id.* While we do not base our decision on a failure to meet this prong of the coram nobis analysis without a hearing, it is very unlikely Delhorno could demonstrate that he was prejudiced.

In *Padilla v. Kentucky*, the Supreme Court held that criminal defense attorneys must inform non-citizen clients of the risks of deportation arising from guilty pleas. 559 U.S. 356, 366–68 (2010); see also *Chaidez v. United States*, 568 U.S. 342, 345–47 (2013) (concluding that *Padilla* adopted a new rule and was not retroactive). Delhorno's guilty plea and sentencing occurred more than a year after *Padilla* was issued, and we are troubled that apparently neither his counsel, the prosecutor, nor the court raised the issue of the mandatory immigration consequences with him.[1]

We are not convinced, however, that this apparently deficient performance prejudiced Delhorno, as required for relief under *Strickland*. Delhorno must show "there is a reasonable probability that, but for counsel's errors, [he] would not have pled guilty and would have insisted on going to trial." *United States v. Reeves*, 695 F.3d 637, 639 (7th Cir. 2012), quoting *Bethel v. United States*, 458 F.3d 711, 716 (7th Cir. 2006); see also *Lee v. United States*, 137 S. Ct. 1958, 1965 (2017). The evidence against Delhorno was very strong: he was stopped while driving with four kilograms of cocaine hidden in a trap compartment. Delhorno himself showed the officers how to operate the trap. Delhorno concedes that success at trial was a "long shot." Given the likelihood of conviction at trial and a potentially longer prison sentence, coupled with the fact that

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[1] Delhorno's lawyer alluded to these consequences at the sentencing hearing when he explained that Delhorno was seeking a visa to remain in the United States. There does not appear to have been any discussion of mandatory deportation as a result of the conviction.

Delhorno was at least aware of the immigration issues, we find it unlikely that Delhorno would have proceeded to trial if he had been given proper *Padilla* warnings.

We are unpersuaded by Delhorno's comparison of his situation to that in *Lee v. United States*, a case in which the Supreme Court found that the defendant established a reasonable probability that he would not have pleaded guilty if he had known of the immigration consequences. 137 S. Ct. 1958, 1969 (2017). In *Lee*, before the defendant pleaded guilty to an aggravated felony, he had asked his attorney multiple times whether he would be deported. *Id.* at 1967–68. His attorney affirmatively told him that he would not be deported. *Id.* at 1963. Lee also specifically told the sentencing judge that deportation would affect his decision to plead guilty. *Id.* at 1968. After discovering that he would be deported, Lee immediately filed a § 2255 motion. *Id.* at 1963. Both Lee and his attorney testified at the subsequent hearing that he would not have pleaded guilty if he had known he would be deported. *Id.*

In contrast, Delhorno has produced no contemporaneous evidence showing that he would not have pleaded guilty. His protests appear to be more in the category of "*post hoc* assertions from a defendant about how he would have pleaded but for his attorney's deficiencies." *Id.* at 1967. These do not weigh in favor of upsetting Delhorno's guilty plea through a writ of coram nobis. *Id.* Despite our skepticism, though, the district court denied Delhorno's request for a hearing to present his argument and evidence. If this prong were dispositive, it might be necessary to remand for a

hearing. Delhorno fails to satisfy the final prong, however, so we need not reach a firm conclusion on whether a hearing was necessary on the merits.

3. *Sound Reasons for Delay*

We agree with the district court that Delhorno failed to take any steps regarding his immigration status until he filed this coram nobis petition, five years after he was sentenced. As noted, a person seeking a writ of coram nobis must offer sound reasons for his failure to seek relief earlier. *Wilkozek*, 822 F.3d at 368. Delhorno has failed to justify his delay, and on this ground we affirm the denial of his petition.

Based on his presentence report, which was filed in April 2012 in advance of his October 2012 sentencing, Delhorno knew or should have known that his conviction could lead to his deportation. The report said that Delhorno knew his noncitizenship could present problems for him and that he was "trying to make arrangements to remain in the United States." The report also said that ICE would investigate his case for deportation following the entry of judgment. With this knowledge, Delhorno went ahead and pleaded guilty. At his sentencing hearing, his lawyer explained to the court that Delhorno was seeking a visa because he was a resident alien and had never sought citizenship. Also, as the district court noted, Delhorno would have likely discovered this immigration issue when he was classified as a "deportable alien" by the Federal Bureau of Prisons when he was taken into custody.[2]

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[2] We assume for purposes of this appeal that no one ever told Delhorno that he would *certainly* be deported (i.e., that he was

At the time when he knew or should have known about his immigration issues, Delhorno had multiple avenues for relief. He could have filed a direct appeal. He also could have filed a habeas corpus petition under 28 U.S.C. § 2255. He did neither. The statute of limitations for a habeas corpus petition would have run from "the date on which the facts supporting the claim or claims presented *could have* been discovered through the exercise of due diligence." 28 U.S.C. § 2255(f)(4) (emphasis added). A reasonably diligent defendant would have discovered the immigration issues by reviewing the presentence report, paying attention at the sentencing hearing, and noticing his BOP classification. Delhorno had an entire year—until October 2013—to file a habeas petition.

Delhorno has offered no justification for failing to seek earlier relief through less extraordinary channels. The record shows conclusively that he knew or should have known about his immigration issues before, during, and after his sentencing. Delhorno's five-year delay in addressing this issue was unreasonable and prevents the federal courts from granting relief through the extraordinary form of a writ of coram

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subject to mandatory deportation). At oral argument in this appeal, Delhorno's counsel explained that Delhorno may have pleaded guilty knowing there were immigration issues but with the understanding that there could be avenues for him to continue living in the United States through some sort of visa. We do not believe the distinction between a warning of mandatory deportation as opposed to likely deportation matters for our present purposes. Delhorno was clearly aware that there were immigration consequences to his guilty plea. He chose to go ahead with his plea and did not raise any challenges for five years.

nobis. The district court's denial of Delhorno's petition is

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Case No. 11-CR-46-JPS

[Filed March 30, 2018]

UNITED STATES OF AMERICA, Plaintiff,	)
v.	)
RUBEN DELHORNO, Defendant.	)

ORDER

I. INTRODUCTION

On January 26, 2012, the Defendant, Ruben Delhorno ("Delhorno"), entered a plea of guilty as to a single-count Indictment charging him with possession with intent to deliver 500 grams or more of cocaine. *See* (Docket #48 and #49). On October 5, 2012, he was sentenced to 60 months of imprisonment and four years of supervised release for the offense of conviction. (Docket #59). Delhorno did not appeal.

Delhorno is a lawful permanent resident alien of the United States, not a citizen, *see* (Docket #74-1), and is therefore subject to deportation based on his conviction

in this case of an aggravated felony. *See* 8 U.S.C. § 1101(a)(43)(B) (The term "aggravated felony" is defined to include "illicit trafficking in a controlled substance."); 8 U.S.C. § 1227 ("Any alien who is convicted of an aggravated felony at any time after admission is deportable."). On or around May 1, 2017, Delhorno completed his sentence and was immediately transferred to the custody of U.S. Immigration and Customs Enforcement ("ICE") for removal processing. *See* (Docket #74-1).

In an effort to avoid removal, Delhorno now seeks to have his conviction overturned. On October 13, 2017, he filed in this Court—his sentencing court—a petition for a writ of coram nobis alleging that his counsel and the Court did not provide adequate warnings prior to Delhorno entering his guilty plea about the possible immigration consequences of his conviction. (Docket #74). Delhorno claims that he "never would have pled guilty to a crime knowing [he] would never be allowed to remain in the United States and instead would be deported to Mexico, a country [he] has no ties to whatsoever." (Docket #74-1 at 2). Delhorno relies on recent precedent from the Supreme Court, *Lee v. United States,* 137 S.Ct. 1958 (2017), for the proposition that his counsel's and the Court's deficient warnings warrant vacation of his conviction.

The government responded to Delhorno's petition, stating that it believes the transcripts from Delhorno's change of plea and sentencing hearings leave doubt as to whether Delhorno was adequately informed of the deportation risk associated with his plea. (Docket #81).

For the reasons explained below, Delhorno's petition will be denied.

II. BACKGROUND

Delhorno's petition is accompanied by an affidavit and a transcript of the change of plea hearing in this case. (Docket #74, #74-1, and #74-2). In considering Delhorno's petition, the Court has also reviewed the transcript of the sentencing hearing, *see* (Docket #80), and the presentence report, *see* (Docket #51). From those materials, the Court gleans the following facts.

On February 23, 2011, a single-count indictment was filed in this district charging Delhorno with possession with intent to distribute cocaine. During plea negotiations, Delhorno discussed "[his] entire case fully with [defense counsel], including informing [defense counsel] that [Delhorno] came to the United States when [he] was four years old and that [he] was a lawful permanent resident alien and not a U.S. citizen." (Docket #74-1 at 1). According to Delhorno, defense counsel did not inform him that "by pleading guilty to the underlying offense of felony drug possession and distribution, [Delhorno] was subject to mandatory removal and/or deportation from the United States, the only country [Delhorno has] ever known." *Id.* at 2.

On January 9, 2012, the government and Delhorno entered into a plea agreement. On January 26, 2012, the Court held a change of plea hearing at which Delhorno entered, and the Court accepted, Delhorno's guilty plea as to the indictment. At that hearing, the Court inquired about Delhorno's citizenship, and

Delhorno informed the Court that he was born in Mexico and is a permanent resident of the United States, not a citizen. There was no discussion about the immigration consequences of the offense to which Delhorno was pleading guilty.

Following the change of plea hearing, a United States Probation officer prepared a presentence investigation report to assist the Court at sentencing. The Probation officer's report notes that Delhorno explained to him his status as a resident alien and further explained that he "understands this may present problems for him, but he is trying to make arrangements to remain in the United States." (Docket #51 at 14). The report goes on to state that "[t]he Bureau of Immigrations and Customs Enforcement confirmed Mr. 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." *Id.*

On October 5, 2012, the Court sentenced Delhorno. Defense counsel spoke on Delhorno's behalf during hearing, at one point informing the Court of Delhorno's attempts to secure a "cooperator's visa to remain in the United States because he is a resident alien and never sought citizenship[.]" (Docket #80 at 10). The immigration consequences of Delhorno's conviction were not otherwise discussed at sentencing.

As a non-citizen of the United States, Delhorno was subject to classification by the Federal Bureau of Prisons ("BOP") as a "deportable alien" when he was taken into BOP custody. *See* BOP Program Statement 5100.08, Inmate Security Designation and Custody

Classification, September 12, 2006, Chapter 5, Page 9, available at *https://www.bop.gov/policy/progstat/5100_008.pdf*.

III. ANALYSIS

The Court first turns to the nature of Delhorno's request for relief. He has petitioned for a writ of coram nobis, a seldom-allowed method of collaterally attacking a criminal conviction for a person who is no longer in custody pursuant to his conviction and therefore cannot seek habeas relief under 28 U.S.C. § 2255 or § 2241. *Chaidez v. United States*, 568 U.S. 342, 369 n.1 (2013).

The authority of federal courts to grant a writ of coram nobis is conferred by the All Writs Act, which permits "courts established by Act of Congress" to issue "all writs necessary or appropriate in aid of their respective jurisdictions." *United States v. Denedo*, 556 U.S. 904, 910 (2009) (quoting 28 U.S.C. § 1651(a)). In order to "confine the use of coram nobis so that finality is not at risk in a great number of cases," the Supreme Court has limited the availability of the writ to "extraordinary cases presenting circumstances compelling its use to achieve justice." *Id*. at 911 (quotations omitted). "Another limit, of course, is that an extraordinary remedy may not issue when alternative remedies, such as habeas corpus, are available." *Id.* (citations omitted).

In Delhorno's case, there was an alternative remedy he could have pursued when he recognized the alleged deficiencies in the warnings given to him by counsel and the Court regarding probable deportation: He could

have filed a petition for a writ of habeas corpus. The statute governing writs of habeas corpus stemming from federal criminal proceedings, codified at 28 U.S.C. § 2255, contains a one-year statute of limitations. The limitations period runs from the latest of:

> (1) the date on which the judgment of conviction becomes final;
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> (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
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> (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
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> (4) the date on which the facts supporting the claim or claims presented *could have* been discovered through the exercise of due diligence.

28 U.S.C. § 2255(f) (emphasis supplied).

When no appeal is taken, a judgment of conviction becomes final, *see* § 2255(1), ten business days after entry, when the time for filing a direct appeal expires. *See Holmes v. United States*, No. 03-CR-0191, 2011 WL 1539901, at *1 (E.D. Wis. Apr. 21, 2011).

Section 2255(4) resets the limitations period's beginning date, moving it from the time when the conviction became final to the later date on which the particular claim accrued. *Ryan v. United States,* 657 F.3d 604, 607 (7th Cir. 2011). The relevant inquiry is how long a "duly diligent prisoner" would take to discover the facts leading to his claim. *Id.*

In this case, Delhorno discovered, or could have discovered, that his conviction would make him deportable, at the latest, during the preparation of the presentence report. The Probation officer who authored the report stated that Delhorno knew his non-citizenship could present a problem for him, but that Delhorno was "trying to make arrangements to remain in the United States." (Docket #51 at 14). Delhorno also knew, or could have known by reviewing the presentence report, that although he was not at that time under investigation for deportation, ICE would investigate the matter upon entry of judgment. *Id.* Then, if Delhorno had any uncertainty about the meaning of that statement in the report, he had plenty of time to confer with counsel, the government, or the Court regarding the likelihood of his deportation. Therefore, a "duly diligent" person in Delhorno's circumstances would have discovered the effect of his guilty plea before sentencing, which came almost ten months after he pleaded guilty.

Nevertheless, Delhorno failed to take any steps whatsoever regarding his immigration status until he filed this petition five years later, and the Court cannot view that period of inactivity as anything other than a marked lack of diligence. That Delhorno actually

discovered the certainty of his deportation in May 2017 is of no legal significance because Delhorno *could have* discovered that he was deportable as an aggravated felon as early as October 2012.

Accordingly, the Court concludes that the limitations period prescribed by Section 2255 regarding Delhorno's ineffective assistance claim concluded in late October 2013, one year after his time to appeal his judgment of conviction expired. Because he could have learned the facts underlying his ineffective assistance claim as early as October 2012—which is, of course, earlier—the discovery rule of Section 2255(f)(4) does him no good. Delhorno filed the instant petition well past the expiration of the statute of limitations for a Section 2255 claim.

Having missed his time to file a Section 2255 claim, Delhorno cannot now "lever his way into" the same relief he could have sought under that section by filing a petition for a writ of coram nobis. *See Morales v. Bezy*, 499 F.3d 668, 672 (7th Cir. 2007) (finding that a prisoner who missed his Section 2255 deadline could not seek the same relief through 28 U.S.C. § 2241, which offers a writ of habeas corpus to a prisoner whose Section 2255 option was not an adequate or effective). A writ of coram nobis, like a writ under Section 2241, is only available when other more traditional remedies are not. *See Denedo*, 556 U.S. at 911. Delhorno, like any other prisoner, could have taken advantage of Section 2255 to raise issues regarding his counsel's assistance at the plea stage. Because he did not, his attempt to do so now— by way of a coram nobis petition—is foreclosed.

This result is not to the contrary of *Lee v. United States*, 137 S. Ct. 1958, 1964 (2017), on which Delhorno relies. In that case, decided last term, the Supreme Court considered a claim for ineffective assistance of counsel brought by a petitioner whose defense attorney gave him incorrect immigration advice prior to the petitioner pleading guilty. Applying the familiar test under *Strickland v. Washington,* 466 U.S. 668 (1984), for a Sixth Amendment ineffective assistance claim, the Court determined that (1) the attorney's performance fell below an objective standard of reasonableness and (2) there was a reasonable probability that, but for the attorney's unprofessional errors, the result of the proceeding would have been different; that is, the petitioner would not have pleaded guilty. *Id.* at 1967.

But, importantly for present purposes, the petitioner in *Lee* brought his ineffective assistance claim in a timely petition under Section 2255. *See Lee v. United States*, No. 2:09-CR-20011-BBD, 2014 WL 1260388, at *3 (W.D. Tenn. Mar. 20, 2014), *aff'd,* 825 F.3d 311 (6th Cir. 2016), *rev'd and remanded,* 137 S. Ct. 1958 (2017), and *vacated sub nom. Jae Lee v. United States*, 869 F.3d 400 (6th Cir. 2017). This Court is foreclosed from even reaching the analysis conducted by the Supreme Court in *Lee* because Delhorno has not come to this Court with a procedurally proper petition.

Finally, even if this Court were to consider the merits of Delhorno's claim in light of *Lee*, the claim would fail on the second prong of the *Strickland* test. The petitioner in *Lee* was able to convince the Supreme Court, based on the "unusual circumstances" of his case, that there was a reasonable probability that he

would not have pleaded guilty but for his counsel's bad advice (affirmatively telling petitioner that he would *not* be deported). *Id.* at 1967. Several factors supported the Court's decision: (1) both Lee and his attorney testified in a hearing on the habeas petition that Lee would have faced trial had he known that he would have been deported; (2) Lee had strong family connections to the United States where he had lived for three decades; (3) when he was warned of potential immigration consequences by the district judge, he responded "'I don't understand,' and turned to his attorney for advice . . . [and] [o]nly when Lee's counsel assured him that the judge's statement was a 'standard warning' was Lee willing to proceed to plead guilty." *Id.* at 1968.

The Supreme Court warned that courts "should not upset a plea solely because of *post hoc* assertions from a defendant about how he would have pleaded but for his attorney's deficiencies." *Id.* at 1967. "[C]ontemporaneous evidence to substantiate a defendant's expressed preferences" should instead be the touchstone. *Id.* Thus, a lack of contemporaneous evidence showing that the defendant would have rejected a plea if he properly understood its immigration consequences is grounds for denying a motion under the *Strickland* prejudice prong.

Delhorno has presented nothing more than *post hoc* assertions about how he would have pleaded if his counsel or the Court had explicitly informed him that his conviction would render him deportable. That is not sufficient to overturn his conviction.

III. CONCLUSION

For the reasons stated above, Delhorno's petition for a writ of coram nobis will be denied. His subsequently-filed motion for a status conference regarding his petition, *see* (Docket #82), will be denied as moot.

Accordingly,

IT IS ORDERED that Defendant's petition for a writ of coram nobis (Docket #74) be and the same is hereby **DENIED**; and

IT IS FURTHER ORDERED that Defendant's motion for a status conference (Docket #82) be and the same is hereby **DENIED as moot**.

Dated at Milwaukee, Wisconsin, this 30th day of March, 2018.

BY THE COURT:

/s/ J.P. Stadtmueller
J.P. Stadtmueller
U.S. District Judge