No. 18-_____

In the Supreme Court of the United States

CARLOS DONJUAN
Defendant – Appellant,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent,

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI
APPENDICES

No. 18-_____

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PETITION FOR WRIT OF CERTIORARI
APPENDIX A

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DENYING MOTION FOR REHEARING DATED 01/30/2018

Filed
United States Court of Appeals
Tenth Circuit
January 30, 2018
Elizabeth A. Shumaker
Clerk of the Court

UNITED STATES COURT OF APPEALS FOR THE

TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

CARLOS DONJUAN,

Defendant - Appellant.

No. 16-8096

ORDER

Before **HARTZ, BALDOCK,** and **BACHARACH,** Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted

to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

s/Elizabeth A Shumaker

ELISABETH A. SHUMAKER, Clerk

No. 18-_____

In the
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CARLOS DONJUAN
Defendant – Appellant,
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UNITED STATES OF AMERICA,
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PETITION FOR WRIT OF CERTIORARI
APPENDIX B

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT
ORDER AND JUDGEMENT
DATED 01/03/2018

UNITED STATES COURT OF APPEALS FOR

THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

CARLOS DONJUAN,

No. 16-8096
(D.C. No. 1:11-CR-00169-NDF-1)
(D.Wyo.)

Defendant - Appellant.

ORDER AND JUDGMENT*

Before **HARTZ**, **BALDOCK**, and **BACHARACH**, Circuit Judges.**

Defendant Carlos Donjuan appeals the denial of his petition for a writ of coram nobis, in which he seeks to set aside his 2011 guilty plea. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

** This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. 32.1.

I.

In July 2011, a grand jury in the District of Wyoming indicted Defendant, a Mexican national unlawfully present in the United States, with knowingly using an unauthorized permanent resident card and an unauthorized social security card, in violation of 18 U.S.C. § 1546(b)(1). In September 2011, Defendant pled guilty to the charge. Notably, the record is silent as to whether counsel advised Defendant of the consequences of pleading guilty. At the plea hearing, the district court, however, warned Defendant of the adverse consequences to pleading guilty, including the risk of deportation: "[I]n addition . . . , there would be adverse consequences upon your ability to remain in the United States, and there would likely be adverse consequences as to your ability to obtain

lawful reentry at a later time. You understand this?" Def. Corrected App'x at 28. Defendant responded, "Yes." *Id.* During the same hearing, the court asked, "Apart from the plea agreement . . . , have you been promised anything . . . to get you to plead guilty?" *Id.* at 34. Defendant replied, "No." *Id.* The court inquired, "And you've discussed the making of this plea with your counsel, Mr. Weiss?" *Id.* at 35. Defendant responded, "Yes." *Id.* The court continued, "And you're satisfied with Mr. Weiss' representation?" *Id.* Defendant responded, "Yes." *Id.* Satisfied that Defendant knowingly and voluntarily pled guilty, the district court sentenced Defendant in October 2011 to time served, plus up to ten days to allow time for deportation. The district court recommended the Department of Homeland Security (DHS) begin removal

proceedings during service of Defendant's sentence. Defendant never appealed his conviction.

That same month, DHS took Defendant into custody and began immigration removal proceedings. This was not Defendant's first interaction with DHS. DHS had served Defendant in July 2011 with a Notice to Appear before the Immigration Court, charging him under 8 U.S.C. § 1182(a)(6)(A)(I) with being unlawfully present in the United States without proper admission or parole. During his immigration proceedings, Defendant conceded removability, but applied for cancellation of removal under § 240A(b)(1) of the Immigration and Nationality Act. *See* 8 U.S.C. § 1229b(b)(1). In late February 2014, the Immigration Court denied Defendant's application because his conviction for using

unauthorized documents rendered him ineligible for cancellation of removal.[1] Defendant appealed this decision. The Board of Immigration Appeals affirmed the Immigration Court and ordered Defendant removed. *See Carlos Israel Donjuan-Laredo*, A201 219 857 (BIA Sept. 10, 2015) (unpublished). Defendant filed a petition for review from the Board of Immigration Appeals' final order, but we denied the petition. *See Donjuan-Laredo v. Sessions*, 689 F. App'x 600 (10th Cir. 2017) (unpublished). Defendant also filed a petition for

[1] Section 240A(b) of the Immigration and Nationality Act provides the Attorney General may cancel removal of an alien if the alien demonstrates, *inter alia*, that he has not been convicted of an offense under section 237(a)(3) of the Act. *See* 8 U.S.C. § 1229b(b)(1). Section 237(a)(3)(B)(iii) provides that an alien is removable if he has been convicted of "a violation of, or an attempt or a conspiracy to violate, section 1546 of Title 18." *See id.* § 1227(a)(3)(B)(iii).

a writ of coram nobis in the District of Wyoming seeking to challenge his § 1546 conviction. The district court denied the writ. That denial is the basis for this appeal.

II.

Due to the writ's exceptional nature, federal courts may only "entertain coram nobis applications in extraordinary cases presenting circumstances compelling its use to achieve justice." *Rawlins v. Kansas*, 714 F.3d 1189, 1196 (10th Cir. 2013) (quotations omitted). To justify issuance of the writ, the Defendant must "demonstrate that he exercised

due diligence in raising the issue and that the information used to challenge the sentence or conviction was not previously available to him." *United States v. Carpenter*, 24 F. App'x 899, 905 (10th Cir. 2001) (unpublished) (citing *Klein v. United States*, 880 F.2d 250, 254 (10th Cir. 1989)). The Defendant must show specifically "(1) an error of fact; (2) unknown at the time of trial; (3) of a fundamentally unjust character which would have altered the outcome of the challenged proceeding had it been known." *Id.* (quoting *United States v. Johnson*, 237 F.3d 751, 755 (6th Cir. 2001)). The Defendant must also exhaust all other remedies, including seeking post-conviction relief under 18 U.S.C.

§ 2255. *Id.* And critically, the writ is available only when the asserted error constitutes "a complete miscarriage of justice." *Klein*, 880 F.2d at 253.

In his petition for a writ of coram nobis, Defendant argued he was not properly advised about the immigration consequences of pleading guilty, in violation of his Fifth Amendment right to due process and his Sixth Amendment right to effective assistance of counsel. The district court first determined it would consider the merits of the coram nobis petition because Defendant did not have any other remedies or forms of relief available.[2] Turning to the merits, the district court denied the petition, finding none of

Defendant's claims of error were sufficient to support issuance of the writ. "When reviewing on appeal the district court's denial of a writ *coram nobis*, we review for clear error the district court's factual finding, *de novo* questions of law, and for abuse of discretion the district court's decision to deny the writ." *Embry v. United States*, 240 F. App'x 791, 795 (10th Cir. 2007) (unpublished). Applying these standards, we conclude Defendant's coram nobis petition is unavailing.

III.

Defendant contends he was not properly advised about the immigration consequences of pleading guilty. With regard to his pre-plea advisement, Defendant asserts

counsel when counsel did not tell him the truth about the immigration consequences of his plea; and (2) the court violated his due process rights when the court did not tell him the extent of the risk of removal he faced with regard to his plea.

Defendant's claims are rooted in the Supreme Court's decision in *Padilla v. Kentucky*, 559 U.S. 356 (2010). Notably, *Padilla* dealt only with ineffective assistance of counsel under the Sixth Amendment, establishing the duty for a criminal defense attorney when advising a non-citizen client. *Id.* at 369. When the deportation consequence of the relevant law is

two claims: (1) his counsel violated his right to effective assistance of

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[2] The district court noted, "[t]his case presents the unusual circumstance where Defendant does not meet the in custody requirement for relief under 28U.S.C. § 2255." *United States v. Donjuan*, No. 11:CR-00169-F, at 3 (D. Wyo. July 7, 2016) (unpublished). The court explained Defendant "is not currently in custody and was not in custody at the time he became aware of the immigration consequences of his [guilty plea]." *Id.* After his judgment of conviction and sentence was entered, Defendant was only in custody pursuant to his federal conviction for ten days. It was during that ten-day period that he would have needed to file a § 2255 motion, but he asserted he did not learn of the immigration consequences of his guilty plea until after that time. The court further explained that Defendant asserted he did not learn of the immigration consequences of his guilty plea until after his time for a direct appeal passed.

clear, "the duty to give correct advice is equally clear." *Id.* When the deportation consequence of the relevant law is "not succinct and straightforward . . . , a criminal defense attorney need do no more than advise a client that pending criminal charges may carry a risk of adverse immigration consequences." *Id.*

We are not persuaded the holding in *Padilla* applies to Defendant's ineffective assistance of counsel claim for two reasons. First, unlike the petitioner in *Padilla*, Defendant's guilty plea did not render him removable. In *Padilla*, the petitioner was lawfully residing in the United States and only became subject to removal as a consequence of his guilty plea. In

contrast, the Defendant here was already subject to removal pursuant to the Notice to Appear he received from DHS on July 19, 2011. The consequence of Defendant's guilty plea was not removal, as was the situation in *Padilla*. Instead, the guilty plea made Defendant ineligible to receive the discretionary relief of cancellation of removal, which is fundamentally different than

a lawful resident alien being subject to removal due to a guilty plea. Second, Defendant was advised correctly that his guilty plea would likely result in his deportation. In contrast, the petitioner in *Padilla* was advised affirmatively and erroneously that his guilty plea would not compromise his ability to remain in the United States.

With these distinctions in mind, we first turn to Defendant's claim of ineffective assistance of counsel. Defendant argues his counsel incorrectly advised him of the immigration consequences of his guilty plea. To demonstrate ineffective assistance of

counsel, Defendant must show both that his attorney's performance was deficient and that the deficiency caused him prejudice. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). We first consider his attorney's performance. To prove an attorney's performance was deficient, Defendant must show that his attorney's performance "was not within the wide range of competence demanded of attorneys in criminal cases." *Laycock v. State of New Mexico*, 880 F.2d 1184, 1187 (10th Cir. 1989) (quoting *Hill v. Lockhart*, 474 U.S. 52, 56 (1985)).

To judge the performance of Defendant's attorney, we have before us Defendant's statements at the plea hearing and an affidavit Defendant supplied after the

fact. "Solemn declarations in open court carry a strong presumption of verity. The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible." *Blackledge v. Allison*, 431 U.S. 63, 74 (1977). The "truth and

accuracy" of a defendant's statements during a plea hearing "should be regarded as conclusive in the absence of a believable, valid reason justifying the departure from the apparent truth of his Rule 11 statements." *Hedman v. United States*, 527 F.2d 20, 22 (10th Cir. 1975) (per curiam).

Even though Defendant stated in court that he was guilty of knowingly using unauthorized documents to obtain employment, he understood the consequences of his guilty plea—including he would likely be removed from the United States— and he was satisfied with his attorney's performance, he later

supplied an affidavit contradicting those statements. This self-serving affidavit is the only account of what Defendant's counsel allegedly told him before he pled guilty.[3] In his affidavit, Defendant wrote:

> I entered the plea to using false papers by an employer because I hoped that the plea would allow me to stay in the United States. No one ever told me that I had no hope of staying in the United States if I entered that plea. I always thought that I had a possibility of fighting to stay in the United States . . . . If I had known that there was no chance of winning in immigration court with this plea, I would have gone to trial.

Def. Corrected App'x at 114–15.

On the present record and in the context of a petition for a writ of coram nobis, Defendant's contentions do not overcome Defendant's burden to demonstrate his counsel's performance was deficient. *Strickland*, 466

U.S. at 687. Defendant's

[3] We do not analyze Defendant's arguments regarding his counsel's statements at the sentencing hearing because those statements do not show his counsel gave him false hope *before* he entered the guilty plea.

affidavit is nothing more than a "mere denial[] of that which he has previously admitted[, and] does not raise a substantial issue of fact . . . . Although an allegation of fact must ordinarily be accepted as true, it is not required where . . . the allegation is contradicted by the files and records before the court." *Runge v. United States*, 427 F.2d 122, 126 (10th Cir. 1970). Defendant's contention that "[s]urely, the Defense Counsel . . . advised Mr. Donjuan there was 'some pretty good hope' that . . . '[Mr. Donjuan] will be eligible for legal permanent resident status'" is speculative and directly contradicts the district court's plea colloquy. Def. Second Corrected

Br. At 19 (second alteration in original) (emphasis omitted). Such speculation is an insufficient basis on which a cognizable claim of ineffective assistance of counsel may rest. *United States v. Gallant*, 562 F. App'x 712, 716 (10th Cir. 2014) (unpublished). Defendant simply did not provide evidence regarding the advice his lawyer gave to him prior to his guilty plea. Therefore, he failed to overcome the presumption of verity of open court declarations, and he failed to overcome his burden of proof to show his lawyer's performance was deficient. No factual basis exists for Defendant's claim that his attorney gave him incorrect advice prior to entering his guilty plea. Accordingly, the district court did not abuse its

discretion in denying Defendant's petition for a writ of coram nobis with regard to his ineffective assistance of counsel claim.[4]

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[4] Because we conclude counsel's performance was not constitutionally(continued...)

With regard to Defendant's claim that his due process rights were violated when the court did not tell him the degree of risk of removal he faced as a result of his plea, we find the court did not violate Defendant's rights because Defendant received correct and adequate advice during the court's colloquy. The Due Process clause requires that a guilty plea be made knowingly, voluntarily, and intelligently. *United States v. Hurlich*, 293 F.3d 1223, 1230 (10th Cir. 2002). To enter a plea that is knowing and voluntary, "[t]he defendant need not understand every collateral consequence of the plea,

but need only understand its direct consequences." *Id.* "Historically, we have deemed deportation a collateral consequence of a guilty plea and not a direct consequence." *United States v. Carillo-Estrada*, 564 F. App'x 385, 387 (10th Cir. 2014) (unpublished).

When faced with a case where a prisoner argued that his due process rights were violated because he was not sufficiently advised that his conviction might lead to deportation, we declined to extend *Padilla* to the due process context. *See id.* (citing *United States v. Delgado-Ramos*, 635 F.3d 1237, 1240–41 (9th Cir. 2011) (per curiam)). We noted that we did not see any basis to depart from our pre-*Padilla* precedent

regarding these types of due process claims. *Id.*

Defendant fails to offer any authority to support his position that the district court owed him the same duty

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[4](...continued)
deficient, we need not address the second prong of the *Strickland* test—whether counsel's deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687.

of advisement under the Due Process Clause as his defense attorney owed him under the Sixth Amendment. Such failure is fatal to his claim on this issue. *See id.* (citing *United States v. Rodriguez-Aguirre*, 108 F.3d 1228, 1237 n.8 (10th Cir. 1997) ("It is the appellant's responsibility to tie the salient facts, supported by specific record citation, to his legal contentions.") (alterations and internal quotation marks omitted)).[5]

IV.

For the reasons stated, the district court did not abuse its discretion in denying Defendant's Petition for a writ of

coram nobis.[6]

[5] In any event, Defendant's belief that he was not adequately apprised of the possibility of deportation is baseless. The record here indicated the district court provided correct and adequate advice—Defendant knew pleading guilty to violating 18 U.S.C. § 1546(b)(1) carried a risk of adverse immigration consequences. During the arraignment and plea hearing, the district court warned Defendant of the adverse consequences to pleading guilty: "[I]n addition to those fines and penalties, there would be adverse consequences upon your ability to remain in the United States, and there would likely be adverse consequences as to your ability to obtain lawful reentry at a later time. You understand this?" Defendant responded to the Court, "Yes." Def. Corrected App'x at 28.

[6] We also note Defendant raises two other claims—that his equal protection rights were violated because he was selectively prosecuted and that § 1546(b) is unconstitutionally vague. We agree with the district

court's resolution of these claims and have nothing further to add to the district court's analysis. We therefore affirm the district court's denial of these claims for substantially the same reasons outlined in its order filed July 7, 2016.

No. 18-_____

In the Supreme Court of the United States

CARLOS DONJUAN
Defendant – Appellant,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent,

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI APPENDIX C

DECISION OF THE U.S. DISTRICT COURT FOR THE District of Wyoming criminal judge denying the petition for WRIT OF *CORAM NOBIS* 07/07/2016

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

UNITED STATES OF AMERICA

Plaintiff,

Case Number: 11-CR-00169-F

vs.

CARLOS DONJUAN

Defendant.

This matter is before the Court on Defendant Carlos Donjuan's ("Defendant") Petition for issuance of Writ Coram Nobis ("Petition"). Defendant filed his Petition on November 18, 2015 and after several stipulated continuances the Government responded on May 13, 2016. Defendant filed a reply to the Government's response on

June 27, 2016. The Court has considered Defendant's Petition, The Government's response, Defendant's reply, the applicable law, and is fully informed in the premises. For the following reasons, the Court FINDS and ORDERS that Defendant's Petition is DENIED.

BACKGROUND

On July 22, 2011, a Grand Jury indicted Defendant in the District of Wyoming for fraud and misuse of identification documents in violation of 18 U.S.C. § 1546(B)(1). (Doc. 40, at 2). On September12, 2011, Defendant pled guilty to that charge. (*Id.*). The Court sentenced Defendant on October 6, 2011 to time served plus ten days. (Doc. 22). *(Id.).* After completing his

prison sentence, authorities took Defendant to immigration removal proceedings, where he sought to obtain permanent resident status under 8 U.S.C. § 1229b. (Doc. 29). Defendant claims the Immigration Court in Denver, Colorado found he lost his eligibility for Section 1229b relief because of his conviction under Section 1546(b)(l) Title 18, U.S.C. *(Id.).* Defendant appealed the decision of the Immigration Judge. On September 10, 2015, the Board of Immigration Appeals affirmed the Immigration Judge and ordered Defendant to leave the United States by November 9, 2015. *(Id.).* Defendant now seeks to set aside the conviction entered on October 7, 2011. *(Id.).*

STANDARD FOR ISSUANCE OF WRIT CORAM NOBIS

A writ of error coram nobis is an extraordinary remedy reserved for only those errors that cause a complete miscarriage of justice. *United States v. Williamson,* 806 F.2d 216, 222 (10th Cir.1986). "[T]he burden is on the petitioner to demonstrate that the asserted error is jurisdictional or constitutional and results in a complete miscarriage of justice." *Klein v. United States,* 880 F.2d 250,253 (10th Cir. 1989).

The "writ is only available when other remedies and forms of relief are unavailable or inadequate." *Embrey v. United States,* 240 Fed.Appx. 791, 794 (10th Cir. 2007 (citing *Barnickel v. United States,* 113 F.3d

704, 706 (7th Cir. 1997) ("[C]oram nobis ... (like habeas corpus) cannot be used to reach issues that could have been raised by direct appeal.")). Therefore, a defendant is not entitled to relief under a writ of error coram nobis where relief under 28 U.S.C. § 2255 was otherwise available or adequate. *United States v. Payne,* 644 F.3d 1111, 1112 (10th Cir. 2011).

In order to gain relief pursuant to a writ of error coram nobis, the petitioner must show that there was "(l) an error of fact; (2) unknown at the time of trial; (3) of a fundamentally unjust character which would have altered the outcome of the challenged proceeding had it been known." *United States v. Carpenter,* 24 Fed.Appx.

899, 905 (10th Cir. 2001). Defendant asserts three theories of error: l) ineffective assistance of counsel; 2) selective prosecution; and 3) the statute Defendant was charged under was void for vagueness. Defendant argues that any one of these reasons satisfies the requirements of the writ.

DISCUSSION

The first issue is whether any other remedies or forms of relief are available. This case presents the unusual circumstance where Defendant does not meet the in custody requirement for relief under 28 U.S.C. § 2255. Specifically, 28 U.S.C. § 2255(a) limits itself to only prisoners in custody. Defendant is not currently in

custody and was not in custody at the time he became aware of the immigration consequences of his sentence. Additionally, Defendant argues that the immigration consequences of his plea were not discovered until after he was denied permanent residence by the Immigration Court in Denver, Colorado, which was after his time for a direct appeal had passed. The Court agrees with Defendant that he did not have other remedies or forms of relief available. Therefore, the Court will consider the merits of Defendant's motion.

Defendant asserts three theories of possible errors for the Court to grant his writ of error coram nobis: 1) whether Defendant's plea was made knowingly and

voluntary[1] and whether Defendant was deprived of effective counsel; 2) whether Defendant was subjected to selective prosecution; and 3) whether 18 U.S.C. § 1546(b)(l) is unconstitutionally vague.

1. **Violation of Fifth Amendment Due Process Because Plea Was Not Made Knowingly and Voluntarily and Sixth Amendment For Ineffective Assistance of Counsel.**

Defendant argues that he did not receive effective assistance of counsel when pleading guilty to 18 U.S.C. § 1546(b)(l) and in turn his plea was not made knowingly and voluntarily in violation of his fifth amendment rights to effective assistance of counsel at the plea proceedings. In order to satisfy due process, a guilty plea must be entered knowingly and voluntarily.

Fields v. Gibson, 277 F.3d 1203, 1212-13 (10th Cir. 2002); see also *Boykin v. Alabama,* 395 U.S. 238,242 (1969).

Defendant relies on *Padilla v. Kentucky,* 559 U.S. 356 (2010) for his claim of ineffective assistance of counsel. In *Padilla* the defendant's counsel wrongfully advised defendant that his guilty plea would have no negative consequences on his ability to remain lawfully within the United States. *Id.* at 359. Padilla alleged that his counsel was constitutionally deficient because he was not informed that his plea would carry a risk of deportation. *Id.* at 359. The Supreme Court used the two prong standard created in *Strickland v.*

Washington, 466 U.S. 688 104 S. Ct. 2052, 80 L.Ed.2d 674, to determine if

[1] In his motion, Defendant refers to "knowing and intelligently" however, the issue for the Court is whether the guilty plea is "knowing and voluntary". *Parke v. Raley,* 506 U.S. 20, 28- 29 (1992) .

> the defendant received effective assistance of counsel during the plea agreement process.

Padilla, 559 U.S. at 366.

Under *Strickland's* two-prong inquiry counsel's representation must fall below an objective standard of reasonableness and there must be a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. *Padilla,* 559 U.S. at 366. The Supreme Court held in *Padilla* that:

> Padilla's counsel provided him false assurance that his conviction would not result in his removal from this country. This is not a hard case in which to find deficiency. The consequences of Padilla's plea could

easily be determined from reading the removal statute, his deportation was presumptively mandatory, and his counsel's advice was incorrect.

Id. at 368-369. *Padilla* established that clear misadvice

on the risks associated with deportation sufficiently

satisfies the first prong of *Strickland. Id.* at 369.

Immigration law can be complex and not all attorneys may be well versed in it.

For this reason the *Padilla* Court went on to hold:

There will, therefore, undoubtedly be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain. The duty of the private practitioner in such cases is more limited. When the law is not succinct and straightforward . . . a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences. But when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear.

Id. at 369. The Supreme Court established two duties for a criminal defense attorney when advising their client. First, when the deportation consequences are truly clear, the attorney has the duty to provide correct advice to their client. Second, when the deportation consequences are unclear or uncertain the attorney must merely advise his client that a guilty plea could carry a risk of adverse immigration consequences.

In Defendant's case he was charged with violating 18 U.S.C. § 1546(b)(l) and pied guilty to that charge. Specifically 8 U.S.C. § 1227 (a)(3) provides: "Any alien who at any time has been convicted . . . of a violation of ... section 1546 of title 18 . . . is deportable."

This language should put an attorney on notice that a guilty plea to 18

U.S.C. § 1546(b)(l) would result in deportation. While 8 U.S.C. § 1229b can be used to prevent deportation in some cases, this option is expressly not available to aliens that have been convicted of an offense under § 1227(a)(3). In this case, the deportation consequences of pleading guilty to 18 U.S.C. § 1546(b)(l) were clear, just as they were in *Padilla.*

However, unlike *Padilla,* Defendant was repeatedly advised that his guilty plea would likely result in his deportation and would also impact his ability to seek reentry into the United States. (Doc. 23,

[COP Tran.] at 6 and 11). Before entering his guilty plea the Court asked Defendant:

> [I]n addition to the penalties that we have discussed, a plea of guilty to the charges ... upon the indictment that you've been charged under, Mr. Donjuan, you would likely be removed from the United States through the administrative process ....Do you understand?

(Id. at 6). Defendant affirmed that he understood. *(Id.).*

The Court again asked Defendant if he understood the immigration consequences associated with pleading guilty and again Defendant stated he did. *(Id.* at 11).

During sentencing Defendant's counsel stated at the sentencing hearing that:

> I was very pessimistic at the time I got the case that a plea to this would mean automatic deportation for Mr. Donjuan. With more research and talking with immigration in Denver, there is some pretty good hope that, given his circumstances in this very specific charge,

> that he will be eligible for legal permanent resident status and has a good chance of receiving that, which I think he would be an excellent candidate.

(Doc. 29-3, at 6). Defendant also provided an affidavit stating that at the time when he entered his guilty plea "[n]o one ever told me that I had no hope of staying in the United States. I always thought I had a possibility of fighting to stay . . .." (Doc 29-4 at 1). However, his affidavit is contrary to the sworn statements Defendant gave during sentencing that he understood the likelihood he would be removed from the United States. In his reply Defendant argues that this case is directly on point with *Padilla,* because the statute mandated removal and defendants were not told that removal was the automatic

result of the plea agreement. However, this case is distinguishable because the Court told Defendant at least twice at his change of plea that he would "likely" be removed from the United States. (Doc. 23 at 6, 11). This is not a case where Defendant was incorrectly advised that his plea would have no effect on his immigration status.

Additionally, Defendant argues he was given false hope of staying in the United States, which vitiated the Court's warning. However, the statement providing some hope that he may not be deported did not come until sentencing, after Defendant had pied guilty. There is nothing in the record to suggest that Defendant had

been provided any indication that he had any hope of staying prior to his guilty plea, rather this hopeful statement came up a couple months later at the sentencing. In fact the hopeful statement at sentencing was prefaced with "I was very pessimistic at the time I got the case that a plea to this would mean automatic deportation ...."(Doc. 24 at 6). Therefore, while Defendant may have had some hope at the time of his sentencing that he could potentially stay in the United States, there is nothing to indicate that at the time he changed his plea any of this information was provided to Defendant.

Defendant argues the only effective advice would have been an advisement that if he pied guilty to 18 U.S.C. § 1546(b)(l) he would be statutorily required to be deported. (Doc. 29 at 6). Defendant's argument relies on the idea that Defendant was given a false sense of hope that he might be able to stay in the United States if he pied guilty and based on this hope he entered a guilty plea. However, there is a distinction between the clearly erroneous advice in *Padilla* and this case where there was merely a statement at sentencing, after the change of plea, that Defendant's counsel was hopeful Defendant would not be deported. For all these reasons, Defendant was sufficiently advised of the immigration

consequences of his guilty plea to satisfy the requirements set out in *Padilla.*

Since Defendant received adequate advice on the risks of deportation during the
plea process, Defendant cannot meet the first prong of *Strickland.* Since Defendant has not met the first prong of *Strickland* there is no reason to address the second prong. Defendant has failed to show his plea was not knowingly and voluntarily made.

Defendant also claims he had a right to the advice of immigration counsel in the plea bargaining process. Defendant relies again on *Padilla* to support this position. However, in *Padilla,* the majority opinion made no requirement for the advice of specialized immigration

counsel. The Supreme Court only held "[i]t is our responsibility under the Constitution to ensure that no criminal defendant-whether a citizen or not-is left to the mercies of incompetent counsel. To satisfy this responsibility, we now hold that counsel must inform her client whether his plea carries a risk of deportation." *Padilla,* 559 U.S. at 374. *Padilla* does not create a right to the advice of counsel specialized in immigration law in the plea bargaining process where deportation is a possible consequence of a guilty plea.

In his reply, Defendant also seems to argue that he did not provide a factual basis for his guilty plea. As previously noted, the Government charged Defendant under 18

U.S.C. § 1 546(b)(1) which provides in relevant part:

(b) Whoever uses-

(1) an identification document, knowing (or having reason to know) that the document was not issued lawfully for the use of the possessor,

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for the purpose of satisfying a requirement of section 274A(b) of the Immigration and Nationality Act, shall be fined under this title, imprisoned not more than 5 years, or both.

During Defendant's change of plea he acknowledged that he used a permanent resident card and social security card knowing that the documents were false, that he used them for purposes of employment verification and that he knew those cards were not issued to him. (Doc. 24 at 21-22). Based on

these sworn statements, there was clearly a factual basis for Defendant's guilty plea.

The remaining arguments in Defendant's reply brief really go to the unfair nature of the application of the immigration laws in this case, not to any clear error of the law.

While the Court acknowledges that this is an unfortunate case, with very sympathetic facts, this does not entitle Defendant to a writ of error coram nobis.

For all the above stated reasons the Court finds that Defendant's claim for ineffective assistance of counsel related to his guilty plea is without merit and his

request for writ of coram nobis based on ineffective assistance of counsel is DENIED.

2. **Violation of Fifth Amendment Equal Protection Because Defendant was Subjected to Selective Prosecution.**

Defendant next claims selective prosecution because he was not allowed to plea to something other than 18 U.S.C § 1546(b)(l). "The requirements for a selective- prosecution claim draw on ordinary equal protection standards. The claimant must demonstrate that the federal prosecutorial policy had a discriminatory effect and that it was motivated by a discriminatory purpose." *United States v. Armstrong* 517 U.S. 456, 465 (1996).

In this case, Defendant failed to present any evidence to support a claim for selective prosecution. His motion only makes a conclusory reference to his inability to plea to another offense. However, the Government has broad discretion in their charging decisions and this was the sole offense charged in the Indictment. Additionally, as the Court has already noted, Defendant acknowledged the factual basis for the charge. There is absolutely nothing to suggest that by charging Defendant under the section selected by the Government that Defendant was unfairly singled out, or treated differently from other defendants.

For all these reasons, the Court finds there is no evidence of selective prosecution to justify overturning the conviction in this case, therefore this claim is DENIED.

3. **Claim that 18 U.S.C. § 1546(b)(l) is Unconstitutionally Vague.**

Defendant's final claim is that 18 U.S.C. § 1546(b){l) is unconstitutionally vague. Defendant claims he could not avoid engaging in criminal conduct because it was impossible to ascertain that what he was doing at the time was against the law. As previously noted, 18 U.S.C. § 1546(b)(l) states "[w]hoever uses an identification document, knowing (or having reason to

know) that the document was not issued lawfully for use of the possessor, . . . for the purpose of satisfying a requirement of section 274A{b) of the Immigration and Nationality Act, shall be fined under this title, imprisoned not more than *5* years, or both."

Defendant gives no reasoning as to why this language is unconstitutionally vague, other than his assertion that it was impossible to ascertain that what he was doing at the time was against the law and a citation to a case with no discussion as to how it might apply to the case at hand or how it advances the notion that 18 U.S.C. § 1546(b)(l) is unconstitutionally vague. "[T]he void for vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness

that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *United States v. Corrow,* 119 F. 3d 796, 802 (10th Cir. 1997) (quoting *Ko/ender v. Lawson,* 461 U.S. 357, 103 S.Ct. 1855, 1858, 75 L.Ed.2d 903 (1983)). The language of 18 U.S.C. § 1546(b){l) is clear and ordinary people can understand that knowingly using a false identification document for employment

verification purposes is prohibited under the statute. For all these reasons, the Court finds 18 U.S.C. § 1546(b)(l) is not unconstitutionally vague.

In the alternative, Defendant argues for relief pursuant to 28 U.S.C. § 1651, the All Writs Act. (Doc. 29, at 18). However, this is not an alternative remedy. A writ of error *coram nobis* derives its very authority pursuant to the All Writs Act, 28 U.S.C. § 1651. *United States v. Morgan,* 346 U.S. 502, 506 (1954). Defendant has not articulated any other theoretical remedy by or through which relief might be granted.

Since Defendant has failed to show any error of fact, he cannot meet the first requirement needed for a writ of error coram nobis. There is no need to address the other requirements. [2]

CONCLUSION

For all the above stated reasons, the Court finds

Defendant's claims for error are insufficient to support a claim for writ of error corum nobis. Defendant's guilty plea was made knowingly and voluntarily, at a minimum Defendant received the Court's warning of the adverse immigration consequences to his plea agreement. Additionally, there is no right to specialized immigration counsel. Defendant also failed to present any evidence of selective prosecution and that claim is denied. Finally Defendant's claim that 18 U.S.C. § 1546(b)(1) is unconstitutionally vague lacks merit or legal support.

[2] Defendant also made arguments relating to theories based on the idea that Defendant was charged under 18

U.S.C. § 1546(b)(3). However, the Indictment and transcript of Defendant's change of plea hearing clearly indicates that he was charged under 18 U.S.C. § 1546(b)(l). (Docs. 1 and 23).

The Court finds that an evidentiary hearing is not necessary in this case. The files and record in this case conclusively establish that Defendant is not entitled to any relief. Accordingly, no evidentiary hearing is required. *Owensby v. United States,* 353 F.2d 412, 417 (l 0th Cir. l 965)("[I]ssue as to whether a hearing should be held should be resolved in the same manner as it is for petitions under 28 U.S.C. § 2255."); see also *United States*

v. Marr, 856 F.2d 1471 , 1472 (10th Cir. 1988) (no hearing required where§ 2255 motion may be resolved on review of record before the Court).

IT IS ORDERED that Defendant s petition for issuance of Writ Coram Nobis is DENIED.

Dated this 6th day of July 2016.

s/Nancy D. Freudenthal
NANCY D. FREUDENTHAL
CHIEF UNITED STATES DISTRICT COURT JUDGE

No. 18-_____

In the
Supreme Court of the United States

CARLOS DONJUAN
Defendant – Appellant,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent,

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI
APPENDIX D

STATUTORY PROVISIONS

STATUTORY PROVISIONS

§ U.S.C. § 1101(a)(48)(A); INA § 101(a)(48)(A) provides as follows: The term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where—

(i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and

(ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

8 U.S.C. §1229b; INA § 240A(b) provides as follows: (b) Cancellation of Removal and Adjustment of Status

(1) In General.-The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien-

(A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application;

(B) has been a person of good moral character during such period;

(C) has not been convicted of an offense under section (Emphasis added) 212(a)(2), 237(a)(2) , or 237(a)(3) (Emphasis added), subject to paragraph (5); and

(D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

8 U.S.C. § 1227(a)(3)(B)(iii); INA

237(a)(3)(B)(iii) provides as follows:

(a) Classes of Deportable Aliens.-Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:

(...)

(3) Failure to register and falsification of documents.-

(...)

(B) Failure to register or falsification of documents.- Any alien who at any time has been convicted-

(...)

(iii) of a violation of, or an attempt or a conspiracy to violate, section 1546 of title 18, United States Code (relating to fraud and misuse of visas, permits, and other entry documents) (Emphasis added), is deportable.

18 U.S.C. § 1546(b)(1) provides as follows:

(b) Whoever uses—

(1) an identification document, knowing (or having reason to know) that the document was not lawfully issued for the use of the possessor,

(...)

for the purpose of satisfying a requirement of section 274A(b) of the Immigration and Nationality Act, shall be fined under this title, imprisonment not more than 5 years, or both.

The requirements of 8 U.S.C. § 1324a(b); INA § 274A(b) are as follows:

(b) Employment Verification System.-The requirements referred to in paragraphs (1)(B) and (3) of subsection (a) [meaning sections 274A(a)(1)(B) and 274A(a)(3)] are, in the case of a person or other entity hiring, recruiting, or referring (Emphasis added) an individual for employment in the United States, the requirements specified in the following three paragraphs:

(1) Attestation after examination of documentation.-

(A) In general.-The person or entity (Emphasis added) must attest, under penalty of perjury and on a form designated or established by the Attorney General by regulation (Emphasis added), that it has verified that the individual is not an unauthorized alien by examining-

(i) a document described in subparagraph (B), or

(ii) a document described in subparagraph (C) and a document described in subparagraph (D).

Such attestation may be manifested by either a hand-written or an electronic signature. A person or entity has complied with the requirement of this paragraph with respect to examination of a document if the document reasonably appears on its face to be genuine. If an individual provides a document or combination of documents that reasonably appears on its face to be genuine and that is sufficient to meet the requirements of the first sentence of this paragraph, nothing in this paragraph shall be construed as requiring the person or entity to solicit the production of any other document or as requiring the individual to

produce such another document.
(...)

INA § 274A(b)(3) Defense.-A person or entity that establishes that it has complied in good faith with the requirements of subsection (b) with respect to the hiring, recruiting, or referral for employment of an alien in the United States has established an affirmative defense that the person or entity has not violated paragraph (1)(A) with respect to such hiring, recruiting, or referral.

8 U.S.C. § 1324c(a)(2); INA § 274C(a)(2)
PENALTIES FOR DOCUMENT FRAUD:

(a) Activities Prohibited.-It is unlawful for any person or entity knowingly-

(1) to forge, counterfeit, alter, or falsely make any document for the purpose of satisfying a requirement of this Act or to obtain a benefit under this Act,

(2) to use, attempt to use, possess, obtain, accept, or receive or to provide any forged, counterfeit, altered, or falsely made document in order to

satisfy any requirement of this Act or to obtain a benefit under this Act,

(3) to use or attempt to use or to provide or attempt to provide any document lawfully issued to or with respect to a person other than the possessor (including a deceased individual) for the purpose of satisfying a requirement of this Act or obtaining a benefit under this Act,

(4) to accept or receive or to provide any document lawfully issued to or with respect to a person other than the possessor (including a deceased individual) for the purpose of complying with section *274A(b)* or obtaining a benefit under this Act , or

(5) to prepare, file, or assist another in preparing or filing, any application for benefits under this Act, or any document required under this Act, or any document submitted in connection with such application or document, with knowledge or in reckless disregard of the fact that such application or document was falsely made or, in whole or in part, does not relate to the person on whose behalf it was or is being submitted, or

(6) (A) to present before boarding a common carrier for the purpose of coming to the United States a

document which relates to the alien's eligibility to enter the United States, and (B) to fail to present such document to an immigration officer upon arrival at a United States port of entry.