

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JORGE ERNESTO BLANCO-RODRIGUEZ,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

BALLI LAW OFFICE
P.O. Box 1058
Laredo, Texas 78042-1058
Tel: (956) 712-4999
Fax: (956) 724-5830

/s/

ROBERTO BALLI
Federal Bar No. 22668
Texas State Bar No. 00795235
Attorney for Petitioner

QUESTION PRESENTED

In the *Padilla v. Kentucky*, 559 U.S. 356 (2010), this Honorable Court held that a criminal defense lawyer is ineffective when the lawyer fails to advise a non-citizen defendant of the immigration consequences of a guilty plea. Nonetheless, when the District Court took Jorge Ernesto Blanco-Rodriguez's guilty plea, the Court, during the plea colloquy, was made fully aware by Blanco-Rodriguez that the defense lawyer had failed to advise Blanco-Rodriguez of the immigration consequences of his guilty plea and that Blanco Rodriguez wanted his immigration questions answered. The Fifth Circuit Court of Appeals held that it would not consider Mr. Blanco-Rodriguez's claim that his plea was involuntary in an appeal but would only consider the issue in a post-conviction writ. This Court should answer the question of whether a trial court commits error when it takes a guilty plea from a criminal defendant when the trial court is on specific notice that defense counsel has not advised the non-citizen defendant of the immigration consequences of the guilty plea, and the Court of Appeals must consider the matter on direct appeal when failure to advise is clear from the record.

LIST OF PARTIES

JORGE ERNESTO BLANCO-RODRIGUEZ,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

The undersigned counsel certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualifications or recusal.

1. Jorge Ernesto Blanco-Rodriguez, Petitioner.
2. Roberto Balli, Counsel for Petitioner.
3. United States of America, Respondent.
4. Carmen Castillo Mitchell, Counsel for Respondent.
5. The Honorable Noel J. Francisco, Jr., Office of the Solicitor General of the United States.

/s/

ROBERTO BALLI

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A copy of the Fifth Circuit's unpublished opinion issued in this case on November 6, 2018, is attached as Appendix A. A copy the District Court's judgment is attached as Appendix B. The district court did not issue a written opinion.

JURISDICTION

The jurisdiction of this Court to review the Judgment of the Fifth Circuit is invoked in 28 U.S.C. § 1254(1), as an appeal from final judgment of conviction in the United States Court of Appeals for the Fifth Circuit on November 6, 2018. Pursuant to Supreme Court Rule 10(a) United States Fifth Circuit Court of Appeals has entered a decision that has so far departed from the accepted and usual course of judicial proceedings and sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment of the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. amend. VI

Federal Rule of Criminal Procedure 11(b) provides:

(b) Considering and Accepting a Guilty or Nolo Contendere Plea.
(1) Advising and Questioning the Defendant. Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following:

- (A) the government's right, in a prosecution for perjury or false statement, to use against the defendant any statement that the defendant gives under oath;
- (B) the right to plead not guilty, or having already so pleaded, to persist in that plea;
- (C) the right to a jury trial;
- (D) the right to be represented by counsel--and if necessary have the court appoint counsel--at trial and at every other stage of the proceeding;
- (E) the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses;
- (F) the defendant's waiver of these trial rights if the court accepts a plea of guilty or nolo contendere;
- (G) the nature of each charge to which the defendant is pleading;
- (H) any maximum possible penalty, including imprisonment, fine, and term of supervised release;
- (I) any mandatory minimum penalty;
- (J) any applicable forfeiture;
- (K) the court's authority to order restitution;
- (L) the court's obligation to impose a special assessment;
- (M) in determining a sentence, the court's obligation to calculate the applicable sentencing-guideline range and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. § 3553(a);
- (N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence; and
- (O) that, if convicted, a defendant who is not a United States citizen may be removed from the United States, denied citizenship, and denied admission to the United States in the future.

(2) Ensuring That a Plea Is Voluntary. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement).

(3) Determining the Factual Basis for a Plea. Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.

Fed. R. Crim. P. 11

STATEMENT OF THE CASE

On August 5, 2015, Jorge Ernesto Blanco-Rodriguez was charged by a seven-count indictment. ROA.22-28. The charges in the indictment related to the illegal access, use or possession of personal credit card information. ROA.22-28. Mr. Blanco-Rodriguez was visiting the United States when he was arrested. ROA.287-288. Mr. Blanco-Rodriguez was a citizen of both Spain and Cuba. ROA.284, 293.

On April 18, 2016, Blanco-Rodriguez pleaded guilty to Count One of the indictment. ROA.150-193. Count one charged conspiracy to commit wire fraud, in violation of 18 U.S.C. § 1343 and 1349. ROA.22-23. During the plea colloquy, Blanco-Rodriguez, advised the Court that he felt “empty” because he had “a lot of questions” that his attorney had not answered regarding his immigration status and that his lawyer told him, “That's not what matters here.” ROA.155-156. Mr. Blanco-Rodriguez also told the Judge that he was not satisfied with his lawyer. ROA.173. Later, during the Rule 11 plea colloquy, the Court warned Mr. Blanco-Rodriguez that after serving any potential prison sentence, it was “likely that you will be deported back to your home country and excluded from returning. Do you understand these additional consequences?” ROA.180. Mr. Blanco-Rodriguez told the Judge that he had asked his attorney about the immigration consequences of his plea and his lawyer “was not able to answer that.” ROA.180. However, the trial court did not stop the plea proceedings but moved forward, leaving Mr. Blanco-Rodriguez with questions. The court flip-flopped, advising Blanco-Rodriguez that since he was Cuban he would not be deported as a matter of U.S. “policy,” and then

saying that you can “voluntarily go to Cuba” and then saying, “I don’t know how that works.” ROA.180-181. The whole time Mr. Blanco-Rodriguez’s attorney was silent. Mr. Blanco-Rodriguez also held Spanish citizenship and the court was silent as to the immigration consequences for Spaniards. ROA.284, 293. Despite the violation of the rule set out in *Padilla v. Kentucky*, 559 U.S. 356 (2010), requiring criminal defense lawyers to advise non-citizens of the immigration consequences of a guilty plea, the court continued the plea colloquy, Mr. Blanco-Rodriguez pleaded guilty, leaving Mr. Blanco-Rodriguez with unanswered questions regarding the immigration consequences of his plea.

Following sentencing, Mr. Blanco-Rodriguez filed a timely notice of appeal. ROA.73-82, 122. The Fifth Circuit Court of Appeals affirmed the district court in *United States v. Jorge Ernesto Blanco-Rodriguez*, No. 17-40516 (5th Cir. November 6, 2018 (unpublished)) by holding that the Fifth Circuit would not consider the claim on appeal but would only consider the matter as part of a post-conviction writ.

REASONS FOR GRANTING THE PETITION

I. IN THE *PADILLA V. KENTUCKY*, 559 U.S. 356 (2010), THIS HONORABLE COURT HELD THAT A CRIMINAL DEFENSE LAWYER IS INEFFECTIVE WHEN THE LAWYER FAILS TO ADVISE A NON-CITIZEN DEFENDANT OF THE IMMIGRATION CONSEQUENCES OF A GUILTY PLEA. NONETHELESS, WHEN THE DISTRICT COURT TOOK JORGE ERNESTO BLANCO-RODRIGUEZ'S GUILTY PLEA, THE COURT, DURING THE PLEA COLLOQUY, WAS MADE FULLY AWARE BY BLANCO-RODRIGUEZ THAT THE DEFENSE LAWYER HAD FAILED TO ADVISE BLANCO-RODRIGUEZ OF THE IMMIGRATION CONSEQUENCES OF HIS GUILTY PLEA AND THAT BLANCO RODRIGUEZ WANTED HIS IMMIGRATION QUESTIONS ANSWERED. THE FIFTH CIRCUIT COURT OF APPEALS HELD THAT IT WOULD NOT CONSIDER MR. BLANCO-RODRIGUEZ'S CLAIM THAT HIS PLEA WAS INVOLUNTARY IN AN APPEAL BUT WOULD ONLY CONSIDER THE ISSUE IN A POST-CONVICTION WRIT. THIS COURT SHOULD ANSWER THE QUESTION OF WHETHER A TRIAL COURT COMMITS ERROR WHEN IT TAKES A GUILTY PLEA FROM A CRIMINAL DEFENDANT WHEN THE TRIAL COURT IS ON SPECIFIC NOTICE THAT DEFENSE COUNSEL HAS NOT ADVISED THE NON-CITIZEN DEFENDANT OF THE IMMIGRATION CONSEQUENCES OF THE GUILTY PLEA, AND THE COURT OF APPEALS MUST CONSIDER THE MATTER ON DIRECT APPEAL WHEN FAILURE TO ADVISE IS CLEAR FROM THE RECORD

A. Review Is Warranted Because the Court of Appeals Sanctioned a Departure from a District Court from the Accepted and Usual Course of Judicial Proceedings, that is, that the District Court Took a Guilty Plea When the District Court was on Notice that the Non-Citizen Defendant had not been Advised of the Immigration Consequences of the Guilty Plea and had Wanted his Questions Answered as to Call for an Exercise of this Court's Supervisory Power.

Federal Rule of Criminal Procedure 11(b) states that "Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and determine that the plea is voluntary . . ." Fed. R. Crim. P. 11. "If a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void. *McCarthy v. United States*, 394 U.S. 459, 466 (1969). To enter a knowing and voluntary guilty plea, the defendant

must have a “full understanding of what the plea connotes and of its consequence.” *Boykin v. Alabama*, 395 U.S. 238, 244 (1969). The defendant must have notice of the nature of the charges against him, he must understand the consequences of his plea, and must understand the nature of the constitutional protections he is waiving. *Matthew v. Johnson*, 201 F.3d 353, 365 (5th Cir. 2000).

Before deciding whether to plead guilty, a defendant is entitled to “the effective assistance of competent counsel under the Sixth Amendment of the United States Constitution.” *McMann v. Richardson*, 397 U.S. 759, 771 (1970); *Strickland v. Washington*, 466 U.S. 668, 686 (1984). Under *Strickland*, the Court must assess whether, counsel's representation “fell below an objective standard of reasonableness.” *Strickland v. Washington*, 466 U.S. 668, 688 (1984). Next, the Court must determine whether there is “a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

A criminal defendant is entitled, under *Strickland* and the Sixth Amendment, to accurate legal advice about the immigration consequences of a guilty plea. *Padilla v. Kentucky*, 559 U.S. 356, 374-375 (2010). Mr. Blanco-Rodriguez told the court during the plea colloquy that his attorney had not answered his questions regarding the immigration consequences of his plea, and, in fact, Mr. Blanco-Rodriguez told the court that his lawyer told him, "That's not what matters here." ROA.155-156. This was a clear violation of Mr. Blanco-Rodriguez's rights to effective assistance of counsel as set out in *Padilla*. *Id.* Mr. Blanco-

Rodriguez told the Judge that he was not satisfied with his lawyer. ROA.173.

Regardless of the clear *Padilla* violation, the court went forward with a plea.

The attorney's failure to advise Mr. Blanco Rodriguez regarding the immigration consequences of his plea was compounded by the court's actions during the Rule 11 plea colloquy. During the colloquy, the Court first warned Mr. Blanco-Rodriguez that because of the plea, it was "likely that you will be deported back to your home country and excluded from returning. Do you understand these additional consequences?" ROA.180. Mr. Blanco-Rodriguez replied to the Judge that he had asked his attorney about the immigration consequences of his plea and his lawyer "was not able to answer that." ROA.180. However, the trial court did not stop the plea proceedings but moved forward, leaving Mr. Blanco-Rodriguez with questions. The court then flip-flopped, advising Blanco-Rodriguez that since he was Cuban he would not be deported as a matter of U.S. "policy," and then saying that you can "voluntarily go to Cuba" and then saying, "I don't know how that works." ROA.180-181. The entire time, Mr. Blanco-Rodriguez's attorney remained silent, never disputing Mr. Blanco-Rodriguez's claims, nor correcting the court's confusing advice, nor requesting a recess to advise Mr. Blanco-Rodriguez. Mr. Blanco-Rodriguez also held Spanish citizenship, and the court and defense counsel were silent as to the immigration consequences for Spaniards. ROA.284, 293. Despite the clear violation of the rule set out in *Padilla v. Kentucky*, 559 U.S. 356 (2010), requiring criminal defense lawyers to advise non-citizens of the immigration consequences of a guilty plea, the court continued the plea colloquy,

Mr. Blanco-Rodriguez's attorney remained silent as to the immigration issues, and Mr. Blanco-Rodriguez pleaded guilty, despite Mr. Blanco-Rodriguez's unanswered questions regarding the immigration consequences of his plea.

On Appeal, the Fifth Circuit held that Mr. Blanco-Rodriguez's complaint should be heard in a post-conviction proceeding and refused to consider it on direct appeal. However, in a case like this, where the trial court and the appeals court have a clear record showing that the plea was not knowing or voluntary because of a *Padilla* violation, the Fifth Circuit erred in not addressing the issue and reversing the trial court of the basis of the involuntary guilty plea.

B. Relief Sought

The Court should grant this Writ and order briefing to decide, in light of the Supreme Court's ruling *Padilla v. Kentucky*, whether the Trial Court is required to stop the Rule 11 plea colloquy when it determines that a non-citizen criminal defendant has not been advised of the immigration consequences of a guilty plea and that a Court of Appeals should address the issue if it is clearly presented in a direct proceeding.

Petitioner ultimately seeks for this Court to reverse the Fifth Circuit in the case below.

CONCLUSION

The Court should grant this Writ and order briefing to determine whether a trial court must stop a plea colloquy when the court has clear evidence during the colloquy that a non-citizen defendant has not been advised by defense counsel about the immigration consequences of a guilty plea in violation of the *Padilla* rule.

Date: February 4, 2019.

Respectfully submitted,

BALLI LAW OFFICE
P.O. Box 1058
Laredo, Texas 78042-1058
Tel: (956) 712-4999
Fax: (956) 724-5830

/s/

ROBERTO BALLI
Federal Bar No. 22668
Texas State Bar No. 00795235
Attorney for Petitioner

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IN THE SUPREME COURT OF THE UNITED STATES

JORGE ERNESTO BLANCO-RODRIGUEZ,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PROOF OF SERVICE

I, Roberto Balli, a member of the Bar appointed under the Criminal Justice Act, do swear and declare that on this 4th day of February, 2019, and pursuant to Rule 29.5, served the preceding Petition for Writ of Certiorari on counsel for the Respondent by enclosing a copy of these documents in an envelope for delivery by private third party commercial carrier for delivery within 3 calendar days and addressed to:

The Honorable Noel J. Francisco
Office of the Solicitor General of the United States
Room 5614, Department of Justice
950 Pennsylvania Ave., N.W., Washington, D.C. 20530-0001

I declare under the penalty of perjury that the foregoing is true and correct.

\s\
ROBERTO BALLI

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JORGE ERNESTO BLANCO-RODRIGUEZ,
Petitioner

v.
UNITED STATES OF AMERICA,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX

<u>EXHIBIT</u>	<u>DESCRIPTION OF DOCUMENT</u>
“A”	Opinion of the Court of Appeals in the <i>Jorge Ernesto Blanco-Rodriguez</i> No. 17-40516 (5 th Cir. November 6, 2018 (unpublished))
“B”	Judgment of the United States District Court in <i>United States v. Jorge Ernesto Blanco-Rodriguez</i> No. 7:15-CR-1083 (S.D. Tex. April 7, 2017)
“C”	Order Appointing Counsel

APPENDIX A

Opinion from Court of Appeals *United States v. Jorge Ernesto Blanco-Rodriguez*, No. 17-40516 (5th Cir. November 6, 2018 (unpublished))

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 17-40516

United States Court of Appeals
Fifth Circuit

FILED

November 6, 2018

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

JORGE ERNESTO BLANCO-RODRIGUEZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 7:15-CR-1083-1

Before DAVIS, COSTA, and OLDHAM, Circuit Judges.

PER CURIAM:*

Jorge Ernesto Blanco-Rodriguez pleaded guilty to conspiracy to commit wire fraud. On appeal, Blanco-Rodriguez challenges his sentence. He argues that his counsel was ineffective for failing to advise him of the immigration consequences of his guilty plea. He also challenges the district court's imposition of a three-level sentencing enhancement under U.S.S.G. § 3B1.1(b)

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

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for his role as a manager or supervisor in the underlying criminal activity. As explained more fully below, we AFFIRM the district court's sentence.

I.

Blanco-Rodriguez pleaded guilty to conspiracy to commit wire fraud. The presentence report ("PSR") recommended a four-level increase in Blanco-Rodriguez's offense level under U.S.S.G. § 3B1.1(a) for his role as an organizer or leader in the conspiracy. In support of the enhancement, the PSR set forth the following facts:

During the instant offense, the defendant's role involved receiving stolen credit/debit card information from unknown individuals in Russia, Ukraine, Romania, and/or China from May 2011 to May 2015. After fraudulently receiving the account numbers, the defendant sold the account information to co-conspirators in exchange for financial gain. Mary Vaquera and other individuals sent electronic payments to unknown coconspirators in Russia, Ukraine, Romania, and/or China, and foreign coconspirators paid the defendant \$2 to \$5 for each fraudulent account number he disseminated during the offense. Investigators were able to confirm the defendant's involvement regarding 12,000 such fraudulent access devices during the four-year period from May 2011 to May 2015. Furthermore, undercover investigators purchased 250 stolen credit/debit account numbers from the defendant from January 2015 [to] April 2015. Although the confirmed fraud in this case affected at least 100 financial institutions and exceeds \$900,000, only 18 of the affected financial institutions reported or claimed pecuniary losses, resulting in a current total financial loss of \$602,864.13.

Defense counsel filed written objections to the PSR, challenging the recommendation that Blanco-Rodriguez receive the four-level enhancement under § 3B1.1(a). Blanco-Rodriguez's counsel argued that Blanco-Rodriguez should have been given a four-level reduction in his offense level under U.S.S.G. § 3B1.2 for being a minimal participant rather than a four-level enhancement under § 3B1.1(a) for being an organizer or leader.

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At sentencing, the Government presented testimony from Secret Service Special Agent Jose Obando, the lead investigator of the case. When questioned by the district court about Blanco-Rodriguez's role, Agent Obando stated, "I'd be speculating a little bit, but he's kind of more like maybe middle tier. He's kind of like -- he buys in bulk and then resells and makes profit."

The district court initially stated that it considered Blanco-Rodriguez "sort of a lone wolf," but the Government argued that the evidence was to the contrary. The Government maintained that Blanco-Rodriguez "would have money sent in other people's names from other countries which require[ed] them to pick up the money, and then whatever portion that [Blanco-Rodriguez] profit[ed] on w[ould] be sent to him." According to the Government, "there [were] more people involved and [Blanco-Rodriguez] caus[ed] their involvement."

Defense counsel responded that 12,000 credit or debit card accounts constituted "a very small percentage" of the total data breach and that "almost anyone can" do what Blanco-Rodriguez did because it is easy to obtain that information on the Internet. Counsel further contended that Blanco-Rodriguez was "just taking advantage of information that[] [was] available on the Internet" and that he was entitled to a mitigating role reduction.

The district court disagreed that Blanco-Rodriguez was entitled to a mitigating role reduction, but again described him as "somewhat of a lone wolf." In doing so, the district court explained that:

[Blanco-Rodriguez] knows how to access these counterfeit numbers, he purchased some, he resells them, he gets paid. And some of what he gets paid, I believe, my impression is some of this is bought on credit. I get paid, you get paid. So he's having money deposited in accounts of people that he owes money to.

The district court ultimately decided that the four-level enhancement under § 3B1.1(a) was not warranted. Instead, the district court imposed a three-level

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enhancement under § 3B1.1(b), finding that Blanco-Rodriguez “was [a] supervisor of . . . five or more” participants.

With a total offense level of 33 and a criminal history category of I, Blanco-Rodriguez’s guidelines range was 135 to 168 months of imprisonment. The district court sentenced Blanco-Rodriguez at the bottom of the guidelines range to 135 months of imprisonment. We review the Appellant’s arguments below.

II.

A.

We consider first Blanco-Rodriguez’s ineffective-assistance-of-counsel claim. We observe that the favored forum for such a claim is a 28 U.S.C. § 2255 proceeding.¹ “When an ineffective-assistance claim is brought on direct appeal, appellate counsel and the court must proceed on a trial record not developed precisely for the object of litigating or preserving the claim.”² Thus, as a general rule, we do not consider ineffective-assistance claims on direct appeal.³ We take up “claims of inadequate representation on direct appeal only in rare cases where the record” permits a fair evaluation of the claims.⁴ A case falls within the parameters of the general rule (against consideration on appeal) when the record does not reveal the reasons for trial counsel’s decisions or shed light on alternative strategies that might have been employed.⁵

Here, Blanco-Rodriguez does not present any justification for an “exception to [the] general rule of non-review” on direct appeal.⁶ Accordingly,

¹ *Massaro v. United States*, 538 U.S. 500, 504–09 (2003).

² *Id.* at 504.

³ *United States v. Isgar*, 739 F.3d 829, 841 (5th Cir. 2014) (noting that the record at hand offered insufficient information concerning trial counsel’s motivations).

⁴ *United States v. Higdon*, 832 F.2d 312, 314 (5th Cir. 1987).

⁵ *United States v. Garcia*, 567 F.3d 721, 729 (5th Cir. 2009) (labeling the ineffective assistance claim premature).

⁶ *United States v. Stevens*, 487 F.3d 232, 245 (5th Cir. 2007).

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we decline to consider his ineffective-assistance-of-counsel argument on direct appeal without prejudice to Blanco-Rodriguez's right to assert it on collateral review.⁷

B.

With respect to Blanco-Rodriguez's argument that the district court erred in finding him to be a manager or supervisor under § 3B1.1(b) and imposed a three-level enhancement, we review this factual finding for clear error.⁸ A factual finding is not clearly erroneous if it is plausible in light of the record as a whole.⁹ We will not deem a factual finding clearly erroneous unless a review of the evidence leaves us with the “definite and firm conviction that a mistake has been committed.”¹⁰

Under § 3B1.1(b), a defendant's base offense level may be increased three levels “[i]f the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive.”¹¹ To qualify for an adjustment under this section, “the defendant must have been the . . . manager[] or supervisor of one or more other participants.”¹² The commentary to the Sentencing Guidelines advises that an upward departure may be warranted for a defendant who did not exercise control over another participant but “nevertheless exercised management responsibility over the property, assets, or activities of a criminal

⁷ See *Isgar*, 739 F.3d at 841.

⁸ See *United States v. Cisneros-Gutierrez*, 517 F.3d 751, 764 (5th Cir. 2008); *United States v. Rose*, 449 F.3d 627, 633 (5th Cir. 2006).

⁹ *Cisneros-Gutierrez*, 517 F.3d at 764.

¹⁰ *Rose*, 449 F.3d at 633 (internal quotation marks and citation omitted).

¹¹ See U.S.S.G. § 3B1.1(b).

¹² See *id.*, comment. (n.2).

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organization.”¹³ We have approved the imposition of this enhancement under the circumstances recited in the commentary.¹⁴

The record supports the district court’s finding that Blanco-Rodriguez was a manager or supervisor under this guideline. Blanco-Rodriguez set the underlying criminal scheme in motion by purchasing the stolen credit card numbers from his contacts in foreign countries. He then sold the card numbers to his contacts in this country to use or to obtain retail merchandise. Blanco-Rodriguez directed the buyers of these card numbers to wire money to representatives of the original sellers of the stolen numbers who confirmed payment to Blanco-Rodriguez. This suggests a finding that Blanco-Rodriguez was a manager of the assets and activities of this criminal enterprise. Accordingly, the district court did not clearly err in applying the § 3B1.1(b) enhancement.

III.

Based on the foregoing reasons, we AFFIRM the district court’s sentence.
AFFIRMED.

¹³ *Id.*

¹⁴ See *United States v. Delgado*, 672 F.3d 320, 345 (5th Cir. 2012) (en banc); *Rose*, 449 F.3d at 633 & n.20; *United States v. Lopez-Urbina*, 434 F.3d 750, 767 (5th Cir. 2005).

APPENDIX B

Judgment of the United States District Court in *United States v. Jorge Ernesto Blanco-Rodriguez*, No. 7:15-cr-1083 (S.D. Tx April 7, 2017 (unpublished))

UNITED STATES DISTRICT COURT
Southern District of Texas
Holding Session in McAllen

ENTERED

April 07, 2017

David J. Bradley, Clerk

UNITED STATES OF AMERICA
v.
JORGE ERNESTO BLANCO-RODRIGUEZ

JUDGMENT IN A CRIMINAL CASE

CASE NUMBER: 7:15CR01083-001

USM NUMBER: 06233-104

 See Additional Aliases.

THE DEFENDANT:

 pleaded guilty to count(s) 1 on April 18, 2016. pleaded nolo contendere to count(s) _____ which was accepted by the court.
 was found guilty on count(s) _____ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
18 U.S.C. § 1343 and 1349	Conspiracy to commit wire fraud.	06/30/2015	1

 See Additional Counts of Conviction.

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

 The defendant has been found not guilty on count(s) _____.
 Count(s) 2, 3, 4, 5, 6, and 7 _____ is are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

March 30, 2017

Date of Imposition of Judgment



Signature of Judge

RANDY CRANE
UNITED STATES DISTRICT JUDGE
Name and Title of JudgeApril 7, 2017

Date

17-40516-66
1660862
DDR

DEFENDANT: **JORGE ERNESTO BLANCO-RODRIGUEZ**
CASE NUMBER: **7:15CR01083-001**

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 135 months.

See Additional Imprisonment Terms.

The court makes the following recommendations to the Bureau of Prisons:
That the defendant be placed in an institution as close as possible to his family in Florida.

The defendant is remanded to the custody of the United States Marshal.

The defendant shall surrender to the United States Marshal for this district:
 at _____ a.m. p.m. on _____.
 as notified by the United States Marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
 before 2 p.m. on _____.
 as notified by the United States Marshal.
 as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

17-40516.67

DEFENDANT: **JORGE ERNESTO BLANCO-RODRIGUEZ**
CASE NUMBER: **7:15CR01083-001**

SUPERVISED RELEASE

Upon release from imprisonment you will be on supervised release for a term of: 3 years.

See Additional Supervised Release Terms.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
 - The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
5. You must comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
6. You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

See Special Conditions of Supervision.

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment, you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

DEFENDANT: **JORGE ERNESTO BLANCO-RODRIGUEZ**
CASE NUMBER: **7:15CR01083-001**

SPECIAL CONDITIONS OF SUPERVISION

You must surrender to U.S. Immigration and Customs Enforcement and follow all their instructions and reporting requirements until any deportation proceedings are completed. If you are ordered deported from the United States, you must remain outside the United States unless legally authorized to reenter. If you reenter the United States, you must report to the nearest probation office within 72 hours after you return.

You must seek proper documentation from U.S. Immigration and Customs Enforcement authorizing you to work in the United States.

DEFENDANT: **JORGE ERNESTO BLANCO-RODRIGUEZ**
CASE NUMBER: **7:15CR01083-001****CRIMINAL MONETARY PENALTIES**

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$100.00		\$602,864.13

See Additional Terms for Criminal Monetary Penalties.

The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal payees must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss*</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
American Express		\$125,862.59	
Chase		73,338.94	
Navy Federal Credit Union		5,343.31	
Capital One		38,856.98	
Discover Financial Services		61,781.24	
Bank-Fund Staff Federal Credit Union		7,130.94	
<input checked="" type="checkbox"/> See Additional Restitution Payees.			
TOTALS	<u>\$0.00</u>	<u>\$602,864.13</u>	

Restitution amount ordered pursuant to plea agreement \$ _____

The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

The court determined that the defendant does not have the ability to pay interest and it is ordered that:

the interest requirement is waived for the fine restitution.

the interest requirement for the fine restitution is modified as follows:

Based on the Government's motion, the Court finds that reasonable efforts to collect the special assessment are not likely to be effective. Therefore, the assessment is hereby remitted.

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: **JORGE ERNESTO BLANCO-RODRIGUEZ**
CASE NUMBER: **7:15CR01083-001**

ADDITIONAL RESTITUTION PAYEES

<u>Name of Payee</u>	<u>Total Loss*</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
Citibank		\$170,000.00	
Frost Bank		117,468.23	
Silver State Schools Credit Union		419.00	
Sikorsky Credit Union		200.00	
Ceca Bank		609.37	
City National Bank		75.25	
Crown Bank		347.63	
Canadian Imperial Bank of Commerce		891.06	
Resource Bank		461.54	
Ent Federal Credit Union		78.05	

See Additional Restitution Payees.

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

17-40516.71

DEFENDANT: **JORGE ERNESTO BLANCO-RODRIGUEZ**
CASE NUMBER: **7:15CR01083-001****SCHEDULE OF PAYMENTS**

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A Lump sum payment of \$100.00 due immediately, balance due
 not later than _____, or
 in accordance with C, D, E, or F below; or

B Payment to begin immediately (may be combined with C, D, or F below); or

C Payment in equal _____ installments of _____ over a period of _____, to commence _____ days after the date of this judgment; or

D Payment in equal _____ installments of _____ over a period of _____, to commence _____ days after release from imprisonment to a term of supervision; or

E Payment during the term of supervised release will commence within _____ days after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F Special instructions regarding the payment of criminal monetary penalties:

Payable to: Clerk, U.S. District Court

Attn: Finance
P.O. Box 5059
McAllen, TX 78502

Payment of the Court-ordered restitution shall be made in equal monthly installments as determined by the U.S. Probation Officer, commencing 60 days after release from imprisonment to a term of Supervised Release, with final payment due 60 days prior to expiration of the defendant's term of Supervised Release.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

 Joint and Several**Case Number****Defendant and Co-Defendant Names
(including defendant number)****Total Amount****Joint and Several
Amount****Corresponding Payee,
if appropriate**

See Additional Defendants and Co-Defendants Held Joint and Several.

The defendant shall pay the cost of prosecution.

The defendant shall pay the following court cost(s):

The defendant shall forfeit the defendant's interest in the following property to the United States:

See Additional Forfeited Property.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

17-40516.72

APPENDIX C
Order Appointing Counsel

ENTERED

June 22, 2017

David J. Bradley, Clerk

United States District Court
Southern District of Texas
FILED

JUN 21 2017

David J. Bradley, Clerk of Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
McALLEN DIVISION

UNITED STATES OF AMERICA

§

APPEAL

VS.

§

CRIMINAL ACTION NO. 7:15-CR-1083

JORGE ERNESTO BLANCO-
RODRIGUEZ

§

§

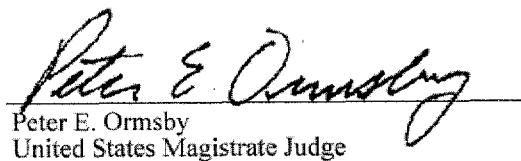
ORDER OF COURT APPOINTING COUNSEL

Because the above-named defendant has testified under oath or has otherwise satisfied this Court that he (1) is financially unable to employ counsel on appeal, and (2) does not wish to waive counsel, and because the interests of justice so require, an attorney is hereby **APPOINTED** to represent this person on appeal in the above-designated case.

Attorney appointed: ROBERTO BALLI

The appointment **SHALL** remain in effect until terminated or a substitute attorney is appointed or makes an appearance herein on behalf of the Defendant.

DONE at McAllen, Texas, this 21st day of June, 2017.


Peter E. Ormsby
United States Magistrate Judge