

No. _____

In The
Supreme Court of the United States

RAMY EID ZAKI HAKIM,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

When Can a Defendant, Induced to Enter a Guilty Plea by the Government's Promise to Assist the Defendant with His Immigration Status, Move to Withdraw His Guilty Plea?

Did the District Court Err By Failing to Hold an Evidentiary Hearing to Allow the Defendant to Prove the Government Failed to Assist Him with His Immigration Status?

LIST OF RELATED CASES

U.S.A. v. Ramy Eid Zacky Hakim, No. 2:02-cr-00616, U.S. District Court for the Central District of California, Judgment entered May 29, 2003. (Dkt 118)

U.S.A. v. Ramy Eid Zacky Hakim, No. 2:02-cr-00616, U.S. District Court for the Central District of California, Denial of Petition for Writ of Error Coram Nobis entered on June 11, 2021. (Dkt 235)

U.S.A. v. Ramy Eid Zacky Hakim, No. 21-55617, U.S. Court of Appeals for the Ninth Circuit, Memorandum affirming district court's decision entered on September 8, 2022. (Dkt 37)

U.S.A. v. Ramy Eid Zacky Hakim, No. 21-55617, U.S. Court of Appeals for the Ninth Circuit, Order denying Petition for Rehearing entered on October 28, 2022. (Dkt 39)

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Ramy Eid Zaki Hakim petitions for a writ of certiorari to review the United States Court of Appeals for the Ninth Circuit's Memorandum denying his petition for writ of error coram nobis to withdraw his 2002 guilty plea. (Appendix A)

OPINION BELOW

On September 8, 2022, the Ninth Circuit Court of Appeals entered a Memorandum affirming the district court's denial of Mr. Hakim's petition for writ of error coram nobis. On October 28, 2022, the Ninth Circuit

Court of Appeals denied Mr. Hakim's petition for re-hearing. (Appendix C)

JURISDICTION

The Court has jurisdiction. 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND REGULATIONS INVOLVED

The United States Constitution, Amendment VI 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 defense.

Federal Rules of Criminal Procedure, Rule 11. Pleas provides in relevant part:

(a) Entering a Plea.

(1) In general. A defendant may plead not guilty, guilty, or (with the court's consent) nolo contendere.

(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); and
- (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.

(c) Plea Agreement Procedure.

(1) In General. An attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement. The court must not participate in these discussions. If the defendant pleads guilty or nolo contendere to either a charged offense or a lesser or related offense, the plea agreement may specify that an attorney for the government will:

(A) not bring, or will move to dismiss, other charges;

(B) recommend, or agree not to oppose the defendant's request, that a particular sentence or sentencing range is appropriate or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request does not bind the court); or

(C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request binds the court once the court accepts the plea agreement).

(2) Disclosing a Plea Agreement. The parties must disclose the plea agreement in open court when the plea is offered, unless the court for good cause allows the parties to disclose the plea agreement in camera.

(3) Judicial Consideration of a Plea Agreement.

(A) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report.

(B) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(B), the court must advise the defendant that the defendant has no right to withdraw the plea if the court does not follow the recommendation or request.

(4) Accepting a Plea Agreement. If the court accepts the plea agreement, it must inform the defendant that to the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or

(C) the agreed disposition will be included in the judgment.

(d) Withdrawing a Guilty or Nolo Contendere Plea. A defendant may withdraw a plea of guilty or nolo contendere:

(1) before the court accepts the plea, for any reason or no reason; or

(2) after the court accepts the plea, but before it imposes sentence if:

(A) the court rejects a plea agreement under Rule 11(c)(5); or

(B) the defendant can show a fair and just reason for requesting the withdrawal.

(e) Finality of a Guilty or Nolo Contendere Plea. After the court imposes sentence, the defendant may not withdraw a plea of guilty or nolo contendere, and the plea may be set aside only on direct appeal or collateral attack.

(f) Admissibility or Inadmissibility of a Plea, Plea Discussions, and Related Statements. The admissibility or inadmissibility of a plea, a plea discussion, and any related statement is governed by Federal Rule of Evidence 410.

(h) Harmless Error. A variance from the requirements of this rule is harmless error if it does not affect substantial rights.



CUSTODY STATUS OF PETITIONER

Mr. Hakim is not in custody.



STATEMENT OF THE CASE

In 2003, Mr. Hakim pleaded guilty, under a plea agreement, to using a communication facility to further a drug felony. 21 U.S.C. § 843(b)

The plea agreement required the government “to bring to the attention of the Immigration & Naturalization Service [“INS”] what the defendant has done and the type of cooperation he has participated in.” (1-ER-33; 3-ER-86)

The district court sentenced Mr. Hakim to 33 months in prison followed by one year of supervised release. (1-ER-2, 4)

On March 11, 2021, Mr. Hakim filed a petition to withdraw his guilty plea. On June 11, 2021, the district court, finding the petition untimely, denied the petition. (1-ER-2)

Mr. Hakim appealed the district court’s denial. (2-ER-64) The Ninth Circuit affirmed the district court’s decision. (Appendix A)

ARGUMENT

I. Mr. Hakim, Induced to Enter a Guilty Plea by the Government’s Promise to Assist Him with His Immigration Status, Timely Moved to Withdraw His Guilty Plea

Mr. Hakim, who wanted to become a naturalized citizen, entered a guilty plea because the government

agreed to help him stay in the United States. (2-ER-55 ¶1; 2-ER-62 ¶ 4) In the plea agreement and during the oral plea colloquy, the government promised to notify the INS about Mr. Hakim's cooperation. (1-ER-33)

Mr. Hakim believed the government's promise meant that the government would help him stay in the United States and not be deported. (2-ER-55 ¶ 1; 2-ER-62 ¶ 4) Neither the district court, nor the prosecutor, nor defense counsel told Mr. Hakim that he would be deported if he pleaded guilty.¹ (2-ER-57 ¶¶ 14-17; 2-ER-58 ¶¶ 31-32; 2-ER-59 ¶¶ 33-35)

Despite the government's promises and representations from his attorney, Mr. Hakim still faces certain deportation and exclusion from the United States, where he has lived since 1994. (2-ER-56 ¶ 2; 2-ER-57 ¶ 21; 2-ER-58 ¶ 26-28; 2-ER-60 ¶ 42)

The district court denied Mr. Hakim's petition, finding it untimely. (1-ER-2, 3) The district court, citing no authority, found Mr. Hakim's lack of knowledge insufficient justification "for such an extended delay where the substantive grounds for relief was known." (1-ER-3) *Machibroda v. United States*, 368 U.S. 487, 493, 82 S. Ct. 510, 7 L. Ed. 2d 473 (1962) ("A guilty or

¹ After Mr. Hakim entered his plea, in *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010), the Supreme Court held that when a criminal defendant is not a citizen, attorneys have a duty to inform their clients of the immigration consequences of a guilty plea. *Padilla*, 559 U.S. at 368. See also Fed. R. Crim. P. 11(b)(1)(O). *Padilla* does not operate retroactively. *Chaidez v. United States*, 568 U.S. 342, 133 S. Ct. 1103, 185 L. Ed. 2d 149 (2013).

no contest plea, ‘if induced by promises or threats which deprive it of the character of a voluntary act, is void.’”). The Ninth Circuit affirmed the district court’s denial and denied rehearing. (Appendix A, C)

Mr. Hakim’s petition should have been granted because, unless Mr. Hakim withdraws his plea, he will be deported and permanently excluded from the United States. Because the government never fulfilled its promise, Mr. Hakim did not enter a knowing and voluntary plea.

The district court recognized that Mr. Hakim’s petition had no statute of limitations. (1-ER-2) But, citing *United States v. Kroytor*, 977 F.3d 957, 961 (9th Cir. 2020), the district court found that, because Mr. Hakim delayed bringing the petition, he must “provide valid or sound reasons explaining why they did not attack their sentences or convictions earlier.” (1-ER-2)

The district court found that Mr. Hakim’s lack of knowledge about the error *coram nobis* “procedural mechanism” failed to justify Mr. Hakim’s “extended delay where the substantive grounds for relief was known.” (1-ER-3)

Mr. Hakim’s case differs from *Kroytor* because, in *Kroytor*, the defendant claimed that his attorney mis-advised him that he could not withdraw his plea but could prevent immigration officials from finding out about his conviction and void removal.

Kroytor held the district court properly denied relief because, after learning he could avoid removal by

challenging his conviction, Kroytor waited two years, without a valid reason, before filing his petition. *Id.* at 959.

Mr. Hakim did not delay his petition “for no reason whatsoever,” or to abuse the writ of coram nobis. *Kroytor*, 977 F.3d at 961. It took time because Mr. Hakim did not know he could correct the error and or the legal mechanism to seek relief. Mr. Hakim learned of the deportation consequences of his conviction in 2005 when the prison released him. (2-ER-57 ¶¶ 20-21)

But Mr. Hakim did not know how to deal with the government’s failure to keep its promises until Mr. Hakim met his wife, who studied law. His wife’s law professor referred him and his wife to Attorney Arfa. (2-ER-59 ¶¶ 34-40)

Mr. Hakim began the process to withdraw his plea three years ago on April 17, 2018, when he sought his plea documents. (See Dkt. No. 214) He continued his efforts for more than a year. (See Dkt. No. 222) Mr. Hakim finally got a copy of his plea transcript in 2020 and, on March 11, 2021, Mr. Hakim filed his petition for writ of coram nobis. (Dkt. Nos. 225-226)

The Ninth Circuit’s Memorandum finds that Mr. Hakim failed to give a “sound reason” for not seeking post-conviction relief sooner. (Memo at 2 citing *United States v. Kroytor*, 977 F.3d 957, 961 (9th Cir. 2020)). The Memorandum finds that Mr. Hakim’s unawareness of the writ did not justify his thirteen-year delay for filing his petition. The Court notes that “[d]elay ‘may be justified’ where petitioners ‘did not have a

reasonable chance to pursue their claim earlier due to the specific circumstances they faced.’’ *Kroytor*, 977 F.3d at 961. The Memorandum finds that Mr. Hakim had 13 years to seek legal counsel after he learned that the Immigration and Naturalization Service (“INS”) intended to deport him. (Memo at 2)

The Ninth Circuit overlooks that Mr. Hakim did give “ . . . valid or sound reasons explaining why [he] did not attack [his] sentence[] or conviction[] earlier.” See *United States v. Kwan*, 407 F.3d 1005, 1012 (9th Cir. 2005). And, “courts have not elaborated on what constitutes a ‘sound reason,’ . . . ” *Id.* at 1013. But courts have denied relief where the petitioner delayed seeking relief for no reason, “where the respondent demonstrates prejudice, or where the petitioner appears to be abusing the writ.” *Id.* Mr. Hakim did not know he could correct the error and/or the legal mechanism to seek relief until he met his wife. Mr. Hakim had every reason to believe the AUSA would help him with his immigration process.

The Ninth Circuit also overlooks that several cases have granted coram nobis relief after an extended delay. See *Hirabayashi v. United States*, 828 F.2d 591 605 (9th Cir. 1987) (refusing argument that laches should preclude 40-year-old claim); *Rewak v. United States*, 512 F.2d 1184, 1185 (9th Cir. 1975) (granting coram nobis relief for sentencing error ten years after petitioner released from custody); See *Sandhu v. United States*, No. 2:05-cr-00449-KJM, 2020 U.S. Dist. LEXIS 13832, at *9 (E.D. Cal. Jan. 24, 2020) (Coram nobis relief granted where petitioner did not

learn that he could seek *coram nobis* relief until he retained immigration counsel).

Certiorari should be granted.

II. Mr. Hakim Presented Sufficient Evidence Supporting His Allegation That the Government Failed to Assist Him with His Immigration Status

The district court denied Mr. Hakim's petition because Mr. Hakim failed to submit " . . . evidence supporting his allegation that the Government failed to notify INS of his cooperation." (Memo at 3) The Ninth Circuit held that, without evidence indicating the Government breached the plea agreement, Mr. Hakim cannot establish an error "of the most fundamental character." (Memo at 3)

The Ninth Circuit overlooks that Mr. Hakim cannot prove a negative. But, Mr. Hakim does state the "Government even worked against my request to keep my green card by sending letters to the Egyptian government asking if I was wanted by the Egyptian government." (2-ER-59) Besides, government would have known if they helped Mr. Hakim with his immigration status. At his plea, government stated:

MR. CHEW: We agree also to bring to the attention of the Court at the time of sentencing what the defendant has done and his cooperation. We also *agree to bring to the attention of the Immigration & Naturalization Service what the defendant has done and the type of*

cooperation he has participated in, and in the opinion of the U.S. Attorney's Office, if the defendant's cooperation constitutes substantial assistance, we agree to make a motion before this Court to depart downward in the defendant's sentence. (1-ER-34) (Italics added.)

The Ninth Circuit overlooks that under the coram nobis procedure, the district court must accept the truth of Mr. Hakim's factual allegations, *United States v. Blaylock*, 20 F.3d 1458, 465 (9th Cir. 1994) (dealing with 2255 petitions); *Korematsu v. United States*, 584 F. Supp. 1406, 1412 (N.D. Cal. 1984) (" . . . [P]etitions for a writ of coram nobis should be treated in a manner similar to § 2255 habeas corpus petitions.")

Mr. Hakim alleged the government breached its promise to help Mr. Hakim with his INS proceedings, and trial counsel misrepresented the immigration consequences of a conviction. (SER-4) Mr. Hakim made specific factual allegations that stated a claim on which relief could be granted if true. See *United States v. Leonti*, 326 F.3d 1111, 1116 (9th Cir. 2003); *United States v. Schaflander*, 743 F.2d 714, 717 (9th Cir. 1984).

If the government had notified the immigration authorities, the government should have disclosed the information to Mr. Hakim. See, e.g., *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.").

The Ninth Circuit should have ordered the district court to set a hearing to decide if the government assisted Mr. Hakim with his INS proceedings. See *United States v. Taylor*, 648 F.2d 565, 573, n. 25 (9th Cir. 1981). (“Whether a hearing is required on a coram nobis motion should be resolved in the same manner as habeas corpus petitions.”); *Korematsu v. United States*, 584 F. Supp. 1406, 1412 (N.D. Cal. 1984) (“[Section] 2255 considerations apply in determining whether an evidentiary hearing is required” in a coram nobis proceeding.).

Certiorari should be granted.

CONCLUSION

Mr. Hakim respectfully requests that this Court grant Certiorari.

DATED: December 7, 2022

Respectfully submitted,

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