No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

ORESTES CABRERA, -- PETITIONER

vs.

UNITED STATES OF AMERICA, -- RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO

THE ELEVENTH U.S. CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

ORESTES CABRERA
07021-017 H02-301U
MCRAE CORRECTIONAL FACILITY
P. O. DRAWER 55030
MCRAE HELENA, GA 31055

QUESTION PRESENTED

WHETHER PETITIONER'S RIGHTS UNDER THE DUE PROCESS CLAUSE AND THE EFFECTIVE ASSISTANCE OF COUNSEL WERE VIOLATED WHERE BOTH OF THE LOWER COURTS ERRED IN MISCONSTRUING, THEN DENYING PETITIONER'S PETITION PURSUANT TO THE ALL WRITS ACT?

LIST OF PARTIES

[X] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Cabrera, Orestes, Petitioner, *pro-se*

Davies, Esq., Robert G., AUSA

Eggers, Esq., Tiffany Hope, AUSA

Kirwin, Esq., Thomas F. United States Attorney

Kypreos, Esq., Spiro Theodore, Court-appointed

Lockhart, Esq., Randal, Court-appointed

Rodgers, Hon. M. Casey, Chief U.S. District Judge

Timothy, Hon. Elizabeth M., Chief U.S. Magistrate Judge

TABLE OF CONTENTS

INDEX OF APPENDICES

TABLE OF AUTHORITIES CITED

STATUTES

OTHER AUTHORITIES

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The June 4, 2018 order of the Eleventh U.S. Circuit Court of Appeals denying rehearing is unpublished and attached as Appendix A. The March 29, 2018 order of the Eleventh U.S. Circuit Court of Appeals dismissing Petitioner's appeal is unpublished and attached as Appendix B. The January 8, 2018 order of the U.S. District Court for the Northern District of Florida denying Petitioner's Motion pursuant to Title 28 U.S.C. § 1651 of The All Writs Act is unpublished and attached as Appendix C. The December 13, 2017 Magistrate Report and Recommendation is unpublished and attached as Appendix D.

JURISDICTION

The Court of Appeals entered its judgment on March 29, 2018 and Petitioner's timely-filed motion for rehearing was denied on June 4, 2018. This court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves a federal criminal defendant's constitutional rights under the Fifth and the Sixth Amendment which provide in relevant part:

> "No person shall be held to answer for a capital, or otherwise infamous crime...nor be deprived of life, liberty, or property, without due process of law..." Amendment V.

> "In all criminal prosecutions, the accused shall enjoy the right to ... the assistance of Counsel for his defence." Amendment VI.

STATEMENT OF THE CASE

Petitioner was charged by indictment in Count 1 with conspiracy to distribute and possess with intent to distribute five kilograms or more of a mixture and substance containing a detectable amount of cocaine in violation of Title 21 U.S.C. § 841(b)(1)(A)(ii); and was charged in count 2 with knowingly and intentionally possessing with intent to distribute 500 grams or more of a mixture and substance containing a detectable amount of cocaine in violation of Title 21 U.S.C. § 841(b)(1)(B)(ii).

On November 4, 2008, after a jury was selected, Petitioner entered a plea of guilty to the charges. On November 24, 2008, Petitioner's public defender filed an *in camera* motion to withdraw, which indicated, in part, that the Petitioner wished to withdraw his plea. The motion was granted and a CJA Panel Attorney was appointed to represent Petitioner.

On January 28, 2009, Petitioner filed a motion to withdraw his plea and on February 10, 2009, a notice of Petitioner's claims of ineffective assistance of counsel was filed as to his CJA Panel Attorney. A hearing was held on both matters on March 16, 2009 and an order denying the motion to withdraw was entered the same day.

On March 20, 2009, a sentencing proceeding was held and on March 26, 2009, a final judgment was entered sentencing Petitioner as to each count to concurrent sentences of 276 months.

On July 27, 2009, Petitioner's attorney filed his opening brief in Petitioner's direct appeal.

On June 2, 2010, the Eleventh U.S. Circuit Court of Appeals denied Petitioner's direct appeal.

On October 19, 2010, the U.S. Supreme Court denied Petitioner's Petition for Writ of Certiorari.

On April 25, 2011, Petitioner filed a Motion pursuant to Title 28 U.S.C. § 2255.

On June 14, 2013, Petitioner's Motion pursuant to Title 28 U.S.C. § 2255 was denied.

On January 22, 2014, Petitioner's Motion Requesting Relief from Judgment pursuant to Fed.R.Civ.P. 60(b) was denied.

On April 8, 2014, Petitioner's Motion for Reconsideration was denied for lack of jurisdiction.

On May 7, 2014, Petitioner's Motion for Leave to Appeal *in forma pauperis* was denied.

On May 29, 2014, the U.S. Supreme Court denied Certorari.

On June 10, 2014, the District Court denied Petitioner's Motion for a Certificate of Appealability.

On August 4, 2015, Petitioner's Motion for Reduction of Sentence pursuant to Title 18 U.S.C. § 3582 was granted and Petitioner's sentence was reduced to 221 months.

On February 23, 2016, the District Court denied Petitioner's Motion to Vacate Count One and Motion for Summary Judgment.

On March 24, 2016, the District Court denied Petitioner's Motion for Leave to Appeal *in forma pauperis*.

On November 17, 2016, the Eleventh U.S. Circuit Court of Appeals denied Petitioner's Motion for Leave to Appeal *in forma pauperis*.

On December 29, 2016, the Eleventh U.S. Circuit Court of Appeals dismissed Petitioner's appeal for want of prosecution.

On November 13, 2017, Petitioner filed a Petition for Mandamus under the All Writs Act, pursuant to Title 28 U.S.C. § 1651, in an effort to challenge the district court's denial of his underlying motion to withdraw his guilty plea.

On December 13, 2017, the Magistrate issued her Report and Recommendation, recommending that the petition be denied. Petitioner timely filed objections.

On January 8, 2018, the District Court adopted the Magistrate's Report and Recommendation and denied Petitioner's petition.

On January 17, 2018, Petitioner filed his Notice of Appeal to the Eleventh U.S. Circuit Court of Appeals.

On March 29, 2018, the Eleventh U.S. Circuit Court of Appeals denied Petitioner's Motion for Leave to Proceed on Appeal *in forma pauperis* because the appeal was frivolous.

On June 4, 2018, the Eleventh U.S. Circuit Court of Appeals denied Petitioner's motion for reconsideration.

On June 29, 2018, the Eleventh U.S. Circuit Court of Appeals entered its Order of Dismissal for failure to prosecute.

STATEMENT OF THE FACTS

On May 31, 2008, Petitioner was stopped for unlawful speed near the 66 mile-marker, west bound on Interstate 10 in north Okaloosa County, Florida. A Sheriff's Office Deputy conducted a walk-around of Petitioner's vehicle and a canine alerted to the presence of the odor of a controlled substance coming from the passenger compartment and/or trunk of Petitioner's vehicle. During a subsequent search, approximately 500 grams of powder cocaine, which field tested positive, was found in the trunk of Petitioner's vehicle. A cutting agent, used to process cocaine, was also found with the drugs. In addition to the drugs found inside the trunk, more cocaine was found inside the passenger compartment. A dollar bill and a small amount of powder cocaine was found inside the driver's door pocket right where Petitioner was sitting. Approximately $1,898 in United States currency was also found inside the driver's side door. (See Appendix E).

THE STATE OF FLORIDA'S DECISION TO *NOLLE PROSEQUI* ITS CASE IN FAVOR OF PETITIONER'S PROSECUTION BY THE FEDERAL GOVERNMENT

On August 15, 2008, the Office of the State Attorney in and for the First Judicial Circuit of Florida announced a *Nolle Prosequi*, stating that Petitioner was in federal custody and that he would be prosecuted federally on the foregoing charges. (See Appendix F). On November 4, 2008, Petitioner entered a plea of guilty to the charges in federal court and, on March 26, 2009, was sentenced to concurrent sentences of 276 months. On August 4, 2015, Petitioner's sentence was reduced to 221 months pursuant to Title 18 U.S.C. § 3582.

THE LOSS OF ALL OF PETITIONER'S LEGAL PAPERS, HIS UNFAMILIARITY WITH THE FEDERAL CRIMINAL JUSTICE SYSTEM AND HIS RELIANCE ON THE ASSISTANCE OF HIS FELLOW INMATES

Petitioner is a native of Cuba and has a very rudimentary knowledge of the English language. The record reflects that, for the entirety of his court appearances, Petitioner required and was afforded the services of a Spanish translator. Petitioner has a ninth grade education and immediately after school, he was employed in the construction industry. Petitioner reads and writes in Spanish. He understands some English but cannot write proficiently in English. As a result, after his conviction, Petitioner has had to rely on his fellow inmates to assist him with preparing legal papers which literally left Petitioner at the mercy of his fellow inmates. This instant Petition for Writ of Certiorari is being prepared by yet another fellow inmate who now demonstrates why Petitioner was unable to effectively prosecute the instant claim earlier, pursuant to Padilla v. Kentucky, 559 U.S. 356 (2010), and now argues that Petitioner is entitled to relief.

After his conviction and sentence, Petitioner was transported to the federal holdover in Tallahassee, Florida, to await his designation to a federal facility. In June of 2009, Petitioner was transported to the federal medical facility in Rochester, Minnesota, where he had been designated. Upon his arrival in Rochester, Minnesota, Petitioner was informed that his property, which contained all of his legal material, had not arrived. In fact, Petitioner would later learn that all of his legal material had been lost by either the U.S. Marshals and the Federal Bureau of Prisons or both.

On July 27, 2009, Petitioner's attorney filed his opening brief in Petitioner's direct appeal. While his direct appeal was pending, on March 31, 2010, the United States Supreme Court decided Padilla v. Kentucky. On June 2, 2010, the Eleventh U.S. Circuit Court of Appeals denied Petitioner's direct appeal. Petitioner then filed a *pro se* Petition for Writ of Certiorari to the U.S. Supreme Court and, having learnt about the Padilla decision from the USA Today newspaper, he attached a copy of the article to his Petition. (See Appendix G).

On October 19, 2010, the U.S. Supreme Court denied Petitioner's *pro se* Petition for Writ of Certiorari. Therefore, Petitioner's § 2255 was due within a year, specifically, on or about October 19, 2011.

PETITIONER'S INABILITY TO EFFECTIVELY PROSECUTE HIS PADILLA V. KENTUCKY CLAIM

Having lost all of his legal material, Petitioner was at a loss as to how to proceed. Petitioner therefore wrote a letter dated February 27, 2011, addressed to the FOIA office in Washington, seeking to obtain the documents from his court files that he needed to prepare his § 2255. (See Appendix H). Petitioner was fearful of being time-barred awaiting for a response to his FOIA request, therefore, on April 25, 2011, he submitted his Motion pursuant to Title 28 U.S.C. § 2255. However, Petitioner was unable to make a full-fledged argument in support of his Padilla claim because of the loss of his legal material so he attached a copy of the USA Today article about the Padilla decision. On June 14, 2013, the district court denied Petitioner's Motion pursuant to Title 28 U.S.C. § 2255.

Subsequent to the denial of his § 2255, Petitioner, assisted by a fellow inmate in Rochester, Minnesota, filed a variety of pleadings in both the United States District Court for the Northern District of Florida and the Eleventh U.S. Circuit Court of Appeals in an effort to attack the district court's denial of his motion to withdraw his underlying guilty plea, all to no avail. (See Appendix I).

Petitioner was initially designated to the medical facility in Rochester, Minnesota, and remained there for the entirety of his incarceration, spanning the ensuing nine years, until June 8, 2018 when he arrived at his current location, the McRae Correctional Facility in McRae Helena, Georgia.

ISSUE

PETITIONER'S RIGHTS UNDER THE DUE PROCESS CLAUSE AND THE EFFECTIVE ASSISTANCE OF COUNSEL WERE VIOLATED WHERE BOTH OF THE LOWER COURTS ERRED IN MISCONSTRUING, THEN DENYING PETITIONER'S PETITION PURSUANT TO THE ALL WRITS ACT

On November 13, 2017, Petitioner filed a Petition for a Writ of Mandamus under the All Writs Act, pursuant to Title 28 U.S.C. § 1651, in an effort to challenge the district court's denial of his efforts to withdraw his underlying guilty plea. Petitioner respectfully submits that his decision to plead guilty to the federal charges was a result of a combination of his mistaken belief about immigration laws, the ineffective assistance of counsel, intimidation, coercion and fear.

Immediately prior to Petitioner's change of plea hearing, Petitioner's attorney made a series of statements to Petitioner. Essentially, Petitioner's attorney repeatedly stated that, by pleading guilty, Petitioner would receive a lesser sentence but if Petitioner went to trial, he would be "punished" by the government with a very lengthy sentence. In fact, a review of Petitioner's testimony at his hearing to withdraw his guilty plea follows.

PETITIONER'S TESTIMONY AT HIS HEARING TO WITHDRAW HIS PLEA AGREEMENT

On March 16, 2009, the District Court held a hearing in regard to Petitioner's effort to withdraw his guilty plea. The pertinent part of Petitioner's testimony was as follows:

> "Q. Now, with the effect of a guilty plea on deportation or your legal status discussed between you and Mr. Lockhart before you changed your plea?
> A. I remember that on the 31st of July the Court was suspended because they didn't know what problem I had with immigration. But I never spoke about immigration. On the 19th he said that I didn't want to plead guilty because I did not want to speak to the government and because I did not want to be deported.
> Q. Are you – I'm sorry.
> A. But I never spoke. I never spoke about immigration. I had no problem with immigration. Well, now.
> Q. Are you in the United States legally at the time?
> A. I'm legal, yes.

Q. Prior to your arrest at least?
A. Before the arrest, yes.
Q. Was there any discussion between you and Mr. Lockhart that you could be deported if you entered a plea of guilty?
A. It was the girl the only one who talks about immigration.
Q. What girl?
A. The girl that's over there.
Q. The prosecutor?
A. The prosecutor.
Q. If you would, refer to her as the prosecutor.
A. I'm sorry.
Q. Did you – what did you hear her say? Was this during the plea colloquy you heard her say – the interpreter say the prosecutor saying something about deportation?
A. The judge said it was going to be five years for the one charge and then five years for the other, and then she said it was going to be more, more plus deportation.
Q. Plus deportation.
A. But Randal did not talk to me about that at the moment. He talked to me about that when he wrote a document to the judge in order to withdraw the guilty plea, when he wanted to withdraw from the case.
Q. Well, when you heard the prosecutor say something about deportation, did you turn to Mr. Lockhart and say something like what is she talking about?
A. It probably was Randal and the officer that was behind me. Randal told me not to ask anything to the Court, but he gave me a pencil and paper and told me to write anything that I wanted to ask. I first asked the question of him and then to the Court.
Q. Well, did you do that? Did you ask the question of what she mean by deportation?

A. No. I did not ask anything about immigration because I know any sentence that a person in the United States does who violate the law could end up in deportation. I didn't ask that question. I know that if I had problems with justice, I was going to have problems with deportation.

Q. Do you recall the Court saying anything to you about deportation in that discussion?

THE INTERPRETER: Interpreter needs a repetition.

BY MR. KYPREOS:

Q. Do you recall the judge saying anything during the plea discussion about deportation?

A. It was the prosecutor.

Q. The interpreter did not tell you that the judge had said that you could be deported?

A. I don't remember because when the girl corrected her when the prosecutor corrected her, she continued talking, but I don't remember..." Transcript, Pages 18- 20

At all times during Petitioner's hearing on his motion to withdraw his guilty plea, Petitioner's pre-plea attorney, Mr. Randal Lockhart, Esq., was present. Mr. Lockhart remained silent and did not object to Petitioner's testimony from which the reasonable inference can be drawn that Petitioner was being truthful when he stated that Mr. Lockhart did not inform him of the consequences that a guilty plea could have on Petitioner's immigration status. (See Appendix I – Transcripts, Document 23, Page 82).

PETITIONER'S BELIEF, AS A LEGAL PERMANENT RESIDENT, THAT HE WAS IMMUNE FROM THE POSSIBILITY OF DEPORTATION

It is very clear from the foregoing testimony that Petitioner has repeatedly maintained that he had had no discussions with his attorney about the effects that his pleading guilty could possibly have on his immigration status. Petitioner arrived in the United States in 1996 and in 1997 became a Legal Permanent Resident. *Petitioner was of the belief that only persons without legal documentation who were convicted of a crime would be eligible to be deported.*

Petitioner did not believe that he, with his status as a Legal Permanent Resident, could be subject to automatic deportation upon a guilty plea. If Petitioner's attorney had made it clear to Petitioner that Petitioner's belief was incorrect and that Petitioner, even though he was a Legal Permanent Resident, could be subject to deportation, Petitioner would not have pled guilty and would have insisted on proceeding to trial.

PADILLA V. KENTUCKY (2010)

> "We have long recognized that deportation is a particularly severe "penalty," Fong Yue Ting v. United States, 149 U.S. 698, 740, 13 S.Ct. 1016, 37 L.Ed.2d 905 (1893); but it is not, in a strict sense, a criminal sanction. Although removal proceedings are civil in nature, see INS v. Lopez-Mendoza, 468 U.S. 1032, 1038, 104 S.Ct. 3479, 82 L.Ed.2d 778 (1984), deportation is nevertheless intimately related to the criminal process. Our law has enmeshed criminal convictions and the penalty of deportation for nearly a century... And, importantly, recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders. Thus, we find it "most difficult" to divorce the penalty from the conviction in

the deportation context ... Moreover, we are quite confident that noncitizen defendants facing a risk of deportation for a particular offense find it even more difficult." Padilla v. Kentucky, 130 S.Ct. 1481.

INEFFECTIVE ASSISTANCE OF COUNSEL AND PADILLA V. KENTUCKY

"A [Petitioner] establishes an ineffective assistance of counsel claim when he shows that (1) counsel's performance was deficient, and (2) the deficient performance prejudiced him. See Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). Prejudice requires the [petitioner] to show that "there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694, 104 S.Ct. at 2068. The Court defined "reasonable probability" as a "probability sufficient to undermine the confidence in the outcome." Id. The Supreme Court in Padilla [v. Kentucky] held that, to provide effective assistance, a criminal defense attorney must advise his client that the pending criminal charge against him may carry a risk of adverse collateral immigration consequences. 559 U.S. at 364-65, 130 S.Ct. at 1483," Valdes v. United States, 503 Fed.Appx. 941, 942 (11th Cir. 2013).

THE CIRCUIT-SPLIT ON THE RETROACTIVITY OF PADILLA V. KENTUCKY

"Before the Supreme Court issued its 2010 decision in Padilla, most courts, including this one, held that counsel was under no constitutional obligation to advise a client of the possible deportation consequences of pleading guilty. See,

e.g., Padilla, 559 U.S. at ----, 130 S.Ct. at 1481 n. 9 (collecting cases); see also United States v. Campbell, 778 F.3d 764, 768-69 (11th 1985). In Padilla, the Supreme Court rejected this view, holding that an attorney renders deficient performance by failing to advise a non-citizen that a guilty plea "carries a risk of deportation." 559 U.S. at ----, 130 S.Ct. at 1486. The Supreme Court did not, however, alter or address the prejudice requirement for obtaining relief, which continues to demand a showing that there was a reasonable probability that, but for counsel's errors, the petitioner would not have pleaded guilty and would have insisted on going to trial. See id. at ----, 130 S.Ct. at 1478, 1483-84; Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 88 L.Ed. 2d 203(1985)."

"Circuits are split as to whether Padilla should be given retroactive effect to convictions that became final prior to its issuance, pursuant to the principles set forth in Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1984). See, e.g., Chaidez v. United States, 655 F.3d 684, 686 (7th Cir. 2011) (Padilla does not apply retroactively to cases on collateral review); United States v. Orocio, 645 F.3d 630, 641 (3rd Cir. 2011) (Padilla does apply retroactively)." United States v. Louis, 463 Fed.Appx. 819, 820 (11th Cir. 2012).

"Defendants have a Sixth Amendment right to counsel, a right that extends to the plea bargaining process." Lafler v. Cooper, --- U.S. ----, 132 S.Ct. 1376, 1384, 182 L.Ed.2d 398 (2012)(citing Missouri v. Frye, --- U.S. ----, 132 S.Ct. 1399, 1407-08, 182 L.Ed.2d 379 (2012); Padilla, 559 U.S. at 373, 130 S.Ct. 1473; Hill v. Lockhart, 474 U.S. 52, 57, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985)). "During plea negotiations defendants are 'entitled to the effective assistance of competent counsel.'" Id.

(quoting McMann v. Richardson, 397 U.S. 759, 771, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970)). The right to effective representation during the pre-guilty-plea stage of proceedings requires defense counsel to, inter alia, fulfill the "quintessential [ ] ... duty ... to provide [the] client with available advice about an issue like deportation." Padilla, 559 U.S. at 371, 130 S.Ct. 1473."

"The familiar two-pronged ineffective assistance analysis set forth in Strickland applies to alleged violations of the right to effective assistance of counsel during pre-guilty-plea proceedings. See Lafler, 132 S.Ct. at 1384 (citing Hill, 474 U.S. at 58, 106 S.Ct. 366); Frye, 132 S.Ct. at 1405; Padilla, 559 U.S. at 366, 130 S.Ct. 1473. Establishing prejudice under Strickland in the context of a claim that the entry of his guilty plea would result in deportation requires the defendant to demonstrate a reasonable probability that "but for counsel's unprofessional errors, ... the outcome of the plea process would have been different." Lafler, 132 S.Ct. at 1384 (citing Strickland, 466 U.S. at 694, 104 S.Ct. 2052; Frye, 132 S.Ct. at 1410). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694, 104 S.Ct. 2052. Additionally, to demonstrate prejudice and "obtain relief on this type of claim, a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances." Padilla, 559 U.S. at 372, 130 S.Ct. 1473. In conducting this prejudice inquiry "we consider the totality of the circumstances." United States v. Kayode, 777 F.3d 719, 725 (5th Cir. 2014)."

"Recently, emphasizing that it is "counsel's duty, not the court's to warn of certain immigration consequences," ... (quoting United States v. Urias-Marrufo, 744 F.3d 361, 369 (5th Cir. 2014)), we held that *"[w]arnings from a judge*

during a plea colloquy are not a substitute for effective assistance of counsel, and therefore have no bearing on the first Strickland prong,"... We further reasoned that, "while judicial admonishments are not a substitute for effective assistance of counsel, they are relevant under the second Strickland prong in determining whether a defendant was prejudiced by counsel's error. ... Accordingly, we held that a judicial admonishment is one of many factors and circumstances that a court may consider in the fact-based, totality of the circumstances prejudice analysis ... but did not determine whether such an admonishment, alone, can remedy or prevent prejudice caused by counsel's failure to provide effective advice about the immigration consequences of the guilty plea." United States v. Batamula, 788 F.3d 166, 170-71 (5th Cir. 2015).

THE VIABILITY OF THE ALL WRITS ACT AFTER THE 1996 ANTI-TERRORISM AND EFFECTIVE DEATH-PENALTY ACT (AEDPA)

Having lost his one-time-only-petition pursuant to title 28 U.S.C. § 2255, Petitioner brought his Padilla claim under The All Writs Act which provides that:

> "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." Title 28 U.S.C. § 1651(a)

"The authority of a federal court to issue a writ of *coram nobis* derives from the All Writs Act, codified at 28 U.S.C. § 1651(a). Section 1651(a) authorizes the federal courts to issue "all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." At common law,

the writ of *coram nobis* was available only "to correct errors of fact," enabling a petitioner "to avoid the rigid strictures of judgment finality by correcting technical errors such as happened through the fault of the clerk." United States v. Denedo, 556 U.S. 904, 910-11, 129 S.Ct. 2213, 173 L.Ed.2d 1235 (2009) ... In its modern form, however, "*coram nobis* is broader than its common-law predecessor" and "can issue to redress a fundamental error ... as opposed to mere technical errors." Id. at 911, 129 S.Ct. 2213 ... In order for a district court to reach an ultimate decision on *coram nobis* relief, a petitioner is obliged to satisfy four essential prerequisites. First, a more usual remedy (such as habeas corpus) must be unavailable; second, there must be a valid basis for the petitioner having not earlier attacked his convictions; third, the consequence flowing to the petitioner from his convictions must be sufficiently adverse to satisfy Article III's case or controversy requirement; and, finally, the error that is shown must be "of the most fundamental character." Bareano v. United States, 706 F.3d 568, 575-76 (4th Cir. 2013)(citing United States v. Akinsade, 686 F.3d 248, 252 (4th Cir. 2012)).

CASES IN WHICH PADILLA RELIEF WAS GRANTED ON COLLATERAL REVIEW

The All Writs Act can function as a vehicle by which an ineffective assistance of counsel claim can be brought. See United States v. Castro-Taveras, 841 F.3d 34, 36-37, 52-53 (1st Cir. 2016)(allowing a defendant to premise his *coram nobis* petition on a Sixth Amendment ineffective-assistance-of-counsel-claim); Murray v. United States, 704 F.3d 23, 28 (1st Cir. 2013) (noting that writs of *coram nobis* are "meant to correct error "of the most fundamental character; that is, such as render[ ] the proceeding itself irregular and invalid"); United States v.

Newman, 805 F.3d 1143 (D.C. Cir. 2015)(reversing and remanding for further proceedings); Chaidez v. United States,655 F.3d 684 (7th Cir. 2011); United States v. Orocio, 645 F.3d 630 (3rd Cir. 2011)(vacated and remanded).

THE GRANT OF RELIEF IN THE JACQUELINE HERNANDEZ CASE AS CONTRASTED WITH THE DENIAL OF RELIEF IN PETITIONER'S CASE

The viability of The All Writs Act, even after the 1996 Anti-Terrorism and Effective Death-Penalty Act, is probably best demonstrated in the case of one Jacqueline Hernandez, published at United States v. Hernandez, 283 F.Supp.3d 144, (S.D.NY. 2018). Ms. Hernandez became a Legal Permanent Resident on October 20, 1992. On June 10, 2004, Ms. Hernandez pled guilty to conspiracy to distribute cocaine and, on June 2, 2005, she was sentenced to time served and three years supervised release. Twelve years later, having been detained by Immigration officials and placed in removal proceedings, on September 17, 2017, she filed a motion for writ of error *coram nobis* under The All Writs Act. She testified that she had told her original criminal attorney that "under no circumstances would she plead guilty if it would cause her to lose her LPR status." Id. at 147. Ms. Hernandez further testified that "she informed [her criminal attorney] that if her entering a guilty plea would have immigration consequences, she would rather have a trial, and that [her criminal attorney] assured her that the plea would not cause her to lose her LPR status and face deportation." See id.

The district court found that Hernandez had "demonstrated circumstances compelling such action to achieve justice," that she had "demonstrated sound reasons for her failure to seek relief earlier," that she "continues to suffer legal

consequences from her conviction" and therefore granted the writ. Id. at 154.

The ruling in Hernandez, supra, stands in stark contrast to the Eleventh Circuit's decision in Petitioner's Application for Leave to File a Second or Successive 2255 and in the Magistrate's Report and Recommendation in Petitioner's § 2255.

In denying Petitioner's Application, the Eleventh Circuit held that:

> "Cabrera does not explicitly assert that his claims are supported by a new rule of law or newly discovered evidence. However, even assuming that Cabrera intended to assert that his claims were supported by a new rule of law or newly discovered evidence, as presented, they do not satisfy either statutory criteria. Padilla was decided prior to the filing of Cabrera's first § 2255 motion. It cannot qualify as a new rule of constitutional law because it was previously available to Cabrera. 28 U.S.C. § 2255(h)(2). The USA Today article that Cabrera attached to his application was published prior to the filing of his first sec 2255 motion. Because it was also previously available to Cabrera, it cannot qualify as newly discovered evidence. 28 U.S.C. § 2255 (h)(1)." (See Appendix I, Document # 2).

In recommending that Petitioner's All Writs Motion be denied, the Magistrate stated that:

> "Cabrera appears to believe that he has a claim under Padilla v. Kentucky, 559 U.S. 356 (2010). Appended to his motion is a copy of the Eleventh Circuit's order denying his application for leave to file a second or successive § 2255 motion ... In its order, the Eleventh Circuit notes that that Padilla was decided before Cabrera filed his first § 2255 motion, and as such did not authorize the filing of a second or successive motion ... Cabrera notes that the appellate court did *not* say that he did not have a claim under Padilla, and thus seeks to pursue this claim pursuant to the All Writs Act." (See Appendix D).

Both decisions outlined above failed to grasp the very difficult circumstances which confronted Petitioner as previously explained above. Petitioner's direct appeal had been pending in the Eleventh U.S. Circuit Court of Appeals when Padilla v. Kentucky had been decided on March 31, 2010. Petitioner then learnt about the decision in the USA Today article of April 1, 2010. At the time, Petitioner, through no fault of his own, did not have any of his legal material. They had been lost by either the United States Marshal's Service or the Federal Bureau of Prisons. Furthermore, Petitioner is not proficient in the English language and was at the mercy of his fellow inmates who had assisted him in filing his § 2255. Even though his § 2255 was submitted without specifically raising the Padilla claim, he did attach a copy of the April 1, 2010 USA Today article which had announced the Supreme Court's March 31, 2010 decision in Padilla v. Kentucky. Simply put, Petitioner had done the very best that he could have done under the very difficult circumstances in which he found himself.

PETITIONER'S PADILLA V. KENTUCKY CLAIM SATISFIES THE FOUR ESSENTIAL PREREQUISITES UNDER THE ALL WRITS ACT

Although Petitioner is in a very similar situation as Ms. Hernandez, supra, he has not received the same benefit. Whereas Ms. Hernandez filed her motion seven years after the Padilla decision and was granted relief under the All Writs Act, Petitioner, under extremely difficult circumstances, did everything possible to advance his Padilla claim as soon as he became aware of the Padilla decision in 2010 but has been repeatedly denied relief. Petitioner respectfully submits

that he is entitled to the same relief as Ms. Hernandez and other petitioners who raised meritorious claims and were granted relief post-Padilla.

Petitioner's attorney was constitutionally ineffective for not affirmatively advising Petitioner that Petitioner would suffer grave consequences if he pled guilty which was certain to include the high probability that Petitioner would be deported. Petitioner has been prejudiced because having pled guilty, an Immigration detainer has been placed upon Petitioner with the "possible deportation to Cuba." Further, Petitioner, despite the loss of all of his legal material, has outlined his affirmative efforts to prosecute his Padilla v. Kentucky claim. Like Ms. Hernandez, if Petitioner had been informed by his attorney that a guilty plea would have very likely subjected Petitioner to deportation, Petitioner would not have pled guilty and would have insisted on proceeding to trial.

Simply put, Petitioner has "demonstrated circumstances compelling such action to achieve justice," that he has "demonstrated sound reasons for his failure to seek relief earlier" and that he "continues to suffer legal consequences from his conviction." As such, Petitioner respectfully submits that his is entitled to the grant of relief pursuant to Title 18 U.S.C. § 1651(a).

RELIEF REQUESTED

Petitioner respectfully requests that this court GRANT this Petition, Vacate Petitioner's conviction and REMAND this case to the Eleventh U.S. Circuit Court of Appeals with instructions to further REMAND this case to the District Court with instructions to GRANT Petitioner a new trial, or GRANT any other relief that this court deems proper, necessary, just and equitable.

REASONS FOR GRANTING THE PETITION

Petitioner has no legal training but has endeavored to present to this court the facts and relevant case law to the very best of his ability. Petitioner believes that he, like others in a variety of other circuits, is entitled to relief under Padilla v. Kentucky and should be granted the opportunity to make his claim in the district court. Additionally, this court should GRANT this petition in order to resolve the split among the circuits as to the retroactivity of Padilla v. Kentucky.

CONCLUSION

For all of the foregoing reasons, Petitioner's case is extraordinary. Petitioner is a Legal Permanent Resident is was wholly unfamiliar with the federal criminal justice system; a "first-time, non-violent offender." Petitioner was unable to take advantage of his rights under the then-recent U.S. Supreme Court decision in Padilla v. Kentucky due to a combination of the ineffective assistance of counsel, Petitioner's very limited command of the English language and the loss of all of his legal material by the United States Marshal's Service and the Federal Bureau of Prisons. This petition for writ of certiorari should be GRANTED in order to allow Petitioner his one-time opportunity to pursue his meritorious Padilla v. Kentucky claim.

Petitioner respectfully submits that this Petition for Writ of Certiorari is being submitted in good faith and is based on the decisions, orders and laws of the Supreme Court of the United States.

Respectfully Submitted,

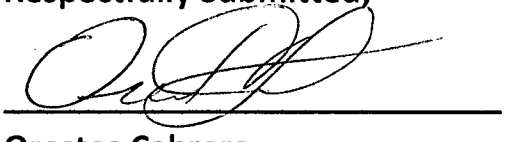
Date: August 2, 2018

Orestes Cabrera
07021-017 H02-301U
McRae Correctional Facility
P. O. Drawer 55030
McRae Helena, GA 31055

CERTIFICATE OF SERVICE

I, ORESTES CABRERA, HEREBY CERTIFY, that a true and correct copy of the foregoing was placed in the McRae Correctional Facility Legal Mail-box, with proper, first-class postage affixed, addressed to the Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Ave., N.W., Washington, DC, 20530-0001, on this 2nd day of August, 2018.

Respectfully Submitted,



Orestes Cabrera
07021-017 H02-301U
McRae Correctional Facility
P. O. Drawer 55030
McRae Helena, GA 31055