No. 18-14

In the Supreme Court of the United States

CARLOS DONJUAN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court abused its discretion in denying a writ of coram nobis on petitioner's claim that his attorney and the court did not adequately warn him of the immigration consequences of his plea.

2. Whether the district court abused its discretion in denying a writ of coram nobis on petitioner's claim that he was selectively prosecuted and thereby denied equal protection.

3. Whether the district court abused its discretion in denying a writ of coram nobis on petitioner's claim that 18 U.S.C. 1546(b)(1) is unconstitutionally vague.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. B1-B31) is not published in the Federal Reporter but is reprinted at 720 Fed. Appx. 486. The order of the district court (Pet. App. C1-C33) is not published in the Federal Supplement but is available at 2016 WL 10860964.

JURISDICTION

The judgment of the court of appeals was entered on January 3, 2018. A petition for rehearing was denied on January 30, 2018 (Pet. App. A1-A2). The petition for a writ of certiorari was filed on April 30, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the District of Wyoming, petitioner was convicted of use of unlawfully issued immigration documents, in violation of 18 U.S.C. 1546(b)(1). Judgment 1.

He was sentenced to time served plus up to ten additional days of imprisonment. Judgment 2. Petitioner did not appeal his conviction or sentence. Petitioner later filed a petition for a writ of coram nobis, which the district court denied. Pet. App. C1-C33. The court of appeals affirmed. *Id.* at B1-B31.

1. In April 2009, petitioner provided his employer in Gillette, Wyoming, fraudulent identification documents in connection with his application for employment. Presentence Investigation Report (PSR) 4. Specifically, he provided his employer a Social Security card and an alien registration receipt card ("green card") that federal agents later determined were not lawfully issued to petitioner. *Ibid.*

A grand jury in the District of Wyoming indicted petitioner on one count of using identification documents, knowing and having reason to know that said documents were not lawfully issued for his use, for the purpose of satisfying a requirement of the employment verification system, in violation of 18 U.S.C. 1546(b)(1). Indictment 1.

2. On September 12, 2011, in exchange for the government's agreement to recommend a sentence of time served, petitioner pleaded guilty to the charged count. Plea Tr. 3, 21. Before accepting petitioner's guilty plea, the district court conducted an extensive colloquy to determine whether petitioner's plea was knowing and voluntary. *Id.* at 3-19.

The district court informed petitioner that because he was entering a plea of guilty, petitioner "would likely be removed from the United States through the administrative process." Plea Tr. 6. The court further explained that petitioner "need[ed] to understand that [a guilty plea] could have and likely would have adverse impacts upon [his] ability to legally seek reentry into

the United States at a later time." *Ibid.* Petitioner confirmed that he understood. *Ibid.*

The district court returned to the issue later in the colloquy and again informed petitioner that "in addition to [other] fines and penalties, there would be adverse consequences upon [his] ability to remain in the United States, and there would likely be adverse consequences as to [his] ability to obtain lawful reentry at a later time." Plea Tr. 11. Petitioner again confirmed that he understood. *Ibid.* After confirming that petitioner had not "been promised any thing or threatened or forced in any way" to plead guilty and had discussed the plea with his counsel, *id.* at 17-18, the court accepted petitioner's guilty plea, *id.* at 22.

On October 6, 2011, the district court held a sentencing hearing. At that hearing, the government informed the court that the parties anticipated that petitioner "would be sentenced to time served plus up to ten days to allow for his deportation." Sent. Tr. 3. Subsequently, petitioner's counsel noted that he had been "very pessimistic * * * that a plea to this would mean automatic deportation for [petitioner]." *Id.* at 6. He expressed a view, however, that "[w]ith more research and talking with immigration in Denver, there is some pretty good hope that, given his circumstances in this very specific charge, that [petitioner] will be eligible for legal permanent resident status and has a good chance of receiving that, [for] which I think he would be an excellent candidate." *Ibid.*

The district court sentenced petitioner to time served plus ten additional days of imprisonment. Sent. Tr. 8. The court explained that "[t]he ten days is in order to let the immigration department get the deportation pro-

ceedings worked out." *Ibid.* The court informed petitioner that "[u]pon release from imprisonment, then [he would] be delivered to an immigration official for deportation in accordance with the established procedures." *Ibid.*

The judgment entered after sentencing likewise states that petitioner was sentenced to "a term of time served, plus up to ten (10) days to allow time for deportation" and to be delivered "to a duly authorized Immigration official for deportation" following this term of imprisonment. Judgment 2 (emphasis omitted). Petitioner did not appeal his conviction or sentence.

3. In July 2011, two months before petitioner's guilty plea, the Department of Homeland Security (DHS) served petitioner with a notice to appear before an immigration court, charging him as being unlawfully present in the United States without proper admission or parole, in violation of 8 U.S.C. 1182(a)(6)(A)(i). Pet. App. B5-B6. In this separate immigration proceeding, petitioner conceded his removability but applied for discretionary cancellation of removal under 8 U.S.C. 1229b(b)(1). Pet. App. B6.

In February 2014, the immigration court denied petitioner's application. Pet. App. B6. Under the immigration statutes, the Attorney General may cancel the removal of certain aliens only if, among other requirements, the alien has not been convicted of violating 18 U.S.C. 1546. See 8 U.S.C. 1227(a)(3)(B)(iii), 1229b(b)(1)(C). Petitioner's September 2011 conviction for violating 18 U.S.C. 1546(b)(1) thus rendered him ineligible for cancellation of removal. In September 2015, the Board of Immigration Appeals (BIA) affirmed the decision of the immigration court and ordered that petitioner be removed. Pet. App. B6-B7. The court of appeals denied

petitioner's request to review that order. *Id.* at B7; see *Donjuan-Laredo* v. *Sessions*, 689 Fed. Appx. 600 (10th Cir. 2017), cert. denied, 138 S. Ct. 1290 (2018) (No. 17-983).

4. Following the decision of the BIA, on November 18, 2015, petitioner filed in the district court an "Emergency Petition for Issuance of Writ *Coram Nobis*," in which he sought to have his guilty plea and judgment of conviction vacated. D. Ct. Doc. 29 (capitalization and emphasis omitted). Petitioner argued that he had received ineffective assistance of counsel under *Padilla* v. *Kentucky*, 559 U.S. 356 (2010), and that his guilty plea was not knowing and voluntary because he had not been properly advised of the immigration consequences of his plea. D. Ct. Doc. 29, at 3-11. Petitioner further argued that he was the victim of selective prosecution and that the statute underlying his conviction, 18 U.S.C. 1546(b)(1), is unconstitutionally vague. D. Ct. Doc. 29, at 11-18.

On July 7, 2016, the district court denied the petition. Pet. App. C1-C33. The court first explained that "unlike *Padilla*, [petitioner] was repeatedly advised that his guilty plea would likely result in his deportation and would also impact his ability to seek reentry into the United States." *Id.* at C14. Although petitioner had submitted an affidavit asserting that "'[n]o one ever told me that I had no hope of staying in the United States,'" the court explained that the affidavit was "contrary to the sworn statements [petitioner] gave during sentencing that he understood the likelihood he would be removed from the United States." *Id.* at C16 (quoting D. Ct. Doc. 29-4, at 1) (first set of brackets in original). The court

therefore found that petitioner had not been "incorrectly advised that his plea would have no effect on his immigration status." *Id.* at C17.

The district court noted the statement by petitioner's counsel at sentencing that he had hope that petitioner could remain in the United States, but observed that it had not been made "prior to [petitioner's] guilty plea," but instead "a couple months later." Pet. App. C17-C18. The court also observed that petitioner's counsel had contrasted the view expressed at sentencing with his view "at the time [he] got the case," which had been "very pessimistic." *Id.* at C18 (citation omitted). The court accordingly found that while petitioner "may have had some hope at the time of his sentencing that he could potentially stay in the United States, there is nothing to indicate that at the time he changed his plea any of this information was provided to [petitioner]." *Ibid.* And the court determined that petitioner "received adequate advice on the risks of deportation during the plea process" and thus did not demonstrate that he received ineffective assistance of counsel, or that his plea was not knowing or voluntary. *Id.* at C20.

The district court also rejected petitioner's selective-prosecution and vagueness challenges. As to the former, it observed that petitioner "failed to present any evidence to support a claim for selective prosecution," and found "absolutely nothing to suggest that by charging [petitioner] under the section selected by the Government that [petitioner] was unfairly singled out, or treated differently from other defendants." Pet. App. C25. As to the latter, "[t]he language of [18 U.S.C. 1546(b)(1)] is clear and ordinary people can understand that know-

ingly using a false identification document for employment verification purposes is prohibited under the statute." Pet. App. C28.

5. The court of appeals affirmed in an unpublished order. Pet. App. B1-B31.

The court of appeals first explained that to justify the issuance of a writ of coram nobis, a petitioner must "show specifically '(1) an error of fact; (2) unknown at the time of trial; (3) of a fundamentally unjust character which would have altered the outcome of the challenged proceeding had it been known.'" Pet. App. B9 (quoting *United States* v. *Carpenter*, 24 Fed. Appx. 899, 905 (10th Cir. 2001)) (unpublished) (citation omitted). The court further explained that the writ is available only when "the asserted error constitutes 'a complete miscarriage of justice,'" *id.* at B10 (quoting *Klein* v. *United States*, 880 F.2d 250, 253 (10th Cir. 1989)), and a petitioner must have exhausted all other available remedies, *id.* at B9.

The court of appeals found no abuse of discretion in the district court's denial of the writ of coram nobas in the circumstances here. Pet. App. B28-B29. The court of appeals rejected petitioner's claim, premised on *Padilla*, that he had received ineffective assistance of counsel about the immigration consequences of his plea. *Id.* at B11-B24. The court noted two distinctions between petitioner's case and *Padilla*. "First, unlike the petitioner in *Padilla*, [petitioner's] guilty plea did not render him removable," *id.* at B14; rather, "the guilty plea made [petitioner] ineligible to receive the discretionary relief of cancellation of removal, which is fundamentally different than a lawful resident alien being subject to removal due to a guilty plea," *id.* at B15-B16. Second, petitioner "was advised correctly that his guilty plea

would likely result in his deportation." *Id.* at B16. "In contrast, the petitioner in *Padilla* was advised affirmatively and erroneously that his guilty plea would not compromise his ability to remain in the United States." *Ibid.*

The court of appeals emphasized petitioner's statements in open court "that he was guilty of knowingly using unauthorized documents to obtain employment, he understood the consequences of his guilty plea—including he would likely be removed from the United States—and he was satisfied with his attorney's performance." Pet. App. B19. The court observed that the only account of what petitioner's counsel allegedly told him before the guilty plea was petitioner's own "self-serving affidavit" and found that it did "not overcome [petitioner's] burden to demonstrate his counsel's performance was deficient." *Id.* at B20-B21 (citing *Strickland* v. *Washington*, 466 U.S. 668, 687 (1984)). The court reasoned that the statements of petitioner's counsel at sentencing "do not show his counsel gave him false hope *before* he entered the guilty plea." *Id.* at B21 n.3. The court thus determined that petitioner had "failed to overcome the presumption of verity of open court declarations, and he failed to overcome his burden of proof to show his lawyer's performance was deficient." *Id.* at B23.

The court of appeals likewise rejected petitioner's claim that his due process rights were violated because the district court did not tell him "the degree of risk of removal he faced as a result of his plea." Pet. App. B25. The court of appeals found that petitioner "received correct and adequate advice during the [district] court's colloquy." *Ibid.* The court of appeals also explained that it had previously declined to extend *Padilla* to the due

process context and that petitioner "fail[ed] to offer any authority to support his position that the district court owed him the same duty of advisement under the Due Process Clause as his defense attorney owed him under the Sixth Amendment." *Id.* at B27-B28; see *id.* at B26.

As for petitioner's remaining claims—that his equal protection rights were violated because he was selectively prosecuted and that 18 U.S.C. 1546(b) is unconstitutionally vague—the court "agree[d] with the district court's resolution of these claims and ha[d] nothing further to add to the district court's analysis." Pet. App. B29-B30 n.6.

ARGUMENT

Petitioner renews (Pet. 27-82) his contentions that he received inadequate advice and warnings about the immigration consequences of his guilty plea; that he was selectively prosecuted in violation of his equal protection rights; and that 18 U.S.C. 1546(b)(1) is unconstitutionally vague. Those claims lack merit, and the court of appeals correctly determined that the district court did not abuse its discretion in declining to issue an extraordinary writ of coram nobis. Petitioner does not identify any division in the courts of appeals on the issues he raises. No further review is warranted.

1. A writ of coram nobis "was traditionally available only to bring before the court factual errors 'material to the validity and regularity of the legal proceeding itself,' such as the defendant's being under age or having died before the verdict." *Carlisle* v. *United States*, 517 U.S. 416, 429 (1996) (quoting *United States* v. *Mayer*, 235 U.S. 55, 68 (1914)). This Court accordingly has held that coram nobis relief is appropriate only in rare cases, to correct errors "of the most fundamental character." *United States* v. *Morgan*, 346 U.S. 502, 512 (1954) (citation

omitted); see *id.* at 510-511. In particular, to ensure "that finality is not at risk in a great number of cases," this Court has "limit[ed] the availability of the writ to 'extraordinary' cases presenting circumstances compelling its use 'to achieve justice.'" *United States* v. *Denedo*, 556 U.S. 904, 911 (2009) (quoting *Morgan*, 346 U.S. at 511). Even then, coram nobis relief is available only where "sound reasons exist[] for failure to seek appropriate earlier relief." *Morgan*, 346 U.S. at 512; see *Denedo*, 556 U.S. at 911. Petitioner's situation is not one of those unusual circumstances in which the writ of coram nobis might be appropriate.

2. Petitioner first contends (Pet. 27-50) that he is entitled to the issuance of a writ of coram nobis based upon this Court's decision in *Padilla* v. *Kentucky*, 559 U.S. 356 (2010). Petitioner argues both that his conviction is invalid because his lawyer provided ineffective assistance by failing to adequately advise him of the immigration consequences of the guilty plea, and that his plea violates due process because the district court also did not adequately advise him of those consequences. The court of appeals correctly rejected both claims and its decision does not conflict with a decision of any other court of appeals.

a. To make out a claim for ineffective assistance of counsel, a defendant must show that his counsel's representation "fell below an objective standard of reasonableness" and "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, 688, 694 (1984). *Padilla* held that counsel performs deficiently when he fails to provide a defendant with reasonable advice "about an issue like deportation." 559 U.S. at 371. In that situation, a defendant who

has pleaded guilty can demonstrate prejudice by showing "a reasonable probability that he would have rejected the plea" had he been adequately advised. *Lee* v. *United States*, 137 S. Ct. 1958, 1967 (2017).

The court below correctly applied that legal standard and found that the district court did not abuse its discretion in denying a writ of coram nobis on this issue. As the court of appeals explained, petitioner "stated in court that he was guilty of knowingly using unauthorized documents to obtain employment, he understood the consequences of his guilty plea—including he would likely be removed from the United States—and he was satisfied with his attorney's performance." Pet. App. B19. "Solemn declarations in open court carry a strong presumption of verity." *Blackledge* v. *Allison*, 431 U.S. 63, 74 (1977). And "[c]ourts should not upset a plea solely because of *post hoc* assertions from a defendant," but "should instead look to contemporaneous evidence." *Lee*, 137 S. Ct. at 1967. In light of petitioner's representation when he entered his guilty plea in 2011 that he understood the plea would likely lead to his deportation, the court of appeals correctly determined that petitioner's *post hoc* October 2015 affidavit did not meet his burden to demonstrate that his counsel's performance had been deficient. See Pet. App. B19-B21; *Lee*, 137 S. Ct. at 1967; *Strickland*, 466 U.S. at 687.

Contrary to petitioner's assertion (Pet. 27-35), the court of appeals did *not* adopt a per se rule that *Padilla* is applicable only to lawful permanent residents. While the court noted that it was "not persuaded the holding in *Padilla* applies" when petitioner "was advised correctly that his guilty plea would likely result in his deportation," and petitioner "was already subject to removal pursuant to the Notice to Appear he received

from DHS on July 19, 2011," Pet. App. B14-B16, the court did not reject petitioner's claim on this basis. Rather, the court applied the traditional *Strickland* framework and held that petitioner's self-serving affidavit did not meet his burden of demonstrating his counsel's deficient performance in light of petitioner's prior representations to the district court. *Id.* at B19-B21. Petitioner's disagreement (Pet. 40-50) with the lower courts' determination that his statements to the district court contradict his statements in his affidavit is a fact-bound issue that does not warrant this Court's review.

b. Petitioner's argument (Pet. 35-40, 51-53) that the district court violated his due process rights by failing to adequately advise him of the immigration consequences of entering a guilty plea similarly lacks merit.

Due process requires a guilty plea to be knowing, intelligent, and voluntary. *Brady* v. *United States*, 397 U.S. 742, 755 (1970). A guilty plea "entered by one fully aware of the *direct* consequences" of the plea satisfies this standard. *Ibid.* (emphasis added; citation omitted). By contrast, this Court has never held that a defendant must be aware of *indirect* or *collateral* consequences of pleading guilty to satisfy due process. Cf. *Hill* v. *Lockhart,* 474 U.S. 52, 56 (1985) ("We have never held that the United States Constitution requires the State to furnish a defendant with information about parole eligibility [a collateral consequence] in order for the defendant's plea of guilty to be voluntary.").

Removal is a collateral, not direct, consequence of conviction because it is not part of the punishment for the defendant's offense. See *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984). Contrary to petitioner's suggestion (Pet. 51-53), *Chaidez* v. *United States*, 568 U.S. 342 (2013), did not hold otherwise. *Chaidez* simply said

that "however apt" the distinction between direct and collateral consequences "might be in other contexts, it should not exempt from Sixth Amendment scrutiny a lawyer's advice (or non-advice) about a plea's deportation risk." *Id.* at 352. *Chaidez* did not address *a judge's* responsibilities in accepting a guilty plea under the Fifth Amendment.

Nor did *Chaidez* (or any other case) hold that *Padilla* created an additional Fifth Amendment due process right to be advised by the trial court of the immigration consequences of a guilty plea. See *United States* v. *Nicholson*, 676 F.3d 376, 382 n.3 (4th Cir. 2012) ("*Padilla* was based solely on the constitutional duty of defense counsel, and it does not speak to the duty of judges.") (citation omitted); *United States* v. *Delgado-Ramos*, 635 F.3d 1237, 1241 (9th Cir. 2011) (per curiam) (because *Padilla* "sheds no light on the obligations a district court may have under Rule 11 and due process[,] * * * the district court did not err in failing to advise [the defendant] of the immigration consequences of his plea"). Petitioner cites (Pet. 35-40) no authority for his contrary position.

In any event, the district court repeatedly advised petitioner of the immigration consequences of his guilty plea. See pp. 2-3, *supra*. The court's admonishments would have satisfied the requirement in Federal Rule of Criminal Procedure 11(b)(1)(O)—enacted two years after petitioner's change-of-plea hearing—that a district court must inform a defendant "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." See Fed. R. Crim. P. 11 advisory committee's note (2013

Amendments). The court of appeals thus correctly determined that petitioner "received correct and adequate advice during the [district] court's colloquy." Pet. App. B25. Further review is not warranted.

3. Petitioner's contention (Pet. 53-60) that his equal protection rights were violated by selective prosecution lacks factual or legal support.

This Court's analysis in *United States* v. *Armstrong*, 517 U.S. 456 (1996), governs claims alleging selective or discriminatory prosecution. In *Armstrong*, defendants sought dismissal of the charges against them on the ground that they were selected for federal prosecution because of their race. *Id.* at 458. This Court held that to make out a claim of selective prosecution, a defendant must satisfy "'ordinary equal protection standards'": he must show that "the federal prosecutorial policy 'had a discriminatory effect and that it was motivated by a discriminatory purpose.'" *Id.* at 465 (quoting *Wayte* v. *United States*, 470 U.S. 598, 608 (1985)).

Petitioner alleges no discriminatory effect or purpose in his prosecution, and his claim therefore fails. As the district court explained in the analysis adopted by the court of appeals, "[t]here is absolutely nothing to suggest that by charging [petitioner] under the section selected by the Government that [petitioner] was unfairly singled out, or treated differently from other defendants." Pet. App. C25. Although petitioner suggests (Pet. 55-57) that he was selectively prosecuted under 18 U.S.C. 1546 because, in his view, that statute imposes a duty only on employers, his argument is both insufficient to support a selective-prosecution claim and incorrect as a matter of law. See *Hoffman Plastic Compounds, Inc.* v. *NLRB*, 535 U.S. 137, 148 (2002) (explaining that under 18 U.S.C. 1546(b), "[a]liens who use or attempt to

use [fraudulent] documents are subject to fines and criminal prosecution").

4. Petitioner also argues (Pet. 60-82) that 18 U.S.C. 1546(b)(1) is unconstitutionally vague. The court of appeals correctly rejected this claim, and petitioner has identified no authority to the contrary.

The Due Process Clause bars enforcement of a criminal statute on vagueness grounds only if the statute "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *United States* v. *Williams*, 553 U.S. 285, 304 (2008). Courts apply a "strong presumpti[on]" that acts of Congress are not unconstitutionally vague. *Skilling* v. *United States*, 561 U.S. 358, 403 (2010) (citation omitted). And a statute is void for vagueness only if it requires proof of an "incriminating fact" that is so indeterminate as to invite arbitrary and "wholly subjective" application. *Williams*, 553 U.S. at 306; see *Smith* v. *Goguen*, 415 U.S. 566, 578 (1974) (A vague statute lacks "any ascertainable standard for inclusion and exclusion" of conduct within its scope.).

Section 1546(b)(1) contains no such indeterminacy. That statute criminalizes using "an identification document, knowing (or having reason to know) that the document was not issued lawfully for use of the possessor, * * * for the purpose of satisfying a[n] [employer verification] requirement of section 274A(b) of the Immigration and Nationality Act." 18 U.S.C. 1546(b)(1). As the district court explained in the analysis adopted by the court of appeals, the language of the statute "is clear and ordinary people can understand that knowingly using a false identification document for employment verification purposes is prohibited under the statute." Pet. App. C28.

Petitioner identifies no authority to the contrary. Instead, petitioner reiterates his argument (Pet. 64-70) that Section 1546(b)(1) imposes a duty only on employers, but that argument is contrary both to the plain language of the statute and to this Court's interpretation of it. See *Hoffman Plastic Compounds*, 535 U.S. at 148. Petitioner's remaining argument (Pet. 74-82) that, based on his interpretation of the statute, he is innocent and never intended to defraud the government is thus inapposite and does not advance his claim that the statute is unconstitutionally vague. Regardless, that fact-bound contention does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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