**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF NEW YORK**

---

United States of America,

Plaintiff,

Court File No: CR-03-492
United States Court House,
Brooklyn New York

vs.

Joy Pope,

Defendant,

---

**DEFENSE`S REPLY MEMORANDUM**

---

## INTRODUCTION

Defendant respectfully submits this memorandum in reply to the memorandum in opposition dated January 3, 2012 filed by the government attorney. Defendant filed a motion seeking the issuance of a writ for *coram nobis*, pursuant to the All Writs Act, 28 US.C 1651(a) asking the court to re-open this matter, allowing her to withdraw guilty plea dated January 30, 2003 and vacate the judgment of conviction entered on January 22, 2004 based amongst other things, that she was not properly advised of the immigration consequences of the plea agreement she entered into. Defendant in support of her motion relies on the landmark decision of Padilla v. Kentucky, 130 S.Ct. 1473 (2010). The available records (Indictment & Transcript of the Plea) establish support for the argument of the Defendant.

Defendant argues that she was not effectively assisted by counsel, in that she was not affirmatively advised of the immigration consequences of the plea agreement. The records established that the Court was not even clear of the immigration consequences of the plea agreement for the Defendant. The Court in its assumption mentioned in a brief conversation with the attorneys i.e. both government and defense`s attorneys, "that it might be a possible

deportable offense". The admonishment was never an affirmative inquiry or careful explanation to the Defendant by the Court to clarify, that the Defendant understood the consequences of the plea agreement she was entering into. The record clearly shows that the colloquy that transpired was just between the Court, defense and government attorneys. Defendant was not part of it.

Defendant also specifically argues that the Indictment upon which she was charged with five counts lacked specificity and particularity of monetary loss tied to each count of the indictment. The charges are overlapping, arising from the same conduct within the same time period and although she ended up pleading guilty through a plea agreement, to Count One: Mail Fraud of the indictment, there was no specific amount of monetary loss that was associated with the said Count One. Defendant`s appeal right was also waived by the plea deal. Nine years after the plea agreement and for the first time, Defendant now faces deportation by Immigration Service on the basis of her plea. The issue before the immigration court is whether or not the Defendant conviction on the single count Defendant pled to, meets the definition of Aggravated felony under INA §101(a0 (43)(M)(1), which requires the amount of loss tied to the particular count to exceeds $10,000.

Defendant is prejudiced and continues to suffer prejudice and legal consequences because the way the plea was structured did not provide any information on the amount of loss tied to the one count the Defendant was convicted of, regardless of the amount of restitution or special assessment agreed to. An effective assistance of counsel under the reasonable objective standard would have addressed this vital legal information and requirement. Defendant argues that, if the portion of monetary loss tied to Count One to which the Defendant pled guilty does not exceed $10,000.00 threshold, ( The amount of restitution which could have been from the dismissed counts is irrelevant for immigration

purposes ). Her offense would not have been considered as an aggravated felony under INA $ 240(c)(4)(A)(1) and she would have been able to qualify for an application for waiver under Section 212(h) of the Immigration Act which could have precluded her deportation or removal from the United States. Defendant argues that her counsel acted ineffectively in not obtaining a clarifications and breakdown of monetary loss as relates to each and everyone of the charges. There is no record of what is the actual monetary loss ties to Count One to which she pled guilty.

In the Defendant`s sworn statement attached as **Exhibit 3** to Affidavit of **Ayodele Ojo ( *Ojo`s Affid.* at 3) .** Defendant stated that she recollected that her attorney informed her during their meetings, that the plea agreement would not lead to deportation because it was not one of the offenses that will require an automatic deportation. She also stated that, she would not have accepted the plea and would have rather go to trial if she was certain that deportation was mandatory. She said she agreed to pay back the entire assistance she had ever received from Section 8 and just get done with the matter. She stated that there was never a breakdown shown of the monetary amount of loss to each or any of the five counts of the indictment and nobody ever brought any such information to her attention. . She further stated that her attorney only met her in Court and informed her about the plea deal, and they never sat down to consider the evidence, any discovery document her actual income or other things. She stated that she has never even been to the office of the attorney. All the meetings between her and her attorney were in the Courthouse, a brief meeting before the hearing.

In the government`s response to Defendant`s motion as contained in the memorandum in opposition dated January 3, 2013, The government counsel admitted that the government could not find the record of the Plea Agreement in this case . However, the government counsel went ahead to base his arguments on substituted facts, specifically

designed to answer the Defendant`s present motion for *writ coram nobis* . The documents cited by the government`s attorney such Plea Agreement, Comparable Version /Chart of breakdown of the Charges and Monetary Loss attached to each count, are not be part of the original record. The government`s counsel attempted to address the issue of lack of specificity in the five counts indictment and the monetary loss tied to each counts by coming up with a made up diagram or chart. See page 5 of the government`s memorandum in opposition dated January 3, 2012. In an attempt to do what was not done initially the government's counsel called the made up chart a "Comparable Version" and relied extensively on Plea Agreement, that the government claims could not be found or located. See footnotes 1 and 3 in government memorandum in opposition.

The reasonable question then is, what source is the government argument and "statement of facts" based upon when it admitted that the record could not be located. In the deportation proceeding against the Defendant, the Immigration Court even asked for the copy of plea agreement or any other document that may shed light on the monetary loss tied to the conviction on the single count Defendant pled to. Such document could not be found. The Defendant, a mother of five United States Citizen children, continues to be locked up in immigration detention, faces imminent deportation, and continues to suffer adverse legal consequences as result of the conviction in this matter . Even though she has paid the entire $67,608.00 restitution back to the government and is no longer on probation. Without the Plea Agreement which consists of the explanation of the amount of loss tied to the one count Defendant pled to, there is no other way to advance the immigration defense /remedies for the Defendant. Accepting the made up "chart" by the government in the place of the original record will amount to injustice and substantial prejudice to the Defendant. There are extraordinary and compelling circumstances in the matter that warrants the issue of writ of *coram nobis* to achieve justice.

## ARGUMENT

### COURT SHOULD DISREGARD THE GOVERNMENT`S ARGUMENT BECACUSE IT IS BASED ON MADE UP FACTS, NOT PART OF THE ORIGINAL RECORD.

One of the core arguments and the grounds upon which the Defendant based her motion to reopen and vacate her conviction in this matter is that, she suffered substantial prejudice due to the deficient nature of the poorly drafted indictment which lacks specificity in term of the monetary loss associated with each counts on the indictment and the resulting plea agreement. Her attorney did not obtain any clarification in this regard, before she was advised to plead guilty to Count One, Mail Fraud, while the other four counts were dismissed. Defendant argues that Count One as shown in the indictment failed the specificity requirement of criminal charges under the Fifth and Sixth Amendments and that her plea agreement was entered into without effective assistance of counsel, because the Defendant's attorney was unreasonable under prevailing professional norms for his failures to investigate and clarify the exact monetary loss tied to Count One irrespective of the amount of restitution that may be agreed to in the final plea agreement and that Defendant has suffered substantial and sufficient prejudice as a result of the ineffective assistance counsel and improper advise as to the immigrations consequences.

The Federal Rules of Criminal Procedure require that an indictment "be a plain, concise and definite written statement of the essential facts constituting the offense charged." If an essential element of the offense is omitted from the indictment, it cannot be consistent with the principle underlying the Fifth Amendment requirement. See Russell v. United States, 369 U.S. 749, 770 (1962). The second part of the clarity test, is to apprise the Defendant of what he or she must be prepared to meet, this incorporates the specificity requirement of the Sixth Amendment. The specificity requirement serves to insure that a

Defendant only has to answer to charges actually brought by the grand jury and not a prosecutor's interpretation of the charges, that the Defendant is apprised of the charges against him in order to permit preparation of his defense, and that the Defendant is protected against double jeopardy. See United States v. Haas, 583 F.2d 216 (5th Cir.), cert. denied, 440 U.S. 981 (1978). An example of an indictment which failed this test is provided by United States v. Nance, 533 F.2d 699 (D.C. Cir. 1976). The indictment in Nance charged a false pretense violation pursuant to the D.C. Code. It listed the name of each victim, the date of the false representation, the amount each victim lost, and the date the sum was paid to the defendants, but was fatally defective as a consequence of its failure to specify the false representation which induced the victims to pay the money to the defendants. See also United States v. Brown, 995 F.2d 1493, 1504-05 (10th Cir.) (indictment charging controlling premises and making them available for storing and distributing cocaine base insufficient because failed to state how control was exercised), *cert. denied*, 114 S.Ct. 353 (1993).

In present case the five counts contained in the indictment lack specificity as to the monetary loss tied to each count of the indictment. The time frame of the alleged commission of the offense also overlapped. For Counts 1 and 2, the alleged time of the commission was stated to be between December 11, 1998 and January 18, 2000. Count 3, 4 and 5 were also alleged to have occurred on December 30, 1998, December 13, 2000 and March 2, 2000. While Counts 1 and 2 relate to the allegation of mailing fraudulent employment and earnings information, counts 3, 4, and 5 relate to the certification of employment and earnings information required for continued qualifications for section 8 rent subsidies. As between counts 1 through 5, there was no particular or specific amount of monetary loss to the victims attached to any one of the Counts contained in the indictment. This has led to the present situation that placed the Defendant in substantial prejudice in with

which Department of Homeland Security commenced the deportation proceedings against her in 2012.

The record does not show any evidence indicating how the amount of loss was calculated. The present attempt by the prosecutor to introduce additional/ substituted facts, comparable versions, in the absence of the actual Plea Agreement will be nothing but the prosecutor`s own interpretation of the charges. The court should and must disregard the government`s attempt to introduce substituted facts, comparable charts or diagram that was not part of the initial records of this matter or could not be verified. The Defendant `s motion should be granted in the interest of justice and to prevent continued suffering of legal consequences that may be remedied by the granting of the writ of *coram nobis*.

**DEFENDANT`S MOTION IS NOT PURSUANT § 2255, THERFORE GOVERNMENT`S ARGUMENT RELATING TO PADILLA`S NON-RETROACTIVITY TO §2255 PETITION SHOULD BE DISREGARDED**

Defendant brought her motion in this matter pursuant to Rule 11 (E) , Coram Nobis, Padilla v. Kentucky, 130 S.Ct. 1473 (2010) in the alternatives . The government citing *Gacko v United States, 210 WL 2076020 at 2 (E.D.N.Y 2010)* argues that the Court should deny the Defendant`s motion because the Court in *Gacko* held that "Padilla does not apply retroactively in Section 2255 petition and Petitioner is required to be reasonably diligent in pursuing the factual basis of his claim and the burden of showing due diligence under § 2255 (f) (4) rests upon him". (Gov. Memo. at 10). The procedure under § 2255 (f) (4) is not the same as under Writ of *Coram Nobis*. The writ of coram nobis is not subject to a specific statute of limitation. Defendant urges the Court to disregard the government argument as an attempt to confuse and shift the focus from the relevant issue in the present motion.

**THERE ARE CIRCUMSTANCES COMPELLING THE GRANTOF DEFENDANT`S CORAM NOBIS MOTION TO ACHIEVE JUSTICE**

In United States v. Morgan, 346 U.S. 502, 511, 74 S.Ct. 247, 252, 98 L.Ed. 248 (1954), the Supreme Court said of the writ of error *coram nobis:* "Continuation of litigation after final judgment and exhaustion or waiver of any statutory right of review should be allowed through this extraordinary remedy only under circumstances compelling such action to achieve justice." The more recently articulated rule in the Second Circuit is that "the writ will issue only where extraordinary circumstances are present". As a remedy of last resort, the writ of error coram nobis is granted only where an error is "of the most fundamental character" and there exists no other available remedy. United States v. Mandel, 862 F.2d 1067, 1075 (4th Cir. 1988).

The writ is narrowly limited to "'extraordinary' cases presenting circumstances compelling its use 'to achieve justice.'" United States v. Denedo, 129 S. Ct. 2213, 2220 (2009) (quoting United States v. Morgan, 346 U.S. 502, 511 (1954)). Defendant Joy Pope, urges the Court to exercise the remedy of coram nobis in her favor to achieve justice, because there is no other remedy available to her in her circumstance the error made in her plea agreement was of fundamental nature. The writ of coram nobis is her last resort

In United States v Temitope Akinsade, No-09-7554 published opinion of the Court of Appeal Fourth Circuit decided on July 25, 2012. The Court of Appeal held that a petitioner seeking this relief must show that "(1) a more usual remedy is not available; (2) valid reasons exist for not attacking the conviction earlier; (3) adverse consequences exist from the conviction sufficient to satisfy the case or controversy requirement of Article III; and (4) the error is of the most fundamental character." Hirabayashi v. United States, 828 F.2d 591, 604 (9th Cir. 1987). The Court of Appeal granted coram nobis petition and vacated the judgment

of conviction in Akinsade case. ***See Ojo`s Affid. at 4,)*** Copy of decision United Sates Court of Appeal in US.v Akinsade Decision attached as **Exhibit 4**

The United States v Temitope Akinsade case share close similarities with the present case, Akinsade is a Nigerian citizen who legally came to America in July 1988 at the age of seven and became a lawful permanent resident in May 2000. In 1999, at the age of nineteen, Akinsade was employed as a teller at a Chevy Chase bank in Aspen Hill, Maryland. During his employment, Akinsade cashed checks for several neighborhood acquaintances, who were not listed as payees on the checks, and deposited a portion of the proceeds from those checks into his own account. On March 1, 2000, Akinsade was charged with embezzlement by a bank employee in the amount of $16,400. 18 U.S.C. § 656 (1948). Considering the government's plea agreement, Akinsade asked his attorney on at least two different occasions about the potential immigration consequences of a guilty plea. Both times his attorney misadvised him that he could not be deported based on this single offense. His attorney told him that he could only be deported if he had two felony convictions. This advice was contrary to the law at that time. See 8 U.S.C. §§ 1101(a)(43)(M)(i), 1227(a)(2)(A)(iii)(1952). Relying on his attorney's advice that one count of embezzlement was not a deportable offense, Akinsade pled guilty. The plea agreement made no mention that deportation was mandatory due to the offense. During the Rule 11 plea colloquy, the district court reviewed the civil ramifications of his plea.

" The Court: [P]eople who are found guilty of felonies, often lose their right to vote, certain professional licenses may be denied them, may not be able to serve on a jury. And I know felons can't possess firearms. Certain jobs may be denied you. If you are on parole or probation with another system, that can be affected. Or if

you are not a citizen, you could be deported. All of these things could be triggered by being found guilty of a felony. Do you understand that?

Akinsade: Yes, Your Honor.

The Court: Knowing that do you still wish to plead guilty? "

Almost nine years after Akinsade's conviction, on January 8, 2009, immigration authorities arrested him at home and placed him in detention in Batavia, New York. After seventeen months in detention, the immigration authorities released Akinsade and charged him with removability as an aggravated felon under 8 U.S.C. § 1227(a)(2)(A)(iii) based on his 2000 embezzlement conviction. Under threat of deportation, Akinsade filed petition for writ of error *coram nobis* in federal court alleging a violation of his Sixth Amendment rights due to his counsel's misadvice. The government argued that Akinsade was not entitled to this extraordinary remedy because he alleged "a mere garden-variety ineffective assistance of counsel claim" that was not a "fundamental error". After conducting a hearing, the district court denied the petition. The court held that while counsel's affirmative misrepresentations rendered his assistance constitutionally deficient under the first prong of Strickland v. Washington, 466 U.S. 668, 687 (1984), Akinsade was not prejudiced as required under Strickland's second prong. It reasoned that its admonishment of the potential for deportation during the plea colloquy cured counsel's affirmative misrepresentations. On appeal, the United States Court of Appeal for the 4th Circuit granted the petition for writ of error coram nobis and vacated Akinsade's conviction.

The similarities in the Akinsade's case to the present case are outstanding. In the present case, Defendant Joy Pope is also a non U.S Citizen (Green Card Holder) who has been in United States since 1988. On the advice of defense's counsel, she took a plea agreement on Count One: Mail Fraud One out of the five counts indictment. Twice, her

attorney answered "No" to the question raised by the presiding judge on the assumption by the court that offense may be a deportable offense, and then said "it is possible". No further affirmative inquiry or careful explanation was made either by the court or defense`s attorney to make sure that the mandatory immigration deportation consequence of her plea was explained to the Defendant. 9 years later, Immigration arrested Defendant in this matter and charged her with removability as an aggravated felon based on her 2003 plea agreement and she has been detention since August 2012. Defendant Joy Pope, filed a motion for writ of error *coram nobis* in federal court alleging a violation of her Sixth Amendment rights due to ineffective of counsel.

In the Defendant's Sworn Statement, she stated, that defense counsel in and out of court statements, informed her that a guilty plea would not lead to deportation since the offense was not one of the listed in the Anti -Terrorism Act. Transcript of the Plea confirmed that the defense`s attorney actually believed and made this statement on the record . This advice was contrary to the law at that time. See 8 U.S.C. §§ 1101(a)(43)(M)(i), 1227(a)(2)(A)(iii)(1952). Defendant accepted the plea on July 30, 2003 without a break down of the loss to the count. She has paid the entire restitution and special assessment of $67, 608.00 and completed her probation. Defendant has no other criminal record. In August 2012 , on a return trip from abroad with her husband and her five United States minor children, she was arrested by immigration and Custom Service (ICE) and put in deportation proceedings on the basis of the guilty plea entered into this matter in 2003. United States Department of Homeland Security maintained that because of the amount of restitution of $67,608.00 that Defendant was asked to pay back, the offenses is considered to be an aggravated felony Under Section 101(a)(43)(M)(1) of the Immigration and Nationality Act.

However Defendant only pled guilty to Count One of the indictment which did not specify the amount of monetary loss tied to the said count. The record does not contain any evidence indicating how the amount of loss was calculated. In fact, if the portion of monetary loss tied to Count One to which the Defendant pled guilty did not exceed $10,000.00 threshold, ( despite the monetary amount of restitution which could have been from the dismissed counts) her offense would not be considered as an aggravated felony under INA $ 240(c)(4)(A)(1) and would have been able to qualify for an application for waiver under Section 212(h) of the Act which could have precluded her deportation or removal from the United States. Government claims the copy of the plea agreement which would have thrown some light on the breakdown of the Charges and the monetary loss tied to each counts( if any), could not be found . Defendant `s motion for issuance of writ of coram nobis is certainly the last resort, there are no other available remedies. The error proceeding that resulted in her condition was of fundamental character, and the grant of the writ in this matter is to achieve justice.

.

**DEFENDANT`S MOTION MEETS THE STANDARD UNDER STRICKLAND V WASHINGTON 466 U.S 668 (1984)**

To determine whether counsel was ineffective for purposes of the Sixth Amendment, counsel must provide "reasonable professional assistance." Strickland v. Washington, 466 U.S. 668 (1984). *Strickland* provides for a two-part test. A court must first determine whether the attorney's representation "fell below an objective standard of reasonableness." *Id*. at 688. Secondly, a court must determine whether "there is reasonable possibility that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id* at 694.

In this case, the Court must consider whether the Defendant's attorney was unreasonable under the prevailing professional norms when he informed the Defendant and

the Court that the offense Defendant pled guilty to, would not result in deportation because it was not one of the listed on the Anti-Terossim Act.

Secondly, the Court also needs to consider whether or not the Defendant's attorney was also unreasonable under prevailing professional norms for his failures to investigate and clarify the monetary loss tied to the one count to which the Defendant was offered to plead guilty to, irrespective of the amount of restitution that may be agreed upon in the final plea agreement.

Thirdly, whether or not the brief colloquy between the Court, the defense`s attorney and government`s counsel in the Plea Transcript wherein the assumption by the Court, that the offense may be a deportable offense was not followed by an affirmative inquiry of the Defendant either by the Court or defense`s attorney or government attorney is enough ground to disallow her ineffective assistance of counsel arguments under the Sixth amendment.

Defendant argues that, in light of the equivocal nature of the admonishment and counsel's affirmative misadvise that is clearly contrary to law and the severity of the consequence itself. The colloquy between the Court and the attorneys on the assumption of the Court that the offense may be a deportable offence did not correct the error of her counsel's affirmative misrepresentation. Defendant argues that the court should find Counsel's misadvise is an error of the "most fundamental character" such that coram nobis relief is required to "achieve justice." Denedo, 129 S. Ct. at 2220.

The court must uphold the merits of Defendant's ineffective assistance of counsel claim to decide whether Defendant has been prejudiced. See Mandel, 862 F.2d at 1074- 75. In this regard the court should note that the colloquy was not followed by any further affirmative inquiry even by the Judge, after the response to the court`s assumption on the question of whether the offense was deportable The reluctant answer by the counsel was in

the realm of mere “possibility” rather than mandatory immigration consequences that the plea will attract.

A defendant may be unable to show prejudice if at the Rule11 proceeding the district court provides an admonishment that corrects the misadvice and the defendant expresses that he understands the admonishment. United States v. Herandez Monreal, 404 F. App’x 714, 715(4th Cir. 2011) (finding that the defendant was not prejudiced by counsel’s failure to advise of deportation consequences when, during his Rule 11 proceeding, the defendant "affirmatively acknowledged his understanding that his plea ‘could definitely make it difficult, if not impossible, for [him] to successfully stay legally in the United States’"); State v. Yahya, No. 10 AP-1190, 2011 WL 5868794, at *5 (Ohio Ct. App. Nov. 22, 2011) ("[A] trial court’s delivery of the warning [that defendant might be deported] would not necessarily cure her attorney’s specific error regarding the consequences of a guilty plea."). Thus, in United States v. Foster, 68 F.3d 86, 88 (4th Cir. 1995), the 4th Circuit determined that the defendant had not been prejudiced by any allegedly incorrect information counsel gave him regarding his sentence because of the district court’s "careful explanation of the potential severity of the sentence" during the Rule 11 hearing. Id. at 88. However, it is vital to note that Defendant in the present case was not given such admonishment even though the issue was clearly before the Court as reflected in the Plea Transcript.

Unlike *Foster*, the Court’s admonishment in this matter was far from a "careful explanation" of the consequences of deportation. Instead, the Court in a conversation with the attorneys not the Defendant stated that the Court “assumed” the offence may be a deportable offence. No further inquiry was made. This general and equivocal admonishment is insufficient to correct counsel’s affirmative misadvice that Defendant’s crime was not one the offense listed in Anti- Terrorism Act and could not lead to deportation. Neither does the

general and equivocal admonishment sufficient to correct counsel's affirmative misadvise of confused and equivocal statement, that "it is possible". More importantly, the admonishment did not "properly inform" Defendant of the consequence she faced by pleading guilty which is a mandatory deportation. Thus, Defendant could not have known that deportation was a legally mandated consequence of her plea. Had she known this, she stated that she would have chosen to go to trial rather than plead guilty.

As recognized in Foster, the specificity and breadth of the court's admonishment are important considerations in deciding whether the defendant is prejudiced. These considerations are equally as important in this case where the advice given is patently erroneous or confusing and the consequences at stake are "particularly severe," Padilla, 130 S. Ct. at 1481 (quoting Fong Yue Ting v. United States, 149 U.S. 698, 740 (1893), and will likely result in the "loss of both property and life, or of all that makes life worth living," Ng Fung Ho v. White, 259 U.S. 276, 284 (1922). "Preserving the client's right to remain in the United States may be more important to the client than any potential jail sentence." INS v. St. Cyr, 533 U.S. 289, 323(2001). The severity of the consequence at issue and the clear error made by counsel in rendering the advice warrants a curative admonishment that is specific and unequivocal as to the deportation consequences of Defendant's conviction.

**Defense Counsel`s Performance was Deficient under Objective Standard of Reasonableness and Defendant was Prejudiced**

Under the prejudice prong of Strickland, the potential strength of the state case must inform the court`s analysis in as much as a reasonable defendant would surely take it into account." Ostrander v. Green, 46 F.3d 347, 356 (4th Cir. 1995) (citing Hill, 474 U.S. at 59-60) overruled on other grounds by O'Dell v. Netherland, 95 F.3d 1214 (4th Cir. 1996) (en banc). Applying this standard, the Court have held that counsel's affirmative misadvice on

collateral consequences to a guilty plea was prejudicial where the prosecution's evidence "proved to be more than enough" for a guilty verdict but was "hardly invincible on its face." Ostrander, 46 F.3d. The court have further found prejudice where the defendant, whose counsel misinformed him of deportation consequences, had significant familial ties to the United States and thus would reasonably risk going to trial instead of pleading guilty and facing certain deportation. United States v. Gajendragadkar, No. 97-7267, 1998 WL 352866, at *2 (4th Cir. June 3, 1998). Although a trial would present the risk of deportation, it would provide the defendant the opportunity to contest the Government's evidence, or failing that, to challenge the Government's estimate loss."

**The Indictment**
**Count 1 and 2**

A look at the five counts indictment in the present case shows that, the counts 1 and 2 alleged mail fraud, on the basis that Defendant mailed only one employment verification for the section 8 program instead of two employment verification. There was no allegation that the one employment verification mailed by Defendant was forged or fraudulent. She actually worked at the job. She only sent one instead of two employment verification. So at best, she could be alleged to have sent incomplete papers, but the paper mailed was not fraudulent Counts 1 and 2 was stated to have been committed on to December 11, 1998 and January 18, 2000.

There was no mention of how much monetary loss was tied to count 1and 2.

**Counts 3, 4 and 5**

Count 3, 4 and 5 were also alleged to have occurred on December 30, 1998, December 13, 2000 and March 2, 2000. While counts 1 and 2 relate to the allegation of mailing fraudulent employment and earnings information. Counts 3, 4, and 5 also relate to

employment and earnings information required for continued qualifications for section 8 rent subsidies. Also there is no monetary loss tied to count 3, 4, and 5 on the face of the charges in the indictment.

**The charges were confusing and overlapping and defense counsel acted below reasonable objective standard , the government could not have prevailed on Count One at Trial**

Plea Transcript paragraphs 12-25 at 19. Show the deficient nature of the representation received by Defendant, which is clearly below the reasonable objective standard. When the Court asked the government counsel to summarize what its evidence will be, with respect to Count one, if the case were tried. The facts were not consistent with the charge, the inconsistent facts could not have supported the statutory lingual of the charge of Mail Fraud and the defense`s attorney still did not properly advised the defendant.

Plea Transcript paragraphs 19 at page 20 shows that when Court asked the Defendant whether she disagreed with the government`s statement. Her answer throws light on her state of mind and lack of prior understanding and explanation of the plea deal by her attorney. A clear understanding of the process, the factual and legal basis of the plea to the count of mail fraud by her attorney would have been reasonable . This should have been done before and agreed upon by Defendant and her attorney even before coming before the Judge. Defendant maintained that she actually worked as home aide for Ms. Cook for which employment verification was sent for Section 8 program. The document that was mailed was not fraudulent. An omission to mail other document from other job may make the section 8 certification incomplete, but that does not make the document that that was mailed to be fraudulent, forged or made up document.

The lack of clarity on the factual basis of the charging document and the plea being agreed to was clearly reflected even more in the presiding Judge`s comments in the Plea Transcript at page 21 paragraphs 2 to 25.

"The Court: But in fact she did work as a home health aide for Ms. Cook

Defendant: Yes, but I also worked with new Brighton.

Court: So in the way it was worded, it sounded like she did nt do anything for Ms.Cook

Coffey: Well, the key fight is she declares or causes to be declared or causes to be declared income of $8,640, but if she worked both jobs, she would have had $64,000---- more than 64, 000 in income, which would have disqualified her

The Court: All right

Is that sufficient for your purpose of the plea

what has been stated by the Ms. Pope

Mr. Coffey: Yes, as long as the she indicates that her income was $64,00.00 for that twelvemonthsperiod……

……

Defendant: You know when I get this, I never put it together to see how much I make"

Even the presiding Judge commented that the wording and factual basis for Count One does not match up. Because the way it was worded, it sounded like the defendant just forged or made up fraudulent employment record as home aid for Ms. Cook and she never worked for her. Yet the defendant`s counsel did not raise any issue, he still advised the defendant to plead guilty to the Mail Fraud charge even without a break down of loss to the Count. If a trained legal mind, such as the Judge of the Federal Court, presiding over the

plea agreement, could reasonably raised questions about the clarity in the wording of the charge that was pled to, in relation to the factual basis. It is clearly a deficient performance below the reasonable objective standard for the defense`s counsel not to do anything. Either in form of asking that the charge be amended or demanding clarifications and specific loss tied to pled count, nothing was done by the defense attorney. Defendant is thereby prejudiced. The same speaks for the confusion and improper advice regarding the mandatory immigration consequences for the plea.

The government apparently based the calculation of the restitution on all the five count including the 4 dismissed counts, at least covering the entire time period of 1995 through 2000 on the basis that Defendant should have had income of $64,000.00 in a 12 months period which the government alleged would have disqualified her from Section 8. Defendant `s responded on the record, that she had not even had any chance to put together or calculate how much she made. An effective assistance of counsel would have ensured that a thorough investigation and exchange of information with the client with regard to the actual amount of income made defendant was clear and unequivocal even before the plea acceptance. After all, that was the core evidence the government can base its case, if the matter had been tried. Clearly, from the forgoing, the defendant attorney`s performance was deficient as measured by the objective standard of reasonableness under *Strickland*

**There exist a reasonable possibility that the outcome of the proceeding could have been different**

In the second prong of Strickland Standard, a court must determine whether "there is reasonable possibility that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id* at 694. The defendant argues , that there exist reasonable possibility the government could not have prevailed on the Mail Fraud count on the factual bias contained in the Indictment, because it based on the premises that the

defendant actually mailed a forged , fraudulent or nonexistent extinct document to section 8. However the fact that came out on the record was that Defendant actually worked at the job and the document she mailed was not forged, fraudulent, or non-existent.

There is also reasonable possibility that the outcome of the proceeding could have been different, had the defense counsel taken time to investigate and demand a breakdown of the monetary loss tied to each charges rather than just agreeing to ballpark estimates submitted by the government even though it was not contained in the charges or any other document presented to the defendant. There is also reasonable possibility that, the plea agreement would have been brokered by competent criminal defense`s attorney defending an Alien non- citizen, (where immigration consequences is in issue) in a way that any of the charges pled to would have not carry threshold amount that would trigger the immigration penalties for offenses considered to be an aggravated felony under Section 101(a)(43)(M)(1) of the Immigration and Nationality Act..

In Nijhawan v Holder, 55 U. S 29(2009). The Court required that there must be a connection between the evidence of loss and specific conviction, and that the dismissed counts must not be source of the evidence *.id at 8*. In Nijhawan the Court required that loss amount be tied to the count of conviction. Defendant, Joy Poe is prejudiced in this case through the ineffective assistance of counsel because the amount of loss for the conviction one count of Mail Fraud that her attorney advised to plead guilty to was is not tied to the said count. In actual fact there was no specific amount of loss tied to the count either in the charging document or record beside the latest recent attempt by the government to introduce that by way of comparable version included tin the government`s memorandum in opposition.

Had the defense counsel been diligent and vigilant, in his representation, the amount of defendant`s actual income upon which the charges of Section 8 over payment was based would have been known to the Defendant and her counsel instead of the guessing the amount, as contained in the record of plea transcript cited above. The amount of government loss would have been contested and government would have been required to prove the loss, rather an estimates of the entire period of 1995-2000, the evidence of which was neither r on the record or could not be located. There is a reasonable ground to believe that, if the defense`s counsel had been certain, or sure that the legal consequences of the plea agreement will be a mandatory deportation and affirmatively so advised the defendant , defendant would have not pleaded guilty, although a trial would present the risk of deportation, it would provide the defendant the opportunity to contest the Government's evidence, or failing that, to challenge the government's estimate loss. See United States Gajendragadkar, No. 97-7267, 1998 WL 352866, at *2 (4th Cir. June 3, 1998

**SOUND REASONS EXIST FOR FAILURE TO SEEK RELIEF EARLIER.**

The Second Circuit in *Nicks* interpreted *United States v. Morgan,* 346 U.S. at 512, 74 S.Ct. at 253, as instructing that "*coram nobis* relief should issue only when `sound reasons exist for failure to seek appropriate earlier relief.'" That raised the question whether Nicks had delayed too long. "His *coram nobis* petition was filed in 1989, 15 years after his federal armed bank robbery conviction in New York and five years after his Alabama murder conviction." 955 F.2d at 167. The *Nicks* court concluded that it could not resolve the issue of timeliness on the record then before it.

First, Defendant, Joy Pope cannot seek relief under the typical remedies for a direct or collateral attack of a federal judgment and sentence because she is no longer in custody. See 28 U.S.C.§ 2255 (1948); 28 U.S.C. § 2241 (1948). She has completed the probation and paid

the entire restitution and special assessment. Her appeal right was also waived in the plea agreement.

Second, valid reasons exist for Defendant, Joy Pope not attacking the conviction earlier. Until physically detained by immigration authorities in August of 2012, upon her return to United States from vacation abroad. Defendant had no reason to challenge the conviction as her attorney's advice, up to that point in time, appeared accurate.

## PETITIONER CONTINUES TO SUFFER LEGAL CONSEQUENCES FROM HER CONVICTION THAT MAY BE REMDIED BY THE GRANT OF THE WRIT

In Nicks v. United States, 955 F.2d at 167 the Court held that the Defendant had to show that he continued to suffer "legal consequences from his conviction that may be remedied by granting of the writ." *Id.* As authority for that proposition, the Second Circuit referred to the Supreme Court's observation in *Morgan*, 346 U.S. at 512-13, 74 S.Ct. at 253, that " [although the term has been served, the results of the conviction may persist. Subsequent convictions may carry heavier penalties, civil rights may be affected." [footnote omitted]. The *Nicks* court also relied upon decisions in other circuits which held that *coram nobis* relief was not available unless the challenged conviction carried continuing penalties. *Nicks,* 955 F.2d at 167 (*citing United States v. Bush,888 F.2d 1145,* 1149 (7th Cir.1989), and United States v. Osser,864 F.2d 1056, 1059 (3rd Cir.1988)). That requisite showing presented no problem for Nicks, since the effect of the 1974 federal conviction he sought to challenge by *coram nobis* factored into an Alabama court's sentence of death for a subsequently committed state crime.

In the instant case, defendant has been detained by Immigration Services since August 8, 2012, when she was arrested upon her return to United States from a vacation abroad. The Defendant, a mother of five United States Citizen minor children, has lived in United Sates since 1988. She is married to United States Citizen, she owns real estate properties in United States. She has substantial families ties in the U.S. However, Immigration Court would not even grant her a bail on the premises that her plea agreement is considered to be a conviction of aggravated felony by just looking only at the amount of restitution $67, 808.00 that she was asked to pay back. A copy of the Plea Agreement would have assisted the Immigration Court to determine the nature of the Plea Agreement and monetary loss, however the government could not produce the copy of the Plea Agreement . If the portion of monetary loss tied to count one to which the Defendant pled guilty does not exceed $10,000.00 threshold, ( despite the monetary amount of restitution which could have been from the dismissed counts) her offense would not be considered as an aggravated felony under INA $ 240(c)(4)(A)(1) and would have been able to qualify for an application for waiver under Section 212(h) of the Act which could have precluded her deportation or removal from the United States.

Defendant continues to suffer the legal consequences that may be remedied by granting of the writ. Defendant will suffer deportation from United States, loss of freedom and property separation from her children and her husband, as result of the conviction.

**Padilla v Kentucky applies to this Matter**

On March 21, 2012, the Supreme Court reinvigorated the debate over *Padilla`s* retroactivity in deciding Lafler v. Cooper, No. 10–209, 565 U.S. 2012 WL 932019.

In *Lafler*, the Court held that the Sixth Amendment applies to plea negotiations, including pleas rejected on the basis of attorney's error. The outcome in *Lafler* supports the conclusion that *Padilla* is an old rule and has immediate implications for non-citizens with pending

*Padilla* motions or appeals. In *Padilla,* however, the Court noted that it has never applied a distinction between direct and collateral consequences to determine whether ineffective assistance of counsel occurred. *Padilla* at 8.

The Court stated that deportation is a "penalty," not a "collateral consequence," of the criminal proceeding. Therefore, the Court found that under the *Strickland test* of objective reasonableness, counsel must accurately inform his client whether his plea carries a risk of deportation in order to satisfy the Sixth Amendment right to effective assistance of counsel. The six amendment right is not a new rule.

Defendant asks the Court to disregard the attempt by the government`s counsel to persuade the court that Padilla which was decided in 2010 is not retroactive and therefore does not apply to this matter because of Teague v Lane 489 U.S 288(1989). The said argument goes on to cite extensively the dissenting opinions in Padilla. However the majority opinion the holding decision in the said case and applies to the present case. The government argument is contrary to the recent Supreme Court decisions.

**CONCLUSION**

Upon the foregoing, Defendant has established her ineffective assistance of counsel claim, Padilla`s retroactivity has been a subject of recent supreme court decisions. The defendant `s petition is not under Section 2225. Petitioner `s ineffective assistance of counsel regarding immigration consequences was held by supreme court in Padilla not just to be collateral consequences. There is no specific statute of limitation to corm nobis petition,

Defendant, Joy Pope respectfully requests this Court grant her coram nobis motion and vacate the judgment of conviction in this matter because the plea agreement violated her constitutional right. Defendant further prays the Court to hold that there are extraordinary

circumstance exist in this matter, and there are compelling to grant the writ to achieve justice.

Respectfully submitted:

Dated: 01/13 /2013

_____

Ayodele M. Ojo
Attorney for Defendant
Attorney License #: 340674
2147 University Avenue. # 201
St. Paul, MN 55114
Tel: 651-204-6470
Fax: 952-960-0219
Email: YDLOJO@YAHOO.COM