

1 **UNITED STATES COURT OF APPEALS**

2  
3 **FOR THE SECOND CIRCUIT**

4  
5 August Term, 2013

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7  
8 (Argued: November 21, 2013 Decided: March 3, 2014)

9  
10 Docket No. 13-0209

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14 STEPHEN KOVACS,

15  
16 Petitioner-Appellant,

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18 - v.-

19  
20 UNITED STATES OF AMERICA,

21  
22 Respondent-Appellee.

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24 - - - - -x

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26 Before: KEARSE, JACOBS, and PARKER, Circuit  
27 Judges.

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29 Appeal from a judgment of the United States District  
30 Court for the Eastern District of New York, denying Stephen  
31 Kovacs' petition for a writ of error *coram nobis* to vacate  
32 his 1999 guilty plea to misprision of felony. We reverse  
33 and order the granting of the writ.

34 NICHOLAS A. GRAVANTE, JR.  
35 (Thomas Ling, on the brief),  
36 Boies, Schiller & Flexner LLP,  
37 New York, N.Y., for  
38 Appellant.

1 MICHAEL H. WARREN (Peter A.  
2 Norling, on the brief), for  
3 Loretta E. Lynch, United States  
4 Attorney for the Eastern  
5 District of New York, Brooklyn,  
6 N.Y., for Appellee.

7  
8 The Opinion of the Court is filed by Judge JACOBS. Judge  
9 KEARSE concurs except for Part I.B.1.

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11 DENNIS JACOBS, Circuit Judge:

12  
13 Petitioner Stephen Kovacs appeals from a judgment of  
14 the United States District Court for the Eastern District of  
15 New York (Wexler, J.), denying his petition for a writ of  
16 error *coram nobis*. Kovacs was convicted for misprision of  
17 felony, in violation of 18 U.S.C. § 4, and seeks the writ on  
18 the ground that his lawyer rendered ineffective assistance  
19 by giving erroneous advice concerning the deportation  
20 consequences of pleading guilty to that offense, with the  
21 result that he is at risk of detention and deportation if he  
22 reenters the United States. The district court denied the  
23 petition without an evidentiary hearing. For the reasons  
24 that follow, we reverse and order the granting of the writ.

25  
26 **BACKGROUND**

27 Stephen Kovacs is an Australian national who became a  
28 permanent resident of the United States in 1977. While

1 here, Kovacs founded International Bullion and Metal  
2 Brokers, Inc., an importer and distributor of gold and metal  
3 jewelry. After Kovacs' company lost \$250,000 in a 1991  
4 burglary, Hanover Insurance Company dispatched a public  
5 adjustor named Eliot Zerring to assess the loss. Zerring,  
6 who was corrupt, see Chubb & Son Inc. v. Kelleher, No. 92 CV  
7 4484, 2010 WL 5978913 (E.D.N.Y. Oct. 22, 2010), purportedly  
8 convinced Kovacs to inflate the claim to \$850,000. The  
9 claim was submitted in September 1991 and paid later that  
10 month. Kovacs ultimately took \$400,000 of the \$850,000, and  
11 Zerring kept the rest.

12 Kovacs was charged in October 1996 with wire fraud and  
13 conspiracy to commit wire fraud, in violation of 18 U.S.C.  
14 §§ 371 and 1343. Kovacs instructed his lawyer, Robert Fink,  
15 to negotiate a plea that would have no immigration  
16 consequences. Fink advised Kovacs that a conviction for  
17 misprision of felony, 18 U.S.C. § 4, would not impact his  
18 immigration status. Fink allegedly conveyed these  
19 immigration concerns to the Government, which agreed to the  
20 misprision of felony charge.

21 On November 24, 1999, Kovacs pled guilty to a single  
22 count of misprision of felony. Kovacs' immigration concerns  
23 were aired during the plea hearing. At the outset, Fink

1 sought to seal the minutes of the guilty plea so immigration  
2 officials could not see them. The district court warned  
3 Kovacs that immigration consequences were not in its control  
4 and that it would give no such assurance. Fink, however,  
5 responded that he "researched it and we feel comfortable  
6 that this is not a deportable offense." Special App. at 12,  
7 ECF No. 31 (transcript of plea proceeding). At the  
8 conclusion of the proceeding, Fink again stated that  
9 "misprision of felony is not deportable." Id. at 16. The  
10 court accepted the plea.

11 Kovacs was sentenced on December 17, 2001 to five  
12 years' probation and restitution of \$600,000. The district  
13 court granted a downward departure for extraordinary  
14 acceptance of responsibility in view of Kovacs' decision to  
15 forgo an available defense based on the five-year statute of  
16 limitations. Kovacs paid the restitution in full by August  
17 8, 2002. In 2006, the district court granted a motion to  
18 terminate Kovacs' probation early.

19 Kovacs continued his regular international travel until  
20 April 2009, when immigration officials questioned Kovacs'  
21 eligibility for reentry on the ground that misprision of  
22 felony is considered a crime of moral turpitude. At that  
23 point, immigration officials directed him to appear for an

1 interview to evaluate his immigration status. Kovacs  
2 discussed his options with his lawyers, but allegedly none  
3 of them advised him to seek vacatur of his conviction.

4 Before his scheduled interview, on the advice of  
5 counsel, Kovacs returned to Australia, where he currently  
6 resides. His wife and children, all United States citizens,  
7 remain here. Kovacs' children have had to adjust their  
8 lives to carry on the family business.

9 Kovacs alleges that, notwithstanding his efforts to  
10 seek counsel earlier, he first became aware of the  
11 possibility of *coram nobis* relief in October 2011. At about  
12 that time, his counsel asked the Government to negotiate an  
13 agreed-upon motion for a writ of error *coram nobis*.  
14 Negotiations failed, and Kovacs submitted a petition for the  
15 writ in May 2012. The district court denied the petition on  
16 the ground that Kovacs could not show prejudice within the  
17 framework established by Strickland v. Washington, 466 U.S.  
18 668 (1984). Because the court denied the petition on those  
19 grounds, it did not reach the merits of the Government's  
20 other arguments: that the petition was untimely, and that  
21 Kovacs could not show Fink's advice was objectively  
22 unreasonable at the time the conviction became final.  
23 Kovacs now appeals the denial of his petition.



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**I**

“Defendants have a Sixth Amendment right to counsel, a right that extends to the plea-bargaining process.” Lafler v. Cooper, 132 S. Ct. 1376, 1384 (2012). Thus, ineffective assistance of counsel is one ground for granting a writ of *coram nobis*. See Chhabra v. United States, 720 F.3d 395, 406 (2d Cir. 2013). A claim of ineffective assistance entails a showing that: 1) the defense counsel’s performance was objectively unreasonable; and 2) the deficient performance prejudiced the defense. Strickland, 466 U.S. at 687-88; see also Hill v. Lockhart, 474 U.S. 52, 58 (1985) (holding Strickland test applies to guilty plea challenges); Bennett v. United States, 663 F.3d 71, 84 (2d Cir. 2011).

**A**

The performance component of the Strickland test asks whether a “counsel’s representation fell below an objective standard of reasonableness.” Strickland, 466 U.S. at 688. A defense counsel’s performance is unreasonable when it is so deficient that it falls outside the “wide range of professionally competent assistance.” Id. at 690.

1           As the district court observed, "there is no dispute  
2 that Fink misadvised Kovacs regarding the immigration  
3 consequences of his plea." Memorandum and Order, Kovacs v.  
4 United States, No. 12-cv-02260, at 3 (E.D.N.Y. Jan. 2, 2013,  
5 ECF No. 18). The transcript of the plea allocution reflects  
6 repeated erroneous assurances by Fink that misprision of  
7 felony was not a deportable offense. We held in United  
8 States v. Couto, 311 F.3d 179, 188 (2d Cir. 2002), that an  
9 affirmative misrepresentation of the deportation  
10 consequences of a guilty plea falls outside this range of  
11 professional competence. However, Couto was decided the  
12 year after Kovacs' 2001 conviction became final. If Kovacs  
13 had entered his plea after Couto was decided, there is  
14 little doubt Fink's performance would be deemed  
15 unreasonable. Kovacs seeks to apply Couto retroactively.<sup>1</sup>

16           The retroactive application of case law is governed by  
17 the rule set forth in Teague v. Lane, 489 U.S. 288 (1989),

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<sup>1</sup> Because the district court ruled Kovacs could not make a showing of prejudice, the court did not decide whether Couto retroactively applies. However, this issue has been argued by the parties and presents a pure question of law. See Hartford Courant Co. v. Pellegrino, 380 F.3d 83, 90 (2d Cir. 2004) ("In general, we refrain from analyzing issues not decided below, but we have the authority to decide issues that were argued before but not reached by the district court.").



1 which looks to a decision's novelty. If a decision  
2 announces a new rule, "a person whose conviction is already  
3 final may not benefit from the decision in a habeas or  
4 similar proceeding." Chaidez v. United States, 133 S. Ct.  
5 1103, 1107 (2013). Only if the Court applies a settled rule  
6 "may a person avail herself of the decision on collateral  
7 review." Id. "[A] case announces a new rule if the result  
8 was not *dictated* by precedent existing at the time the  
9 defendant's conviction became final." Teague, 489 U.S. at  
10 301 (emphasis in original). Such a holding must have been  
11 "apparent to all reasonable jurists." Chaidez, 133 S. Ct.  
12 at 1107 (quoting Lambrix v. Singletary, 520 U.S. 518, 527-28  
13 (1997)).

14 We have little trouble concluding that, by the time  
15 Kovacs' conviction became final, the Couto rule was  
16 indicated, and was awaiting an instance in which it would be  
17 pronounced. Courts had concluded similar misadvice was  
18 objectively unreasonable as far back as the 1970s<sup>2</sup>; our  
19 decisions reflected this trend long before Kovacs'

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<sup>2</sup> See, e.g., United States v. Briscoe, 432 F.2d 1351, 1353-54 (D.C. Cir. 1970); Downs-Morgan v. United States, 765 F.2d 1534, 1538-41 (11th Cir. 1985); United States v. Nagaro-Garbin, 653 F.Supp. 586, 590 (E.D. Mich. 1987); United States v. Corona-Maldonado, 46 F.Supp.2d 1171, 1173 (D. Kan. 1999).

1 conviction. See United States v. Santelises, 509 F.2d 703,  
2 704 (2d Cir. 1975) (per curiam) ("Since [defense counsel]  
3 does not aver that he made an affirmative misrepresentation,  
4 [petitioner] fails to state a claim for ineffective  
5 assistance of counsel."); Michel v. United States, 507 F.2d  
6 461, 465 (2d Cir. 1974) ("While recognizing that deportation  
7 was a serious sanction, this court . . . [noted] that there  
8 was before it no allegation of misleading by counsel."); see  
9 also United States v. Zilberov, 162 F.3d 1149, 1998 WL  
10 634211, at \*1 (2d Cir. 1998) (unpublished summary order)  
11 ("[T]rial counsel's alleged warning of 'possible'  
12 deportation may have been inaccurate and, arguably,  
13 objectively unreasonable.").

14 The Government observes that these statements were  
15 dicta, not holdings; but if there had been holdings, there  
16 would be no occasion now to consider retroactivity. Couto  
17 did nothing more than apply the "age-old principle that a  
18 lawyer may not affirmatively mislead a client." Chaidez,  
19 133 S. Ct. at 1119 (Sotomayor, J., dissenting). At the time  
20 Kovacs' conviction became final, no reasonable jurist could  
21 find a defense counsel's affirmative misadvice as to the  
22 immigration consequences of a guilty plea to be objectively  
23 reasonable.

1 **B**

2 Once a petitioner shows deficient performance of  
3 defense counsel, the inquiry shifts to the prejudicial  
4 effect of that performance. To establish prejudice, a  
5 petitioner "must show that there is a reasonable probability  
6 that, but for counsel's unprofessional errors, the result of  
7 the proceeding would have been different. A reasonable  
8 probability is a probability sufficient to undermine  
9 confidence in the outcome." Strickland, 466 U.S. at 694.  
10 In determining whether a different outcome sufficiently  
11 demonstrates prejudice, we must keep in mind that "a  
12 defendant has no right to be offered a plea, nor a federal  
13 right that the judge accept it." Missouri v. Frye, 132 S.  
14 Ct. 1399, 1410 (2012) (internal citations omitted).

15 Notwithstanding the prevalence of pleas in the criminal  
16 justice system, see id. at 1407, the Supreme Court has not  
17 often had occasion to consider Strickland prejudice in the  
18 plea negotiation context. The Government, relying on Hill,  
19 474 U.S. 52, contends Kovacs can succeed only if he shows he  
20 would have gone to trial absent his attorney's unreasonable  
21 performance. While Kovacs contends he has made that  
22 showing, he also argues that he can demonstrate prejudice by

1 showing his ability to negotiate an alternative plea based  
2 on the holding of Frye, 132 S. Ct. 1399.

3 In Hill, the petitioner sought habeas relief to  
4 challenge his guilty plea to first-degree murder. Hill, 474  
5 U.S. at 54. He alleged that his attorney's misadvice about  
6 when he would become eligible for parole caused his plea to  
7 be involuntary. See id. at 56. In that context, the Court  
8 stated that prejudice is shown when "there is a reasonable  
9 probability that, but for the counsel's errors, he would not  
10 have pleaded guilty and would have insisted on going to  
11 trial." Id. at 59. Because the petitioner there did not  
12 allege that he would have insisted on trial or that he  
13 placed "particular emphasis on his parole eligibility in  
14 deciding" to plea, the Court denied his petition. Id. at  
15 60.

16 Frye opened another avenue to showing prejudice in the  
17 pretrial process. Frye's lawyer failed to tell him of a  
18 proposed plea that would have resulted in a reduced  
19 sentence. 132 S. Ct. at 1404-05. The plea lapsed and Frye  
20 argued that he would have accepted the better offer but for  
21 his attorney's performance. Id. Prejudice can arise under  
22 Frye if a petitioner can "demonstrate a reasonable

1 probability [he] would have accepted the earlier plea offer  
2 had [he] been afforded effective assistance of counsel."  
3 Id. at 1409. In addition, a petitioner must show "a  
4 reasonable probability that the end result of the criminal  
5 process would have been more favorable by reason of a plea  
6 to a lesser charge or a sentence of less prison time." Id.  
7 Acknowledging that there is no right to a plea, the Court  
8 also required "a reasonable probability neither the  
9 prosecution nor the trial court would have prevented the  
10 offer from being accepted or implemented." Id. at 1410.

11 The Government contends that Frye is limited to lapsed  
12 pleas and that Kovacs must satisfy the Hill standard. We  
13 disagree. "Hill . . . applies in the context in which it  
14 arose." Id. at 1409. "Hill does not . . . provide the sole  
15 means for demonstrating prejudice arising from the deficient  
16 performance of counsel during plea negotiations." Id. at  
17 1409-10.<sup>3</sup> The proper focus is not on the specific test  
18 applied in Hill or Frye; each case is a context-specific  
19 application of Strickland directed at a particular instance  
20 of unreasonable attorney performance. See Hare v. United

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<sup>3</sup> As the Supreme Court noted, "it is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process." Frye, 132 S. Ct. at 1407.

1 States, 688 F.3d 878, 879 (7th Cir. 2012) (“Both Hill and  
2 Frye apply Strickland’s inquiry . . . .” (internal quotation  
3 marks omitted); see also Lafler v. Cooper, 132 S. Ct. 1376  
4 (2012) (developing different test for prejudice when  
5 attorney misadvice leads to standing trial instead of  
6 accepting a plea offer).

7 We conclude that a defense lawyer’s incorrect advice  
8 about the immigration consequences of a plea is prejudicial  
9 if it is shown that, but for counsel’s unprofessional  
10 errors, there was a reasonable probability that the  
11 petitioner could have negotiated a plea that did not impact  
12 immigration status or that he would have litigated an  
13 available defense.<sup>4</sup> See United States v. Kwan, 407 F.3d  
14 1005, 1017-18 (9th Cir. 2005) (“Kwan could have gone to  
15 trial or renegotiated his plea agreement to avoid  
16 deportation.”). The petitioner must clearly demonstrate  
17 “that he placed particular emphasis on [immigration  
18 consequences] in deciding whether or not to plead guilty.”  
19 Id. at 1017 (internal quotation marks omitted).

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<sup>4</sup> See also Sasonov v. United States, 575 F.Supp.2d 626,  
639 (D.N.J. 2008) (immigration consequences “may have been  
enough to . . . have allowed [petitioner] to negotiate a  
more favorable plea agreement with the Government.”); United  
States v. Shaw, No. Civ.A. 03-6759, 2004 WL 1858336, at \*11  
(E.D. Pa. 2004) (“Defendant could have negotiated with the  
government in such a way as to produce a sentence that would  
not have triggered the INA mandatory removal provisions.”).

1           Strickland prejudice focuses on the outcome of the  
2 proceeding rather than a defendant's priorities or desires.  
3 "[B]ecause a defendant has no right to be offered a plea,"  
4 Frye, 132 S. Ct. at 1410, the ultimate outcome of a plea  
5 negotiation depends on whether the government is willing to  
6 agree to the plea the defendant is willing to enter. To  
7 prevail on that ground, a petitioner must therefore  
8 demonstrate a reasonable probability that the prosecution  
9 would have accepted, and the court would have approved, a  
10 deal that had no adverse effect on the petitioner's  
11 immigration status. Cf. id. ("reasonable probability  
12 neither the prosecution nor the trial court would have  
13 prevented the offer from being accepted or implemented");  
14 Lafler, 132 S. Ct. at 1385 ("the prosecution would not have  
15 withdrawn it in light of intervening circumstances"); United  
16 States v. Moya, 676 F.3d 1211, 1214 (10th Cir. 2012) ("He  
17 alleges no facts that would suggest that his attorney could  
18 have *successfully* negotiated a plea agreement . . . .")  
19 (emphasis added).

20           We conclude 1) that Kovacs has sufficiently shown that  
21 he could have negotiated a plea that would not have impaired  
22 his immigration status, and 2) that even if he could not, he

1 would have litigated an available defense. Judge Kearse  
2 would decide this appeal on the second ground only, under  
3 Hill, and does not subscribe to our discussion of the first.

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5 **1**

6 Kovacs has sustained the very considerable burden of  
7 establishing prejudice under the principles reviewed above.  
8 It is apparent from the transcript of the Rule 11 hearing  
9 that Kovacs' single-minded focus in the plea negotiations  
10 was the risk of immigration consequences. The declaration  
11 submitted by Fink stated that the misprision of felony  
12 charge was settled on in the plea negotiation for the sole  
13 reason that Fink believed it would not impair Kovacs'  
14 immigration status--a view Fink conveyed to the prosecution.  
15 Kovacs has thus shown a reasonable probability that he could  
16 have negotiated a plea with no effect on his immigration  
17 status. The Government's arguments on appeal are directed  
18 at contesting the applicable legal standard rather than the  
19 factual premise: the reasonable probability that the  
20 prosecution would have accepted a plea to an offense that  
21 would have left Kovacs' immigration status intact.



1           Consequently, we find that Kovacs has made a showing of  
 2 prejudice based on his ability to negotiate an alternative  
 3 plea.

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6           Alternatively, Kovacs demonstrates prejudice under the  
 7 standards set forth in Hill. Kovacs' petition alleges he  
 8 would have litigated a meritorious statute of limitations  
 9 defense. When a petitioner claims that he would have  
 10 pursued an affirmative defense but for his lawyer's  
 11 erroneous advice, "the resolution of the 'prejudice' inquiry  
 12 will depend largely on whether the affirmative defense  
 13 likely would have succeeded at trial."<sup>5</sup> Hill, 474 U.S. at  
 14 59. At sentencing, Kovacs requested a downward departure  
 15 for extraordinary acceptance of responsibility on the basis  
 16 that he waived this potential meritorious defense, and the  
 17 district court granted it. The request itself demonstrates  
 18 Kovacs' awareness of the defense prior to the plea becoming  
 19 final. See Fed. R. Crim. P. 11(d)(2). More importantly,

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<sup>5</sup> The Government argues that this language applies only when the unreasonable performance impairs the defense. This portion of Hill, though, merely provides examples of how its rule might apply, and does not suggest a limitation. See Hill, 474 U.S. at 59-60.

1 the district court's grant of Kovacs' request in the course  
2 of a conscientious and searching sentencing process  
3 implicitly acknowledged that the defense had weight. As a  
4 result, Kovacs has shown a reasonable probability that he  
5 would have proceeded to trial.

6 The Government contests the merit of the defense,  
7 citing a fax sent after Kovacs received the final payment in  
8 his fraudulent scheme, a document that is not in the present  
9 record. In any event, the question is not whether the  
10 defense would ultimately have been successful. Rather, the  
11 inquiry is whether the defense was viable and sufficiently  
12 promising that Kovacs would have litigated the defense to  
13 avoid immigration consequences. There is no doubt that (fax  
14 or no fax) the defense was sufficient trouble for the  
15 Government that Kovacs would have been foolish to forgo it  
16 at trial or as a means of softening the Government's  
17 position in plea bargaining.

18  
19 **II**

20 The Government urges affirmance on the ground that the  
21 petition was untimely. The district court did not reach  
22 that issue; but we do, insofar as timeliness bears on  
23 possible prejudice to the Government.

1           No statute of limitations governs the filing of a *coram*  
2 *nobis* petition. See Foont, 93 F.3d at 79. At the same  
3 time, the petitioner must demonstrate "sound reasons" for  
4 any delay in seeking relief. Id. "The critical inquiry . .  
5 . is whether the petitioner is able to show justifiable  
6 reasons for the delay." Id. at 80.

7           Kovacs has supplied sufficient reasons to justify the  
8 delay. He avers that he has diligently pursued ways to  
9 reenter the country, but was unaware that a writ of *coram*  
10 *nobis* existed until October 2011--and contacted the  
11 Government soon thereafter. The Government is skeptical  
12 about the recent discovery of a writ so "ancient." Morgan,  
13 346 U.S. at 506. When such a disputed issue of fact arises,  
14 we typically remand for a hearing. Under present  
15 circumstances, however, no hearing is needed because it is  
16 improbable that Kovacs (or whatever attorney he consulted)  
17 would have promptly thought about *coram nobis*, which is as  
18 arcane as it is ancient. The writ is an "extraordinary  
19 remedy" available only in rare cases. Id. at 511. Further,  
20 the Government does not suggest any tactical reason Kovacs  
21 would have delayed pursuit of the writ until 2011 if he had  
22 learned of it earlier. Lastly, the focus on the filing date  
23 of the petition insufficiently accounts for Kovacs' efforts

1 to negotiate for an agreed-upon motion in 2011. We conclude  
2 that Kovacs' petition was timely.

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4 For these reasons, Kovacs has established his claim of  
5 ineffective assistance of counsel and satisfies the  
6 requirements for *coram nobis* relief. Therefore, we reverse  
7 and remand to the district court with instructions to issue  
8 the writ and vacate Kovacs' conviction.