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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

ANDY SONG,

Plaintiff(s),

v.

UNITED STATES OF AMERICA,

Defendant(s).

CASE NO. CV 09-5184 DOC
CR 98-0806 DOC

O R D E R GRANTING MOTION TO VACATE JUDGMENT (CORAM NOBIS)

Before the Court is Petitioner Andy Song's Petition to Vacate Judgment *Coram Nobis* ("Petition") (Docket 1). After considering the moving, opposing and replying papers, and for the reasons explained below, the Court GRANTS the Petition.

I. BACKGROUND

Petitioner Andy Song ("Mr. Song" or "Petitioner") was born in South Korea and legally entered the U.S. on a C-1/D transit visa in 1987 at the age of 28. On March 22, 1995, Petitioner gained lawful permanent resident status in the country. Exh. G to Gov.'s Opp. at 1. On September 20, 1995, Mr. Song was charged in the U.S. District Court for the Western District of Washington for violations of 18 U.S.C. §§ 371 (conspiracy to commit offense or to defraud the

United States), 542 (entry of goods falsely classified), 545 (smuggling goods into the United States), and 2320 (trafficking in counterfeit goods or services). Petitioner was alleged to have received shipments from Korea labeled as ladies fashion belts and other generic descriptions but containing merchandise manufactured in Korea resembling brand name items. Petitioner's case was transferred to the U.S. District Court in Los Angeles, and on August 24, 1998, Petitioner entered a guilty plea to 18 U.S.C. § 371 for conspiring to violate 18 U.S.C. §545 and 19 U.S.C. §1526 (importing merchandise bearing an American trademark). Transcript of Proceedings, Change of Plea at 4, *U.S. v. Andy Song*, No. CR 98-806 CM, attached as Exh. H to Gov.'s Opp.. The plea agreement used the word "fraudulently" and indicated a loss of $116,946.64 to the United States. Plea Agreement at 2, 16, *U.S. v. Andy Song*, No. CR 98-806 CM, attached as Exh. B to Gov.'s Opp.. On April 12, 1999, the court sentenced Petitioner to five years probation with six months home detention and restitution of $116,946.64. Transcript of Proceedings, Sentencing at 9, *U.S. v. Andy Song*, No. CR 98-806 CM, attached as Exh. I to Gov.'s Opp. ("Sentencing Transcript"). Mr. Song declares that, prior to advising him to enter into this plea, his criminal counsel ("Counsel") did not inform him of the immigration ramifications of doing so. In his deposition, Counsel admitted to failing to discuss the immigration consequences of a conviction for this type of crime with Mr. Song. *See infra* Part III.

Mr. Song is married to a U.S. citizen. He has two children with his wife, both of whom are U.S. citizens. At the time of Mr. Song's 1998 conviction, Mr. Song provided the principal means of financial support to his family. Sentencing Transcript at 7 (government attorney explaining that, even during his time under house arrest, Mr. Song served as "the principal means of sustaining [his] business and the family.")

On November 22, 2002, the Immigration & Naturalization Services ("INS") initiated removal proceedings against Mr. Song. On February 14, 2006, the Immigration Judge found that Petitioner's conviction was for an offense involving fraud or deceit for which the loss to the victim exceeded $10,000. Order of Immigration Judge, *In the Matter of Song, Ki-Sok*, A72-905-099, attached as Exh. G to Gov.'s Opp. ("IJ Order"). Therefore, the Immigration Judge concluded that Mr. Song had been convicted of an aggravated felony as described in 8 U.S.C. §

1101(a)(43)(M)(1). *Id.* Under 8 U.S.C. § 1227 (a)(2)(A)(iii), any person convicted of an aggravated felony is deemed deportable. The Immigration Judge thus ordered Mr. Song removed to Korea. *Id.* The Board of Immigration Appeals affirmed this holding without opinion on October 11, 2007. Order of Board of Immigration Appeals, *In the Matter of Song, Ki-Sok*, A72-905-099, attached as Exh. G to Gov.'s Opp. Petitioner then filed a further appeal with the Ninth Circuit, which is still pending. *Song, et al. v. Holder*, Case No. 07-74265. Mr. Song faces mandatory deportation.

With the instant Petition, Mr. Song moves the Court to vacate his guilty plea *coram nobis* on the grounds that his Counsel provided ineffective assistance by failing to inform him of the immigration consequences of the plea deal that he signed.

II. LEGAL STANDARD

The writ of *coram nobis* is an extraordinary remedy that allows a petitioner to attack an unconstitutional or unlawful conviction after the petitioner has served his sentence and is no longer in custody. *United States v. Morgan*, 346 502, 511 (1954); *Estate of McKinney v. United States*, 71 F.3d 779, 781 (9th Cir. 1995). "The writ provides a remedy for those suffering from the lingering collateral consequences of an unconstitutional or unlawful conviction based on errors of facts and egregious legal errors." *United States v. Walgren*, 885 F.2d 1417, 1420 (9th Cir. 1989) (internal citations and quotations omitted). To qualify for *coram nobis* relief, a petitioner must establish 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 to satisfy the case and controversy requirement of Article III; and (4) the error suffered is of the most fundamental character. *United States v. Kwan*, 407 F.3d 1005, 1011 (9th Cir. 2005) (abrogated on other grounds by *Padilla*, 130 S.Ct. 1473 (2010)).

III. DISCUSSION

The government does not contest that Mr. Song has satisfied the first three elements of the test for *coram nobis* relief. The dispute between the parties centers on the fourth prong of the analysis: whether the error Mr. Song suffered is of the most fundamental character. *Kwan*, 407 F.3d at 1011. Ineffective assistance of counsel has been recognized as the type of

fundamental error sufficient to justify *coram nobis* relief. *See Kwan*, 407 F.3d at 1014. Accordingly, if Mr. Song can establish that his counsel's performance was constitutionally deficient, his Petition must be granted.

Mr. Song has succeeded in making this showing. *Strickland v. Washington*, 466 U.S. 668 (1984) governs claims for ineffective assistance of counsel. In *Strickland*, the Supreme Court articulated a two-part test to gauge whether an attorney's efforts fell below the minimum level of adequacy guaranteed by the Sixth Amendment. Specifically, the petitioner must show (1) that his counsel's actions were "objectively unreasonable" and (2) that the petitioner suffered prejudice as a result. *Id.* The Court considers each factor in turn.

a. Adequacy of Representation

In *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010), the United States Supreme Court held that failure to inform a client of the immigration consequences of his or her plea deal constitutes ineffective assistance of counsel in violation of the Sixth Amendment. *Id.* at 1486 ("It is our responsibility under the Constitution to ensure that no criminal defendant – whether a citizen or not – is left to the mercies of incompetent counsel. To satisfy this responsibility, we now hold that counsel must inform her client whether his plea carries a risk of deportation. Our longstanding Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demand no less.").[1] The Ninth Circuit has further clarified that a defendant who, like

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[1]The government argues in a footnote that *Padilla* does not apply retroactively to convictions entered before the decision was issued. The government is wrong. The Supreme Court expressly contemplated retroactive application when it decided *Padilla*. In fact, the Court devoted several pages of its opinion to assuaging the government's fears that its ruling would open the "floodgates" to new litigation challenging prior guilty pleas. *Padilla*, 130 S. Ct. at 1484-85. If the Court intended *Padilla* to apply only prospectively, the entire "floodgates" discussion would have been unnecessary. *United States v. Hubenig*, 2010 WL 2650625 (E.D. Cal. Jul 01, 2010). Indeed, in *United States v. Bonilla*, 637 F.3d 980 (2011), the Ninth Circuit explicitly applied the *Padilla* standard to a guilty plea entered prior to the Supreme Court's issuance of the decision. *See id.* at 982 (noting that the district court proceedings had taken place in a pre-*Padilla* regime); *id.* at 984 (applying *Padilla* to the case).

Mr. Song, "faces almost certain deportation" as a result of a conviction for an aggravated felony, "is entitled to know more than that it is *possible* that a guilty plea could lead to removal; he is entitled to know that it is a virtual certainty." *United States v. Bonilla*, 637 F.3d 980, 984 (9th Cir. 2011).

In this case, Mr. Song's counsel admits to believing that he provided ineffective assistance of counsel based on his failure to inform Mr. Song of the immigration consequences of his plea to an aggravated felony. Counsel testified in his deposition as follows:

> Q. And, in your opinion, were you ineffective in your representation of Mr. Song in his criminal matter.
>
> A. Yes.

Exh. J to Govt's Opp. at 48. When asked to explain why he felt that his representation was constitutionally inadequate, Counsel stated:

> A. I have no recollection of discussing the immigration consequences of his plea with [Mr. Song], and there are no notes in the file to indicate that we discussed that. There are no notes in the file indicating that I did any research concerning whether the charged offenses or the offense that he pled to or the way that the plea agreement was written would or would not place him in jeopardy of losing his residency status. And there are no notes in his file which indicate that I consulted with anyone in the office or any immigration experts outside the office concerning those issues.

Id. at 47. He later elaborated:

> A. ... [T]here's no correspondence in the file between me and the DOJ attorney. There's no evidence of any analysis of those immigration issues.

Id. at 48-49. Similarly, when asked if Counsel considered the ramifications of including the word "fraud" in Mr. Song's plea agreement, he answered:

> A. . . . I don't have any recollection of discussing the presence of that

> word in the plea agreement with counsel for the government. I don't have any recollection of discussing the significance of the word with Mr. Song. I know that I did not consult anybody who I would have viewed as an immigration law expert and there are no notes in the file that would suggest any of those discussions or consultations.

Id. at 39-40.

In other words, Counsel in this case has admitted to falling short of the minimum level of constitutionally adequate representation described by the Supreme Court in *Padilla*. Counsel's admissions are supported by the evidence at hand – namely, the lack of any indication in the case file that immigration consequences were ever considered, let alone discussed, when advising Mr. Song to plead guilty to an aggravated felony. Mr. Song clearly did not receive the advice to which he was constitutionally entitled: that conviction for the offense to which he pled guilty was "virtually certain" to lead to deportation. *Bonilla*, 637 F.3d at 984. It is beyond debate that Mr. Song has satisfied the first prong of the *Strickland* test: a showing that his representation "fell below an objective standard of reasonableness." *Padilla*, 130 S. Ct. at 1482 (quoting *Strickland*, 466 U.S. at 688).

b. Prejudice

The Court next turns to the second step of the *Strickland* analysis: whether the petitioner has proven that his counsel's ineffective assistance resulted in prejudice. "In the context of a plea, a petitioner satisfies the prejudice prong of the *Strickland* test where 'there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'" *Smith v. Mahoney*, 596 F.3d 1131, 1141 (9th Cir. 2010) (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)). As the Ninth Circuit has explained, "[t]hat an alien charged with a crime . . . would factor the immigration consequences of conviction into deciding whether to plead or proceed to trial is well-documented." *Magana-Pizano v. INS*, 200 F.3d 603, 612 (9th Cir. 1999). In addition, as the Supreme Court stated in *Padilla*: "[c]ounsel who possess the most rudimentary understanding of the deportation consequences of a particular criminal offense may be able to plea bargain creatively with the prosecutor in order to craft a conviction

and sentence that reduce the likelihood of deportation, as by avoiding a conviction for an offense that automatically triggers the removal consequence." *Padilla*, 130 S.Ct. at 1486.

In this case, there is certainly a "reasonable probability" that Mr. Song – a lawful permanent resident who provided the principal means of financial support to his U.S. citizen wife and two U.S. citizen children – would have decided against pleading guilty to a crime involving fraud, via a plea agreement expressly referencing fraud, had he been adequately apprised of the immigration consequences of doing so. Instead, Mr. Song could have asked Counsel to do what the Supreme Court urged counsel to do in Padilla: "plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation, as by avoiding a conviction for an offense that automatically triggers the removal consequence." *Padilla*, 130 S.Ct. at 1486. Given that Mr. Song possessed information helpful to the prosecution at the time of entering into his plea deal, it is reasonably probable to assume that the government would have been willing to work with Mr. Song in order to formulate a plea agreement that did not render him automatically removable. *See* Sentencing Transcript at 7 (government attorney stating that "it's undisputed that [Mr. Song] did provide cooperation to the government concerning the underlying matters under investigation."); IJ Order at 2 (explaining that Mr. Song agreed to help the government as part of his plea deal). The Assistant United States Attorney assigned to Mr. Song's criminal case also declared on the record that he was impressed by Mr. Song's "extraordinary" post-offense rehabilitation, suggesting that the government viewed Mr. Song as the type of defendant for whom leniency was appropriate. Sentencing Transcript at 7. Unfortunately, Counsel made no attempt to capitalize on these factors in order to structure a plea deal with less devastating immigration ramifications. Instead, Counsel admits that he "made no effort to ensure that the precise nature of [Mr. Song's] plea and the precise nature of the judgment would have been handled in a way to avoid his removal from the United States." Exh. J to Gov.'s Opp. at 48. Given Counsel's admission that Mr. Song's immigration status was not taken into account as part of Mr. Song's defense, this lack of effort is unsurprising. By contrast, had the risk of virtually certain removal been communicated to Mr. Song, it is reasonably probable to believe that Mr. Song would have insisted that Counsel

attempt to negotiate a more immigration-safe plea.

Even if these efforts failed at creative plea bargaining failed, Mr. Song still could have taken his chances at trial. Although conviction after trial may have increased Petitioner's exposure to punishment, Mr. Song should have been entitled to determine whether the virtual certainty of deportation (and, by extension, forced separation from his family) was worse than the risk of increased penal sanctions. Common sense dictates that there is at least at reasonable probability that Mr. Song would have decided that it was. *See Hubenig*, 2010 WL 2650625 at *9 ("A reasonable person would certainly conclude that the risk of punishment – even considering the very unlikely event that the statutory maximum penalty might be imposed – was worth the possibility of avoiding deportation, a punishment that the Supreme Court has characterized as 'the equivalent of banishment or exile.'") (quoting *Delgadillo v. Carmichael*, 332 U.S. 388, 390-91 (1947)). Mr. Song has met his burden of establishing prejudice.

Accordingly, Mr. Song has shown that he received ineffective assistance of counsel in violation of the Sixth Amendment. This kind of fundamental error entitles Mr. Song to *coram nobis* relief. *See Kwan*, 407 F.3d at 1014. His guilty plea and conviction must be vacated.

IV. DISPOSITION

For the foregoing reasons, Mr. Song's Petition for *Coram Nobis* relief is GRANTED. Mr. Song's guilty plea under 18 U.S.C. § 371 for conspiring to violate 18 U.S.C. §545 and 19 U.S.C. §1526 is VACATED. A status conference is set on criminal case CR 98-0806-DOC for this matter on August 1, 2011 at 8:30 a.m.

IT IS SO ORDERED.

DATED: June 27, 2011

David O. Carter

DAVID O. CARTER
United States District Judge