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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

UNITED STATES OF AMERICA)
)
) Plaintiff/Respondent,)
)
) v.)
)
) CLICERIO GUILLEN-REYES,)
)
) Defendant/Petitioner.)
 _____)

Civil No. 07cv2134 J
Criminal No. 89MJ1132

**ORDER DENYING PETITION FOR
WRIT OF ERROR CORAM NOBIS**

Before the Court is the petitioner Clicerio Guillen-Reyes’ petition, filed *pro se*, for Writ of Error Coram Nobis. [Doc. No. 1.] This Court has considered the Petition, Respondent’s Response and Opposition, and all the supporting documents the parties have submitted. Having considered the documents, this Court **DENIES** the Petition for the reasons stated below.

Factual Background

On March 12, 1989, Petitioner was arrested in the San Diego County area by Immigration officers. On March 14, 1989, Petitioner was charged with the following violations: Count I, 8 U.S.C. § 1324(a)(1)(B), Illegal Transportation of Aliens (felony); and Count II, 8 U.S.C. § 1325 and 18 U.S.C. § 2, Aiding and Abetting Illegal Entry (misdemeanor). [Pet., Ex. A.] On March 14, 1989, Federal Public Defenders, Inc., were appointed to represent Petitioner. [*Id.*] Petitioner pled guilty to Count II of the Complaint. [*Id.*] Count I was dismissed, and Petitioner was

1 committed to the custody of the Burea of Prisons for imprisonment for a period of thirty days.

2 [*Id.*]

3 *Procedural History*

4 On October 31, 2007, Petitioner filed his petition for writ of error coram nobis.
5 [Doc. No. 1.] On January 10, 2008, this Court issued an Order to Show Cause why the Petition
6 should not be granted. On January 24, 2008, the Court received returned mail, originally sent to
7 Petitioner regarding the Order; the mail was returned as undeliverable because no forwarding
8 address could be found. [Doc. No. 3.] On February 19, 2008, Respondents issued their
9 Response and Opposition to Petitioner’s Petition, asking the Court to dismiss the Petition with
10 prejudice. [Doc. No. 4.]

11 *Legal Standard*

12 The writ of error coram nobis affords a remedy to attack an unconstitutional or unlawful
13 conviction when the petitioner already has fully served a sentence and is no longer in custody.
14 *Estate of McKinney v. United States*, 71 F.3d 779, 781 (9th Cir. 1995); *United States v. Walgren*,
15 885 F.2d 1417, 1420 (9th Cir. 1989). The writ is an “extraordinary remedy” that should be
16 granted “only under circumstances compelling such action to achieve justice.” *United States v.*
17 *Morgan*, 346 U.S. 502, 511 (1954); *see Carlisle v. United States*, 517 U.S. 416, 429 (1996)
18 (“[I]t is difficult to conceive of a situation in a federal criminal case today where [a writ of
19 *coram nobis*] would be necessary or appropriate.”) (quoting *United states v. Smith*, 331 U.S.
20 469, 475 n.4 (1947)) (second alteration in original).

21 “Where the errors are of the most fundamental character, such that the proceeding, itself
22 is rendered invalid, the writ . . . permits a court to vacate its judgments.” *Estate of McKinney*, 71
23 F.3d at 781. This Court has authority to issue the writ under the All Writs Act, 28 U.S.C.
24 1651(a). *Id.* To qualify for coram nobis relief, a petitioner must satisfy the following four
25 requirements: (1) a more usual remedy is not available; (2) valid reasons exist for not attacking
26 the conviction earlier; (3) adverse consequences exist from the conviction sufficient to satisfy
27 the case or controversy requirement of Article III; and (4) the error is of the most fundamental
28 character. *United States v. Kwan*, 407 F.3d 1005, 1011 (9th Cir. 2005).

1 *Analysis*

2 Petitioner argues: (1) a more usual remedy is not available because he is not in
3 custody and thus ineligible for habeas or § 2255 relief; (2) valid reasons exist for not attacking
4 the conviction earlier because Petitioner was unaware that the conviction could affect his
5 immigration status, and it wasn't until 2003 that he realized he was being prejudiced; (3) the INS
6 denial of Petitioner's petition to renew his amnesty card and the possibility of deportation justify
7 the case or controversy requirement of Article III; and (4) the error is of the most fundamental
8 character because Petitioner received ineffective assistance of counsel. (Pet. at 3-4.)

9 **I. First Requirement - A More Usual Remedy is Not Available**

10 Petitioner argues that a more usual remedy is not available because he is not in custody
11 and not eligible for habeas relief or § 2255 relief. (Pet. at 3.) A petitioner may satisfy the first
12 requirement of the writ, that a more usual remedy is not available, by establishing that he is not
13 in custody and, as a result, not eligible for habeas relief or § 2255 relief. *Kwan*, 407 F.3d at
14 1012. Respondents do not argue Petitioner fails to satisfy this requirement. Accordingly, based
15 on the record and Respondent's non-opposition, the Court **FINDS** Petitioner meets this
16 requirement for the writ of error coram nobis.

17 **II. Second Requirement - Valid Reasons Exist for Not Attacking Conviction Earlier**

18 Petitioner contends valid reasons exist for not attacking the conviction earlier because he
19 was initially unaware the conviction could affect his immigration status, and further, because it
20 wasn't until 2003 that he realized he was being prejudiced. (Pet. at 3.) Respondent argues
21 Petitioner's claim should be dismissed because Petitioner failed to provide any reasons why he
22 did not attack his conviction until October of 2007 rather than in 2003, when Petitioner allegedly
23 first learned of the adverse consequences of his 1989 misdemeanor conviction. (Response at 5;
24 Pet. 2-3.)

25 There is no statutory time line for filing a petition for writ of coram nobis. *Kwan*, 407
26 F.3d at 1012. However, in lieu of a specific statute of limitations, those seeking coram nobis
27 relief "must provide valid or sound reasons explaining why they did not attack their sentences or
28 convictions earlier." *Id.* at 1012, 1014 ("The law does not require [a petitioner] to challenge his

1 conviction at the earliest opportunity, it only requires [him] to have sound reasons for not doing
2 so.”) Courts have denied relief for lack of “sound reason” where: (1) the petitioner has delayed
3 for no reason whatsoever; (2) the respondent demonstrates prejudice; or (3) where the petitioner
4 appears to be abusing the writ. *Id.* at 1013.

5 Respondent alleges Petitioner failed to provide any reasons for the delayed filing of the
6 Petition. (*See generally*, Resp. at 4-5.) A petitioner has the initial burden of offering reasons to
7 justify delay. *See Riedl*, 496 F.3d at 1007-08 (citing *Hirabayashi v. United States*, 828 F.2d 591,
8 604 (9th Cir. 1987)). Thus, the Court must look to whether Petitioner has met his burden of
9 justifying any delay in filing. *See United States v. Riedl*, 496 F.3d 1003, 1008 (2007); *see also*
10 *Kwan*, 407 F.3d at 1013.

11 Petitioner admits that, in 2003, he learned that the INS had denied a replacement card
12 “presumably because of the 1989 misdemeanor conviction.” (Pet. at 2-3.) Assuming *arguendo*
13 Petitioner learned of the denial of his replacement amnesty card on the final day of that year, *i.e.*
14 on December 31, 2003, Petitioner still waited almost four years from his notice of the presumed
15 adverse affects of the conviction before filing his Petition on October 31, 2007. The Petition is
16 completely silent as to why Petitioner failed to file within that time period. Thus, Petitioner has
17 not met his burden of offering reasons to justify delay. *Riedl*, 496 F.3d at 1007-08. Petitioner’s
18 failure to provide any reason whatsoever to explain his delayed filing is grounds to deny relief.
19 *See Riedl*, 496 F.3d at 1006 (petitioner denied relief for failing to explain why she didn’t
20 challenge her conviction while still imprisoned, during the nine-month period between her
21 release from prison and her deportation, or during the twenty-month delay between her deporta-
22 tion and the filing of her coram nobis petition); *Kwan*, 407 F.3d at 1014; *Maghe v. United States*,
23 710 F.2d 503, 503-04 (9th Cir. 1983) (denying coram nobis petition as untimely where claim
24 could have been raised earlier and there were no sound reasons for the delay). Accordingly,
25 based on the record and for the reasons discussed above, the Court **FINDS** Petitioner fails to
26 meet the “valid or sound” explanation requirement of coram nobis relief and **DENIES** the
27 Petition in its entirety.

28 **III. Third Requirement - Adverse Consequences**

1 Petitioner argues that adverse consequences exist from the 1989 conviction sufficient to
2 satisfy case or controversy requirements of Article III because the INS denied his petition to
3 renew the amnesty card and because he faces the possibility of deportation. (Pet. at 3-4.)

4 Respondents argue Petitioner has failed to demonstrate adverse consequences of his 1989
5 misdemeanor conviction for aiding and abetting illegal entry. (Resp. at 5-6.)

6 Article III standing requires the following: (1) a threatened or actual distinct and palpable
7 injury to the plaintiff; (2) a fairly traceable causal connection between the injury and the
8 defendant's challenged conduct; and (3) a substantial likelihood that the requested relief will
9 redress or prevent the injury. *Estate of McKinney*, 71 F.3d at 782 n.4 (internal citations and
10 quotations omitted). "A criminal case is moot only if it is shown that there is no possibility that
11 any collateral legal consequences will be imposed on the basis of the conviction." *Sibron v. New*
12 *York*, 392 U.S. 40, 53-58 (1968) (citing *Pollard v. United States*, 352 U.S. 354 (1957); see
13 *Hirabayashi v. United States*, 828 F.2d 591, 606 (1987). The Ninth Circuit has applied *Sibron* to
14 hold that, for coram nobis relief, a misdemeanor conviction carries a presumption of adverse
15 consequences. *Hirabayashi*, 828 F.2d 606-07; see also *Estate of McKinney*, 71 F.3d at 782 n.6
16 ("We have repeatedly affirmed the presumption that collateral consequences flow from any
17 conviction and have found the presumption to be irrebuttable in this day of federal sentencing
18 guidelines" (internal citations omitted)).

19 Both Petitioner and Respondent acknowledge Petitioner was convicted of aiding and
20 abetting illegal entry, a misdemeanor. (Pet. at 2; Resp. at 3, 5-6.) Petitioner now seeks to have
21 that conviction vacated through his Petition. (Pet. at 4; Resp. at 2.) Respondent argues that
22 Petitioner should be denied relief for failure to demonstrate adverse consequences because
23 Petitioner did not provide any evidence to demonstrate: he was a lawful permanent resident at
24 the time of his arrest and conviction in 1989; any loss of status he may have suffered was a
25 consequence of his conviction; or he is entitled to any immigration benefits today. (Resp. at 5-
26 6.)

27 The entirety of Respondent's argument is based on Petitioner's failure to show adequate
28 evidentiary support to show adverse consequences. However, under *Hirabayashi*, Petitioner is

1 presumed to continue to suffer collateral consequences as the result of his 1989 conviction.
2 *Hirabayashi*, 828 F.2d 606-07; *see also Estate of McKinney*, 71 F.3d at 782 n.6. Respondent
3 fails to make any showing that no collateral consequences flow from Petitioner’s 1989 conviction.
4 Accordingly, the Court **FINDS** Petitioner has met the Third Requirement, that adverse
5 consequences exist from the 1989 conviction sufficient to satisfy the case or controversy
6 requirements of Article III, and **DENIES** Respondent’s request to dismiss the Petition on the
7 above-mentioned grounds.

8 **IV. Fourth Requirement - Fundamental Error**

9 Petitioner argues he meets the fundamental error requirements of coram nobis
10 relief because he received ineffective assistance of counsel. (Pet. at 4.) Respondent argues
11 Petitioner fails to establish a claim of ineffective assistance of counsel to satisfy the fundamental
12 error requirement because Petitioner failed to establish that his counsel’s performance fell below
13 an objective standard of reasonableness or that his counsel’s performance prejudiced him in any
14 manner. (Resp. at 6-7.)

15 Petitioner may satisfy the fundamental error requirement for coram nobis relief by
16 establishing that he received ineffective assistance of counsel. *See Kwan*, 407 F.3d at 1014-15
17 (citing *United States v. Mett*, 65 F.3d 1531, 1534 (9th Cir. 1995)). To make out a claim of
18 ineffective assistance of counsel, Petitioner must show (1) “that counsel’s performance was
19 deficient” and (2) “the deficient performance prejudiced the defense.” *Strickland v. Washington*,
20 466 U.S. 668, 686 (1984); *see Kwan*, 407 F.3d at 1014-15.

21 The first prong of the *Strickland* test requires a petitioner to demonstrate that counsel
22 “made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed by the
23 Sixth Amendment.” *Strickland*, 466 U.S. at 687. “[T]he defendant must show that counsel’s
24 representation fell below an objective standard of reasonableness . . . under prevailing profes-
25 sional norms.” *Id.* at 688; *see Kwan*, 407 F.3d at 1014-16. Furthermore, judicial scrutiny of
26 counsel must be highly deferential because of the risk that the benefit of hindsight would make
27 the counsel’s performance seem unreasonable. *Strickland*, 466 U.S. at 689. Defense counsel is
28 strongly “presumed to have rendered adequate assistance and made all significant decisions in

1 the exercise of reasonable professional judgment.” *Strickland*, 466 U.S. at 690. An attorney’s
2 failure to advise a client of the immigration consequences of a conviction, without more, does
3 not constitute ineffective assistance of counsel under *Strickland*. *United States v. Fry*, 322 F.3d
4 1198, 1200 (9th Cir. 2003). However, where counsel has not merely failed to inform, but has
5 effectively misled his client about the immigration consequences of a conviction, counsel’s
6 performance is objectively unreasonable. *Kwan*, 407 F.3d at 1015.

7 The second prong of the *Strickland* test requires that any deficiency of counsel also be
8 prejudicial. *Id.* at 692; *see Kwan*, 407 F.3d at 1014, 1017-18. Therefore, even if a defendant is
9 able to show that counsel acted unreasonably, he still must show that counsel’s actions had an
10 adverse effect on the outcome of the proceedings. *Id.* at 693. “The defendant must show that
11 there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the
12 proceeding would have been different.” *Id.* at 694.

13 **A. Deficient Performance**

14 Petitioner argues he meets the fundamental error requirements of coram nobis
15 relief because he received ineffective assistance of counsel. (Pet. at 4.) Specifically, Petitioner
16 argues that the federal public defender rendered constitutionally ineffective assistance because
17 counsel allegedly: (1) affirmatively misled Petitioner as to the immigration consequences of the
18 conviction; (2) failed to advise Petitioner of the availability of a judicial recommendation against
19 an adverse effect of the conviction in immigration proceedings or to request the same from the
20 sentencing court; (3) failed to investigate; (4) acted in haste to get the case over with and
21 abandoned Petitioner’s defense when delivering Petitioner to the mercy and discretion of the
22 sentencing court; and (5) failed to keep abreast of changes in the law and its practice. (*Id.* at 3.)

23 Petitioner’s claim of deficient assistance fails because it is unsupported by the record.
24 First, Petitioner provides no evidentiary support to show defense counsel affirmatively misled
25 him. Further, Petitioner fails to establish that counsel’s failure to advise him of the availability
26 of a judicial recommendation against an adverse effect of the conviction amounted to assistance
27 falling below an objective standard of reasonableness considering all of the circumstances. *See*
28 *Strickland*, 466 U.S. at 688; *see also Fry*, 322 F.3d at 1200. Additionally, Petitioner fails to

1 show that defense counsel's alleged "haste" in resolving Petitioner's case amounted to deficient
2 assistance. There is a strong presumption defense counsel acted reasonably in expediting
3 Petitioner's case. *Strickland*, 466 U.S. at 690. Here, Petitioner's unsupported allegations are not
4 sufficient to overcome the strong presumption defense counsel rendered adequate assistance.
5 *See James v. Borg*, 24 F.3d 20, 26-27 (9th Cir. 1994). Absent any additional showing, Petitioner
6 fails to establish defense counsel's performance fell below an objective standard of reasonable-
7 ness. Therefore, the Court **FINDS** Petitioner fails to show counsel rendered constitutionally
8 deficient assistance under *Strickland*. Accordingly, the Court **DENIES** the Petition in its
9 entirety.

10 **B. Prejudice**

11 Finally, assuming *arguendo* Petitioner could establish deficiency, Petitioner fails to show
12 "a probability sufficient to undermine confidence in the outcome" of the proceedings. *See*
13 *Kwan*, 407 F.3d at 1017-18. Accordingly, the Court **FINDS** Petitioner fails to show his defense
14 was prejudiced and **DENIES** the Petition in its entirety.

15 **C. Conclusion**

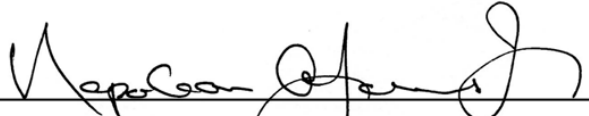
16 Based on the record and for the reasons discussed above, the Court **FINDS** Petitioner
17 fails to meet the fundamental error requirement of coram nobis relief and **DENIES** the Petition
18 in its entirety.

19 Conclusion

20 Because Petitioner has failed to satisfy the second and fourth requirements for coram
21 nobis relief, the Court **DENIES** the Petition for writ of error coram nobis in its entirety.

22
23 **IT IS SO ORDERED.**

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25 DATED: September 24, 2009

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HON. NAPOLEON A. JONES, JR.
United States District Judge