

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF KENTUCKY  
LOUISVILLE DIVISION  
INDICTMENT NO. 3:06CR-90-H**

UNITED STATES OF AMERICA

PLAINTIFF

vs.

**DEFENDANT'S REPLY MEMORANDUM IN SUPPORT OF  
MOTION TO VACATE FINAL JUDGMENT**

JIAN TIAN LIN

DEFENDANT

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Comes the Defendant, Jian Tian Lin, and in support of his Motion to Vacate the Final Judgment herein, submits the following Reply Memorandum:

**INTRODUCTION**

The response filed by the United States nowhere addresses the fact that Movant was never advised about the immigration consequences of a guilty plea, in violation of the holding of the U.S. Supreme Court in *Padilla vs. Kentucky* 559 U.S. \_\_\_, 176 L.Ed.2d 284, 130 S.Ct. 1473 (2010). Rather than address the merits of Movant's claim of constitutional error, the Government simply states that there is "no authority" cited that would permit this Court to vacate the conviction, and then suggests that Movant would *only* have a claim if the U.S. Supreme Court decides in *Chaidez v. United States* that *Padilla* is retroactive. Movant will address these contentions serially.

**(A) THERE IS AUTHORITY TO VACATE MOVANT'S CONVICTION**

The Government is correct that Defendant did not file his motion to vacate his conviction until 2 years after the ruling in *Padilla*. However, it is not "unclear" why this occurred. As noted in both his supporting Memorandum and in his Affidavit, Movant filed his motion to

vacate only recently because he was denied asylum status, due to his conviction under 8 USC §1324(a)(1)(A)(v)(I) and §1324 (a)(1)(B)(i), for allegedly harboring aliens. [Affidavit of Jian Tian Lin, ¶4]. The United States Immigration and Customs Enforcement (I.C.E.) determined that, pursuant to Section 101(a)(43) of the Immigration and Nationality Act, because his conviction for harboring constitutes an “aggravated felony,” he is not eligible for asylum status. [Affidavit of Jian Tian Lin, ¶4]. This is the first time that Movant learned he was convicted of an offense that would subject him to automatic removal. Furthermore, Movant was never advised that harboring aliens was an aggravated felony under the immigration laws, or that he would be subject to automatic removal. [Affidavit of Jian Tian Lin, ¶6]. At the time of his plea, Movant was only told that if he pleaded guilty, he would be released immediately. [Id]. Defendant did not know to inquire about the consequences of his guilty plea. [Id].

The United States correctly points out that the movant, Jian Tian Lin, did not cite any particular authority for his "motion to vacate final judgment. However, there is authority for this Court to correct this injustice. Because Movant's sentence has expired, a motion to vacate a final judgment, at least pursuant to 18 U.S.C 2241 or 28 U.S.C 2255 would be inappropriate. However, pursuant to the All Writs Act, 28 U.S.C 1651, this Court may issue all writs necessary or appropriate in aid of its jurisdiction. Rule 60 of the Federal Rules of Civil Procedure has abolished the writ of *coram nobis* in civil cases, but the writ is still available in criminal proceedings. *Porcelli vs. United States*, 404 F.3d 157 (CA 2, 2005). The writ is available in this case because Movant is currently under a substantial legal disability since mandatory removal has already been initiated by I.C.E. *Coram nobis* may be utilized where necessary in order to achieve justice. *Johnson vs. United States*, 344 F.2d 401 (CA 5, 1965). Although *coram nobis* is an extraordinary remedy, it has traditionally been used to attack federal

convictions where a petitioner is no longer in custody, but facing the type of continuing consequences Movant now faces. See, e.g., *United States vs. Rhines*, 640 F.3d 69 (CA 3, 2011).

The fact that Movant is facing imminent and mandatory removal should be sufficient cause for this Court to consider the "continuing consequences" of Movant's erroneous conviction. Even in the context of habeas corpus, where a person must be "in custody" for purposes of the habeas petition, deportation is a serious enough collateral consequence to consider an alien petitioner to be in "custody". *Mustata vs. United States Department of Justice*, 179 F.3d 1017 (CA 6, 1999).

Because Movant has demonstrated that his conviction was obtained unconstitutionally in violation of his rights to effective assistance of counsel and due process of law, and given that removal proceedings have been initiated and he is thus under sufficient legal disability, justice should compel the issuance of the writ to correct this constitutional error. *United States vs. Nazon*, 936 F.563 (ND Ind. 1996); *Johnson vs. United States*, *supra*.

**(B) THIS COURT SHOULD DETERMINE THAT *PADILLA* IS RETROACTIVE**

The Government suggests that this Court should deny the Motion to vacate, but also admits that Movant "may have a basis to attack his guilty plea and subsequent sentence" if the Supreme Court rules that *Padilla* is retroactive. However, if this Court awaits a ruling in *Chaidez*, then Movant will undoubtedly have been deported, and will have no remedy from China. Instead, this Court should find that *Padilla* is retroactive, and vacate Movant's conviction.

*Padilla* did not announce a "new rule" such that its holding would not be retroactive. The framework for evaluating claims of ineffective assistance of counsel was announced in 1984, in *Strickland v. Washington*, 466 U.S. 668 (1984). *Padilla* followed this established

framework, specifically finding that "professional norms have generally imposed an obligation on counsel to provide advice on the deportation consequences of a client's plea." *Padilla*, 130 S.Ct. at 1485. The Supreme Court in *Padilla* relied on *Strickland* in finding that the failure to do so constituted ineffective assistance of counsel. Under the analysis established by the Supreme Court in *Teague v. Lane*, 489 U.S. 288 (1989), *Padilla* obviously did not announce a "new rule," and thus, its holding will be applied retroactively.

### CONCLUSION

For the foregoing reasons, Movant respectfully requests this Court to issue a writ of coram nobis, and vacate the judgment of conviction previously entered herein.

Respectfully submitted,

/s/ C. Thomas Hectus

C. Thomas Hectus

**HECTUS•WALSH•BUCHENBERGER PLLC**

2010 Edgeland Ave.

Louisville, Kentucky 40204

Telephone: (502) 426-0105

Facsimile: (502) 882-9244

e-mail: [cthectus@hwblawoffice.com](mailto:cthectus@hwblawoffice.com)

**Counsel for Movant, Jian Tian Lin**

**CERTIFICATE OF SERVICE**

I hereby certify that the original of the foregoing was electronically filed, on this the 26<sup>th</sup> day of November, 2012, with the Clerk, United States District Court, Western District of Kentucky, Louisville Division, who will electronically provide notice to the following:

Daniel Kinnicutt, Esq.  
Assistant United States Attorney  
10<sup>th</sup> Floor  
510 West Broadway  
Louisville, Kentucky 40202

*/s/ C. Thomas Hectus* \_\_\_\_\_  
C. THOMAS HECTUS