

NO: 11-12316-CC

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**In The  
United States Court of Appeals  
For the Eleventh Circuit**

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**UNITED STATES OF AMERICA,**

*Appellee,*

vs.

**MARISELA CARMEN-IGLESIAS,**

*Appellant.*

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***ON APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE SOUTHERN DISTRICT OF FLORIDA***

***Criminal Number 1:93-cr-00339-FAM-2***

***Honorable Federico Moreno, United States District Judge***

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**APPELLANT'S BRIEF**

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Law Offices of Henry E. Marines  
Henry E. Marines, PA  
Florida Bar No.: 702722  
Professional Arts Building  
8501 SW 124 Avenue, Suite 204  
Miami, FL 33183  
(305) 412-4443 Office  
(305) 704-8217 Fax  
email: hm@henrymarineslaw.com

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

UNITED STATES OF AMERICA,

Apellee,

vs.

Docket No.: 11-12316-CC

MARISELA CARMEN-IGLESIAS,

Appellant,

\_\_\_\_\_ /

**CERTIFICATE OF INTERESTED PERSONS AND  
CORPORATE DISCLOSURE STATEMENT**

Pursuant to Eleventh Circuit Rule 26.1-2 and 26.1-3, Appellant Marisela Carmen-Iglesias respectfully submits the following list of interested persons and corporate disclosure statement:

Carmen-Iglesias, Marisela – Appellant.

Marines, Henry E. – Counsel for Appellant.

Minardi, Michael C., Esq. – Counsel for Appellant in District Court.

Moreno-Federico – Chief United States District Judge.

Petri, Steven R. – Assistant U.S. Attorney

s/ Henry E. Marines  
Law Offices of Henry E. Marines  
HENRY E. MARINES, PA  
Florida Bar No.: 702722

## **STATEMENT REGARDING ORAL ARGUMENT**

Appellant Marisela Carmen-Iglesias presents that the issues raised in this appeal are adequately explained in the appellate brief and do not require oral arguments, unless the directed by the Court.

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## STATEMENT OF JURISDICTION

The District Court for the Southern District of Florida had subject matter jurisdiction regarding a writ of error coram nobis based on the All Writs Act. *See* 28 U.S.C. § 1651(a); *United States v. Morgan*, 346 US 502 (1954). The writ “is used to attack allegedly invalid convictions which have continuing consequences, when the appellant has served his sentence and is no longer ‘in custody’ for purposes of Title 28 U.S.C. § 2255.” *Id.*

This court has jurisdiction on appeals from “all final decisions of the District Courts in the United States.” Title 28 U.S.C. § 1291; Fed.R.App. P. 28(a)(4)(B).

The District Court order is dated May 6, 2011. (J.A- 28; D. E. 175)<sup>1</sup> An appeal from the order granting or denying an application for writ of error coram nobis is an appeal in a civil case for purposes of Rule 4(a). Since the United States is a party, so the deadline for the notice of appeal was 60 days after the order was entered. Fed.R.App. P. 4(a-c); *See* Fed.R.App. P., Advisory Committee Notes to Rule 4, 2002 amendments (providing that an appeal from an order denying a petition for Writ of Error Coram Nobis is governed by the civil time limitations).

Appellant timely filed this notice of appeal on May 17, 2011. (J.A- 29; D. E. 177) This appeal is from a final order and opinion that disposes of all the party’s claims. (J.A- 28; D. E. 175); Fed.R.App. P. 28(a)(4)(A).

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<sup>1</sup> J.A. Refers to the Joint Appendix filed in this case and D.E. refers to the Docket Entry’s in the District Court.

## **STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

The overreaching issue is whether Mrs. Carmen-Iglesias conviction should be vacated through a writ of error coram nobis. The District Court denied the writ without the benefit of a government response.

There are three sub-issues. The first sub issue is whether the record establishes that the District Court actually advised prior counsel or Carmen-Iglesias of the immigration consequences of her guilty plea.

The second sub-issue is whether the writ of error coram nobis was deemed untimely.

The third sub-issue is whether counsel was ineffective warranting reversal of Carmen-Iglesias conviction.

## STATEMENT OF THE CASE

This is an appeal from the District Court of the Southern District of Florida's denial of Carmen-Iglesias' petition for writ of error coram nobis based on ineffective assistance of counsel as presented in *Strickland v. Washington*, 466 US 668 (1984) and the Supreme Court's recent decision in *Padilla v. Kentucky*, 130 S.Ct. 1472 (2010).

On October 6, 1993, Marisela Carmen-Iglesias entered a plea of guilt to Count I of a four-count superseding indictment charging her with conspiracy to possess a counterfeit security in violation of Title 18 U.S.C. § 371, relying on the advice of her prior attorney, Steven E. Kreisberg<sup>2</sup>. As per Carmen-Iglesias' sworn affidavit, Mr. Kreisberg did not inform her of the deportation consequences of her guilty plea. (J.A.- 28; D. E. 173) As per the sworn affidavit, Carmen-Iglesias presented that neither counsel, the court, nor the government inform at the change of plea hearing that she could even face the possibility of deportation based on her plea of guilt.<sup>3</sup> The change of plea minutes do not show that Carmen-Iglesias was advised of the deportation consequences. (R1- 21; D. E. 49) Neither does the plea

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<sup>2</sup> Mr. Kreisberg has since passed away.

<sup>3</sup> Counsel has attempted to secure the change of plea transcripts, however has been advised by the clerk's office that the court reporter has since passed away and that no documents or transcripts from the change of plea hearing are available.

agreement place Ms. Carmen-Iglesias on notice of the possibility of deportation. (J.A. 17; D. E. 50)

On December 6, 1993, Carmen-Iglesias was sentenced to eight months imprisonment; two years supervised release, along with a \$50.00 special assessment. The court also imposed restitution in the amount of \$762,238.24. (J.A.- 23; D. E. 77) She was supervised by the U.S. District Court for the Southern District of Florida and was discharged after successfully completing her term of supervised release.

On March 27, 2007, Ms. Carmen-Iglesias was placed in the deportation proceedings. (J.A.- 34; D. E. 173) She consulted with Immigration Attorney Grisel Ybarra to learn that she faces mandatory deportation due to the prior conviction. (J.A.-37; D. E. 173) Ms. Carmen-Iglesias sought post conviction relief in the form of a writ of error coram nobis in the Southern District of Florida based on her prior attorney's Mr. Kreisberg's ineffective assistance by failing to advise her of the deportation consequences of the guilty plea. The United States Attorney's Office was never requested to provide a response. On May 6, 2011 the District Court denied the pleading on the position that the court clearly advised counsel of the immigration consequences of Carmen-Iglesias' guilty plea and under an optional theory that in any event the motion was untimely. Ms. Carmen-Iglesias followed by filing a notice of appeal. (R1-31; D.E. 177)

## STATEMENT OF THE FACTS

On March 19, 1993, Nelson Serrano, Carmen-Iglesias' co-defendant was arrested by Miami Dade Police Department after attempting to pass a counterfeit cashier's check in the amount of \$65,925.00 to an undercover police officer posing as a courier. (J.A.S. 4) (¶-5)<sup>4</sup> It appeared that Cellular Wholesales of Skokie, Illinois, had received an order from a Julio Fernandez of Fernandez Export attempting to purchase a large quantity of cellular telephones. (R2-4) (¶-4) Cellular Wholesalers' employees became very suspicious of the order and subsequently informed the Miami Dade Police Department. Subsequently, the undercover investigation was conducted which led to the arrest of Serrano. (R2- 4; ¶-6)

As a result of Serrano's arrest, Secret Service Agents uncovered information that a group of Miami based individuals using the disguise of Fernandez Export, Comco Trading, Inversiones Tarantina, and J&S International, were soliciting orders from merchants with the basic pattern. The merchandise orders included the conditions that payment is made by cashier's check, on a COD basis. Because of Serrano's arrest and cooperation, the authorities were able to arrest Alex Ramirez, Marisela Carmen-Iglesias, and Luigi Falla. (¶- 14) (J.A.S. 2- 6)

It was later determined that Carmen-Iglesias was married at the time to her co-defendant that was considered to be the lead of the organization, Alex Ramirez.

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<sup>4</sup> J.A.S. - refers to the Presentence Investigation Report and is filed under seal.

Co-defendant Luigi Falla was considered her husband's right hand man, made all of the phone calls to the victims, and placed all of the orders with the vendors.

After consulting with her trial counsel, Carmen-Iglesias pled guilty on October 3, 1993 and on December 6, 1993 was sentenced to eight months imprisonment, two years supervised release, along with a \$50.00 special assessment.<sup>5</sup> (J.A. 23; D. E. 77)

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<sup>5</sup> Also, as previously mentioned, due to the age of this case, the sentencing transcripts are not available for review as to whether the District Court in fact advised Carmen-Iglesias of the deportation consequences during the sentencing hearing.

## **SUMMARY OF THE ARGUMENT**

Carmen-Iglesias presents that the District Court erred in summarily denying the writ of error coram nobis with an incomplete record to support that she was actually advised of the immigration consequences of her plea. The District Court made a determination that it recalled advising Carmen-Iglesias' *counsel* of the ramifications of the immigration consequences from a 1993 proceedings, but failed to refer to any portion of the record to establish that *Carmen-Iglesias* was actually advised of the immigration consequences of her plea.

Furthermore, Carmen-Iglesias presents that the District Court erred in reaching a determination that her writ of error coram nobis was untimely filed before the District Court which in essence, denied Carmen-Iglesias her right to effective assistance of counsel.

## ARGUMENT

### **I. THE DISTRICT COURT ABUSED ITS DISCRETION IN *SUA SPONTE* DENYING CARMEN-IGLESIA'S WRIT OF CORAM NOBIS WITHOUT FACTUAL SUPPORT FROM THE RECORD**

***Standard of Review:*** The issuance of a writ pursuant to the All Writs Act, 28 U.S.C. § 1651, is a matter within the Court's sound discretion. See, *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1096 (11th Cir. 2004) (reviewing a district court's decision under the All Writs Act for abuse of discretion).

#### A. There was an Incomplete Record in the District Court to Reach a Determination on the Merits of the Writ of Error Coram Nobis

As a threshold matter, this Court should note the proceedings that occurred in the District Court were from a change of plea hearing that occurred in October 6, 1993. Since there was no appeal taken, there were never any transcripts from the change of plea prepared. The Court reporter has since passed away and no recorded audio tapes from the change of plea hearing or transcripts have been located. There is no independent record except the district court's statements that Carmen-Iglesias was aware of the immigration consequences.<sup>6</sup>

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<sup>6</sup> As of the filing of this brief, there have been 635 written opinions by Judge Moreno since October 6, 1993. This list does not include all the other non-published written decision the court has made during its daily proceedings. <http://www.lexis.com/research/xlink?source=6312&search=writtenby+%28moreno%29+or+judges+%28moreno%29+or+opinion+%28before+PRE%2F10+moreno%29+and+date+aft+10+6+1993+and+court%28southern+district+w%2F5+florida%29&autosubmit=no>

In fact, the District Court's order of denial only states that, "the Court clearly advised counsel of the immigration consequences of her guilty plea." The court does not state that Carmen-Iglesias was advised of the immigration consequences, nor whether the court relied on any document on the record that refutes Carmen-Iglesias sworn affidavit. Even more important, the District Court does not clarify the main issue presented in the writ of coram nobis, whether counsel advised Carmen-Iglesias of the repercussions of pleading guilty and the effects that such plea would have on her immigration consequences.

The District Court in this matter committed reversible error as a matter of law by making a determination on the merits of the issues raised, relying not only on an incomplete record, but no record at all. There is insufficient record to make a final determination on the merits of the writ of coram nobis without a hearing. *See, McFarland v. Norton*, 425 F.3d 724 (9th Cir. 2005)(Since the factual basis of these claims is incomplete in the record, summary judgment at this stage would be inappropriate); *Jones-Hamilton Co. v. Beazer Materials & Services, Inc.*, 973 F.2d 688, 694 n.2 (9th Cir. 1992)(We may review a denial of summary judgment . . . where the record has been sufficiently developed to support meaningful review of the denied motion.) *Varghese v. Honeywell Int'l, Inc.*, 424 F.3d 411, 425 (4th Cir. 2005) (denial of summary judgment after a full trial is inappropriate because the denial was based on an undeveloped, incomplete record)

Based on the incomplete record that was relied upon by the District Court, the most logical solution is to remand the case to the District Court to consider the matter of the incomplete record prior to rendering a decision. *See, Oneida Indian Nation v. City of Sherrill*, 337 F.3d 139, 171 (2nd Cir. 2003)(rather than attempt to decide the issue based on an incomplete record, we vacate this portion of the judgment and remand for further proceedings)

B. The Writ of Error of Coram Nobis was Timely Filed.

Carmen-Iglesias filed her motion for writ of coram nobis to vacate her plea of guilt based on the Supreme Court's decision of *Padilla v. Kentucky*, 130 S.Ct. 1473 (Mar. 31, 2010). The writ of coram nobis was filed on March 31, 2011. (J.A.- 7; D. E. 173)<sup>7</sup> The petition could not have been filed prior to the *Padilla* decision and was filed within one year of the Supreme Court's decision in *Padilla*.<sup>8</sup>

The decision to deny the writ of error of coram nobis was an error as a matter of law. Carmen-Iglesias seeks this writ is to avoid that “a wrong may stand uncorrected which the available remedy would right.” *Id. United States v. Morgan*,

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<sup>7</sup> The writ was filed via traditional means on March 31, 2011 (J.A.- 7 D.E. 169, 170). However, on April 4, 2011 the Court denied the motion requesting leave of court for traditional filing but did not strike the original motion. (J.A.- 7; D.E.172) To err on the side of caution, prior counsel *re-filed* the motion via ECF on May 4, 2011. (J.A. -7; D.E.173)

<sup>8</sup> Although the pleading was filed within one year of the Supreme Court's decision, the one year time limitation does not apply to the writ of error coram nobis as it applies 28 U.S.C. § 2255(f)(3).

346 U.S. 502 (1954) The wrong is the failure of attorney Kreisberg to effectively represent Carmen-Iglesias, a lawful permanent resident, by failing to advise her of the immigration consequences of her plea. Advising Carmen-Iglesias of the consequences of her plea would have permitted her to proceed to trial, as were her original intentions and provide her the chance to avoid deportation. (J.A. 28; D.E. 171)

Carmen-Iglesias has served her term of incarceration, but “the results of her conviction persists” because the conviction renders her deportable. See *Morgan*, 346 US at 512-513 If the writ is issued vacating the conviction, Carmen-Iglesias will not be deported.

The District Court’s authority to issue a Writ of Error Coram Nobis stems from the All Writs Act. *Id.* *Morgan*, 346 US at 507 n.6 (citing Title 28 U.S.C. § 1651(a)). “A United States District Court has power to vacate its judgment of conviction and sentence after the expiration of a full term of service.” *Id.* 346 US at 503. A writ of coram nobis is an “extraordinary remedy” that should be used “only under circumstances compelling such action to achieve justice.” *Id.* at 511. Carmen-Iglesias bears the burden of proving that the proceedings were incorrect. *Id.* The writ of error coram nobis requires, (1) an invalid criminal proceeding; (2) that the petitioner suffered from continuing consequences of the conviction; (3) that there

was no remedy available at the time of trial; (4) and that the sound reason exists for failing to seek relief earlier. *Id.*

B. Since the Writ of Coram Nobis was Timely Filed, Mr. Kreisberg's Ineffective Assistance to Mrs. Carmen-Iglesias is a Fundamental Error that Rendered the Proceedings Irregular and Invalid

Mr. Kreisberg violated Carmen-Iglesias right to effective assistance of counsel. “[E]rrors of fact ‘of the most fundamental kind’” render a criminal proceeding “irregular and invalid.” *United States v. Mayer*, 235 U.S. 55, 69 (1914). A person who is not in custody may seek a writ of error coram nobis to attack a conviction for a “fundamental defect” such as ineffective assistance of counsel. *United States v. Minhas*, 2007 U.S. Dist. LEXIS 99619 (N.D. Fla. Dec. 26, 2007)).

*Strickland v. Washington*, 466 U. S. 668 (1984) sets forth the test for ineffective assistance of counsel. The test has two prongs: “(1) that counsel’s representation fell below an objective standard of reasonableness and (2) that there is a reasonable probability that, but for counsel’s error, the result of the proceedings would have been different.” *Aldrich v. Wainwright*, 777 F.2d 630 (11th Cir. Fla. 1985). Carmen-Iglesias meets both prongs.

C. Mr. Kreisberg's Representation of Carmen-Iglesias Fell Below an Objective Standard of Reasonableness

Mr. Kreisberg’s performance as Carmen-Iglesias attorney meets the first prong of *Strickland* because it fell below an objective standard of reasonableness. *See* 466 U.S. at 687. First, as per Carmen-Iglesias affidavit, Mr. Kreisberg failed

to advise her regarding the deportation consequence of her plea, which the Supreme Court recently held constitutes ineffective assistance of counsel. *Padilla*, 2010 U.S. LEXIS 2928, at \*33.

1. Mr. Kreisberg Failed to Advise Carmen-Iglesias Regarding the Deportation Consequence of Her Plea

The Supreme Court of the United States held that “counsel must inform her client whether her plea carries a risk of deportation.” *Padilla*, 2010 U.S. LEXIS 2928, at \*33. The facts of *Padilla* are similar to this case: both Carmen-Iglesias and Mr. Padilla are Lawful Permanent Residents who are facing virtually automatic deportation for a single conviction pursuant to Title 8 U.S.C. § 1227(a)(2)(B)(i).

The Supreme Court held that the subsection of the Immigration and Nationality Act renders both Mr. Padilla and Carmen-Iglesias deportable, although under different scenarios, but deportable nonetheless. The *Padilla* court explained that Immigration was “succinct, clear, and explicit in defining the removal<sup>9</sup> consequences.” *Padilla*, 2010 U.S. LEXIS 2928, at \*22 (citing 8 U.S.C. § 1227(a)(2)(B)(i)(“Any alien who at any time after admission has been convicted of

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<sup>9</sup> The term “removal” is used interchangeably with the term “deportation.” *Padilla* states: “The changes to our immigration law have also involved a change in nomenclature; the statutory text now uses the term ‘removal’ rather than ‘deportation.’” 2010 U.S. LEXIS 2928, at \*14 (citing *Calcano-Martinez v. INS*, 533 U.S. 348, 350, n.1 (2001)).

a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States or a foreign country is deportable.”)). Carmen-Iglesias is deportable under Section 237(a)(2)(a)(iii) of the Immigration and Naturalization Act, in that after admission, she was convicted of an aggravated felony as defined in § 101(a)(43)(M).

Neither Carmen-Iglesias nor Mr. Padilla are eligible for the narrow, “limited remnant[] of equitable discretion vested in the Attorney General to cancel the removal for noncitizens convicted of particular classes of offenses.” *Padilla*, 2010 U.S. LEXIS 2928, at \*14. Both Mr. Padilla’s and Carmen-Iglesias attorneys failed to advise them of the deportation consequence prior to entering their pleas, and each one relied on their attorney’s advice to enter his plea. *Padilla*, 2010 U.S. LEXIS 2928, at \*6. Both Padilla and Carmen-Iglesias would have insisted on going to trial had they received correct advice from their attorneys. *Id.*

Similar to Carmen-Iglesias Petition for Writ of Error Coram Nobis to Vacate Conviction, Mr. Padilla sought post-conviction relief based on the failure of his criminal defense attorney to advise him of the deportation consequence prior to entering his plea. *Padilla*, 2010 U.S. LEXIS 2928, at \*7. Mr. Padilla filed a *pro se* motion to vacate, set aside, or correct sentence pursuant to Kentucky Rule of Criminal Procedure 11.42. (Joint Appendix at 72-83, *Padilla*, 2010 U.S. LEXIS 2928 (available at on Lexis as *Padilla v. Kentucky*, 2008 U.S. Briefs 651))

In *Padilla*, the Supreme Court of the United States reversed the judgment of the Supreme Court of Kentucky and held that Mr. Padilla met the first prong of *Strickland* because his attorney's conduct was ineffective. *Padilla*, 2010 U.S. LEXIS 2928. The United States Supreme Court held that "Constitutionally competent counsel would have advised [Mr. Padilla] that his conviction for drug distribution made him subject to automatic deportation." *Id.* at \*7. The Court reasoned, "The consequences of *Padilla's* plea could easily be determined from reading the removal statute, his deportation was presumptively mandatory, and his counsel's advice was incorrect." *Id.* at \*23. The Court held, "[W]hen the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear." *Id.* at \*23-24. The same scenario applies to Carmen-Iglesias.

#### D. Mr. Kreisberg's Ineffective Assistance Prejudiced Carmen-Iglesias

Mr. Kreisberg's failure<sup>10</sup> to advise Carmen-Iglesias of the deportation consequence of her plea prejudiced Carmen-Iglesias. Prejudice exists where "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694 (noting that prejudice need not be shown by a preponderance of the evidence).

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<sup>10</sup> Based on Carmen-Iglesias affidavit, it can be established that the Court also failed to advise Carmen-Iglesias of the ramifications that pleading guilty would have on her immigration status.

## 1. Prejudice to Carmen-Iglesias is Presumed

Prejudice to Carmen-Iglesias should be presumed. In *Strickland*, the Supreme Court explained prejudice is presumed in certain Sixth Amendment contexts, such as where the impairment of the right involved is easy to identify and easy to prevent. *Id.* 466 U.S. at 691; *Penson v. Ohio*, 488 U.S. 75, 86-89, 109 (1988); *Cuyler v. Sullivan*, 446 U.S. 335, 349-50 (1980)

In *Padilla*, the Supreme Court stated, “The weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation.” *Padilla*, 2010 U.S. LEXIS 2928, at \*20. An attorney’s failure to advise his client of at least the possibility of deportation is easy to identify and easy to prevent. Therefore, prejudice is presumed. *See Strickland*, 466 U.S. at 691.

## 2. Carmen-Iglesias Suffered Actual Prejudice

Assuming for the sake of argument that prejudice is not presumed, Carmen-Iglesias can demonstrate actual prejudice because “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694. A reasonable probability is “a probability sufficient to undermine confidence in the outcome.” *Id.*

Counsel for Carmen-Iglesias, could have secured a plea to a charge that did not automatically trigger deportation proceedings. *See, United States v. Kwan*, 407 F.3d 1005, 1017-18 (9th Cir. 2005)(holding that an alien was prejudiced by his

attorney's ineffective assistance where his criminal defense attorney failed to pursue a nominally shorter sentence that would have avoided deportation and where the attorney failed to withdraw the plea so that the alien could have gone to trial, renegotiated the plea to avoid deportation, pled guilty to a lesser charge, or stipulated to a slightly lesser sentence to avoid deportation), *abrogated on other grounds by Padilla*, 2010 U.S. LEXIS 2928, at \*25; *Sasonov v. United States*, 575 F.Supp.2d 626 (D. N.J. 2008)(vacating guilty plea because defendant was prejudiced where defense counsel failed to negotiate a different plea agreement that would not have the consequence of deportation).

Second, whether a plea subjects an individual to automatic deportation constitutes a different result of the proceedings. *See Strickland*, 466 U.S. at 694. The Supreme Court held that deportation is part of the “penalty” of a conviction. *Padilla*, 2010 U.S. LEXIS 2928, at \*18. It stated, “deportation is an integral part – indeed, sometimes the most important part – of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.” *Id.* at \*15 (internal footnote omitted). Deportation is “intimately related to the criminal process . . . we find it ‘most difficult’ to divorce the penalty from the conviction in the deportation context.” *Id.* at \*17-18 (citing *United States v. Russell*, 686 F.2d 35, 38 (D.C. Cir. 1982)). But for Mr. Kreisberg’s ineffective assistance, there is a reasonable

probability that Carmen-Iglesias would not be deportable, which would be a different result of the proceedings. *See Strickland*, 466 U.S. at 694.

Third, Carmen-Iglesias would not have pled guilty had she known that her conviction would lead to automatic deportation. To satisfy the *Strickland* prejudice requirement of a different outcome in the guilty plea context, the “defendant must show 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.” *Hill v. Lockhart*, 474 U.S. 52, 59 (1985), subsequent habeas corpus proceeding at 877 F.2d 698 (8th Cir. 1989), *adopted en banc*, 894 F.2d 1009, (8th Cir. 1990), *cert. denied*, 497 U.S. 1011 (1990).

The record supports a finding that Carmen-Iglesias was prejudiced. The PSI establishes that Carmen-Iglesias was born in Cuba and was not a United States Citizen. (J.A.S. 2, 14) According to her sworn affidavit, the District Judge never informed her that she could be deported based on a plea of guilty. Neither the Plea Agreement nor the Change of Minutes mentions the possibility of deportation. (J.A. 21; D.E. 49) The sentencing hearing transcripts are unavailable and the Judgment and Commitment Order is silent on the matter of deportation as well. (J.A. 22; D. E. 77)

### E. Deportation is a Continuing Consequence of Carmen-Iglesias Invalid Conviction

Carmen-Iglesias is suffering from the continuing consequences of her invalid conviction. See, *United States v. Ibekwe*, 891 F. Supp. 587, 589 (M.D. Fla. 1995) (citing *Morgan*, 346 U.S. at 512-13). In 1946, the United States Supreme Court allowed an alien to challenge his criminal conviction because the conviction had the continuing consequence of rendering him deportable. *Fiswick v. United States*, 329 U.S. 211 (1946) The Court determined that the alien had “a substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him,” because, “to leave him to defend a deportation order on the ground that the crime of which he was convicted did not involve [the deportation ground] is to add to his burdens by depriving him of his best defense – that he was not properly convicted.” *Id.* at 221-222 (internal footnotes omitted) The Court noted that deportation is a “very great hardship” that may result in the loss “of all that makes life worth living.” *Id.* at 222 n.8 (citing *Bridges v. Wixon*, 326 U.S. 135, 147 (1945); *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922)). The Court determined that because the alien was “not accorded the trial to which he is entitled under our system of government” he “must stand in the position of any man who has been accused of a crime but not yet shown to have committed it.”) *Id.* at 223. Therefore, deportability is a continuing consequence of a conviction. See, *United States v. Stoneman*, 870 F.2d 102 (3rd Cir. 1989)

#### F. No Remedy was Available During the Criminal Proceedings

The writ of error coram nobis is appropriate because there was no remedy available at the time. *See Stoneman*, 870 F.2d at 106. This requirement “may reflect the rule that deliberate failure to use a known remedy at the time of trial may be a bar to subsequent reliance on the defaulted right.” *Id. Morgan*, 346 U.S. at 511. Since Mr. Kreisberg did not advise Carmen-Iglesias of the deportation consequence of her plea, Mr. Kreisberg was probably not aware of this consequence and thus had no incentive to attack what he believed was a fine result of the proceedings. There was no remedy available to Carmen-Iglesias while she only sought legal advice from Mr. Kreisberg and had no notice that the counseled advice she was receiving was ineffective.

#### G. Carmen-Iglesias has a Sound Reasons for Failing to Seek Relief Earlier

Carmen-Iglesias has sound reasons for failing to seek relief earlier. *Stoneman*, 870 F.2d at 106. She was not aware that her conviction would lead to mandatory deportation until she was placed into deportation proceedings and sought legal advice from Grisel Ybarra, an attorney and immigration law specialist. The passage of time does not preclude Carmen-Iglesias from relief because she did not delay after she received notice of her pending deportation trial. *See United States v. Cariola*, 323 F.2d 180 (3<sup>rd</sup> Cir. 1963)

In sum, this Court should issue a writ of error coram nobis and vacate Carmen-Iglesias conviction. She served her sentence successfully. Deportation is a “drastic measure,” *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948), which the Supreme Court has “long recognized that deportation is a particularly severe ‘penalty,’” *Padilla*, 2010 U.S. LEXIS 2928, at \*17 (citing *Fong Yue Ting v. United States*, 149 U.S. 698, 740 (1893)). The constitutional errors in Carmen-Iglesias criminal case and the equities justify that this court grant Carmen-Iglesias appeal and issue a writ of error coram nobis.

### **CONCLUSION**

For all the foregoing reasons, this Court should vacate the District Court’s decision denying the writ of coram nobis.

Dated this 12th day of July, 2011.

s/ Henry E. Marines  
Law Offices of Henry E. Marines  
HENRY E. MARINES, PA  
Florida Bar No.: 702722  
8501 S.W. 124 Avenue, Suite 204  
Miami, FL 33183  
(305) 412-4443 Office  
(305) 704-8217 Fax  
e-mail: [hm@henrymarineslaw.com](mailto:hm@henrymarineslaw.com)

**CERTIFICATE OF SERVICE**

I hereby do certify that on 12th, of July 2011 I filed the foregoing document with the Clerk of Court and have mailed copies via the United States Mail to Steven R. Petri, United States Attorney's Office, 500 E Broward Boulevard, 7th Floor, Fort Lauderdale, FL 33301-3002, parties that are not participants of the Electronic Brief Filing System.

s/ Henry E. Marines  
Law Offices of Henry E. Marines  
HENRY E. MARINES, PA  
Florida Bar No.: 702722  
8501 S.W. 124 Avenue, Suite 204  
Miami, FL 33183  
(305) 412-4443 Office  
(305) 704-8217 Fax  
e-mail: [hm@henrymarineslaw.com](mailto:hm@henrymarineslaw.com)