IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

----------x **RAVIDATH RAGBIR,** **Petitioner,** **- against –** **UNITED STATES OF AMERICA,** **Respondent.** ----------x	**No.** **Petition for** **Writ of Coram Nobis**

PETITION FOR WRIT OF CORAM NOBIS

NATURE OF THE ACTION

Ravidath Ragbir ("Mr. Ragbir" or "Petitioner") submits this petition for a writ of coram nobis, requesting that this Court vacate his 2001 conviction for wire fraud and conspiracy under 18 U.S.C. §§ 1343, 371, and 2 or, in the alternative, vacate his sentence and order resentencing so that that he may receive an opportunity for a hearing on loss and restitution. This petition is filed following the parties' March 3, 2016 voluntary dismissal of Mr. Ragbir's previous 2012 petition, No. 2:12-civ-07380-KM, without prejudice to refiling.

As a longtime lawful permanent resident ("green card" holder), Mr. Ragbir has called the United States home for more than twenty years. In that time he has become a father, a husband, and a nationally recognized community leader. Since 2001, however, Mr. Ragbir has suffered the serious and continuing consequences of his only conviction, which arose out of his employment as a low-level loan processor for a now-defunct mortgage lending company. On November 29, 2000, a jury convicted Mr. Ragbir of wire fraud and conspiracy, and on September 12, 2001 the

district court sentenced Mr. Ragbir to serve 30 months in prison and to pay $350,001 in restitution to his former employer (a sum based not on an actual calculation of loss, but on a fundamentally flawed stipulation).

Based on this conviction and the sentence of restitution imposed, immigration officials subsequently charged Mr. Ragbir with mandatory deportability based on having been convicted of an "offense involving fraud . . . in which the loss to the victim [attributable to the counts of conviction] . . . exceeds $10,000" under 8 U.S.C. § 1101(a)(43)(M)(i). Upon release from the custody of the Bureau of Prisons after serving his criminal sentence, Mr. Ragbir was immediately placed in custodial immigration detention, and he was subsequently ordered removed from the United States. Mr. Ragbir was released from immigration detention in 2008, but his efforts to have his order of removal overturned have been unsuccessful. Despite diligent and continued efforts to seek relief, he now faces deportation and permanent separation from his family and community.

Subsequent Supreme Court cases have brought to light two types of fundamental errors in Mr. Ragbir's criminal proceedings, each of which warrants coram nobis relief and would, if remedied, address these severe legal consequences of Mr. Ragbir's sole conviction. First, overly broad jury instructions permitted the jury to convict Mr. Ragbir of conduct that is not fraudulent or otherwise criminal, thus meriting the vacatur of his conviction. This includes incorrect "willful blindness" and "scheme or artifice to defraud" instructions. *See Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060 (2011); *Skilling v. United States*, 561 U.S. 358 (2010). Second, Mr. Ragbir's Sixth Amendment and Fourteenth Amendment rights to effective assistance of counsel were violated, during trial- and appellate-level proceedings, respectively. This includes the ineffective assistance Mr. Ragbir received from his defense counsel during the sentencing

phase of the district court proceedings, when she not only misadvised him about the immigration consequences of the loss calculation in his case, but also failed to investigate, negotiate, and properly calculate the loss attributable to his conviction. *See Lafler v. Cooper*, 132 S. Ct. 1376 (2012) (holding that the Sixth Amendment right to effective assistance of counsel extends to sentencing). Addressing this error would merit resentencing, at which time Mr. Ragbir would be able to demonstrate that losses tied to counts on which he was convicted were less than $10,000, and thus the conviction should not subject him to removal.

Had these legal errors not occurred, Mr. Ragbir and his family would not be suffering from the legal consequences they are experiencing today. Mr. Ragbir thus meets the three requirements for coram nobis relief: he suffers severe legal consequences from his underlying conviction; fundamental errors in his criminal proceedings render those proceedings invalid; and there was no remedy for the error that could have been raised at the time of his trial and he was unable to seek appropriate earlier relief. For these reasons and the reasons detailed herein, Mr. Ragbir respectfully requests that this Court vacate his conviction or, in the alternative, order his resentencing.

PARTIES

1. Petitioner Ravidath Ragbir has resided in the New York-New Jersey metropolitan area at all times since being granted lawful permanent residency in 1994, except for the period of incarceration and immigration detention arising from his conviction and sentence in the instant case. Today Mr. Ragbir lives with his wife at 193 State Street, Apt. 8, Brooklyn, New York 11201.

2. Respondent is the United States of America.

JURISDICTION

3. This Court has subject matter jurisdiction over this petition for the writ of coram nobis under the All Writs Act, 28 U.S.C. §1651. *See United States v. Morgan*, 346 U.S. 502 (1954); *United States v. Stoneman*, 870 F.2d 102, 105 (3d Cir. 1989).

4. Mr. Ragbir was convicted of wire fraud and conspiracy under 18 U.S.C. §§ 1343, 371, and 2 on November 29, 2000. On September 12, 2001, Mr. Ragbir was sentenced to serve 30 months in prison and to pay $350,001 in restitution. Mr. Ragbir has served his 30-month prison sentence and is no longer in criminal custody. He continues, however, to suffer the consequences of his conviction, including imminent deportation and separation from his family.

VENUE

5. Venue properly lies in the United States District Court, District of New Jersey. The Honorable William Bassler originally entered the judgment against Mr. Ragbir in the United States District Court in the District of New Jersey.

FACTS

A. Mr. Ragbir's Background

6. Ravidath Ragbir is a longtime lawful permanent resident, community leader, and husband and father to U.S. citizens, who is facing deportation and permanent separation from his family because of a fourteen-year-old conviction. He has lived in the United States for over two decades and has been a Lawful Permanent Resident since 1994. (Ex. B, Mr. Ragbir's Immigrant Visa and Alien Registration.) He has a 21-year-old daughter, Deborah Ragbir, who is a graduate of Rutgers University, and he currently lives in Brooklyn, NY with his wife, Amy Gottlieb, who is the Associate Regional Director for the Northeast Region of the American Friends Service Committee. (Ex. F, Deborah Ragbir's Birth Certificate; Ex. C, Amy Gottlieb's Affidavit and Passport ¶ 1.)

7. Because of Mr. Ragbir's experiences in immigration detention, he began working to help immigrant communities upon his release from detention in 2008. (Ex. B, Ragbir Aff. ¶¶ 3-4; Ex. D, Schaper Aff. ¶¶ 3-5.) Mr. Ragbir became a community organizer with the New Sanctuary Coalition of New York City, a coalition of faith-based organizations that serves vulnerable immigrant communities in New York City and the surrounding areas, and is involved in work with other immigrant rights organizations nationwide. (*Id.*)

8. In his capacity as an immigrant rights leader, Mr. Ragbir currently sits on the Planning Committee of the New York Immigration Coalition, through which he works closely with elected officials in support of New York's immigrant community, and is a former Chair of the Board of Directors for Families For Freedom, a prominent immigrant rights organization. (Ex. B, Ragbir Aff. ¶ 4.) He has testified before the New York City Council on detention and deportation policies, and he met with President Obama's transition team, to share his views on national immigration policy. (*Id.*)

9. Permanent separation would cause extreme hardship for Mr. Ragbir's family, particularly for his wife, Amy, and his daughter, Deborah. Mr. Ragbir, in conjunction with his ex-wife, supports and cares for Deborah, who would be devastated if she were to lose her father . (Ex. F, Deborah Ragbir's Letter in Support of Mr. Ragbir's Application for Deferred Action.) Amy would also be devastated by the loss of Mr. Ragbir, which would destroy their dream of creating a family together. (Ex. C, Gottlieb Aff.)

B. Mr. Ragbir's Criminal Proceedings

i. Background

10. In the late 1990s, Mr. Ragbir worked for Household Finance Corporation

("HFC"), a now-defunct mortgage lender,[1] where he was an "account executive," which was "the lowest-level sales position . . . offered in the individual branch offices." (Ex. T, Mem. Order and Op. 6.) Account executives were primarily salespeople, who solicited mortgage applications, conducted an initial review, referred applications to the company's underwriter for independent titling verification and appraisals, and met with applicants at loan closings to finalize the paperwork. (Ex. L, Superseding Indictment, Count One ¶ 2.) Account executives were instructed to solicit five referrals from every customer, and turn around applications in less than 72 hours. (Ex. M, Tr. of R. vol. 4, 154–155; *see also id.* at vol. 8, 66–68 (Testimony of HFC Employee Sankarsingh: "[O]ur job [was] to convince [people] that they needed money [and] that they should use our company as a lender . . . [E]verything was like really rushed. We had to get the documentation in and everything had to be turned right in so it could go to preliminary approval within 72 hours.").)

11. In or around 1998, Mr. Ragbir was approached by Robert Taylor, the owner of a local real estate business. (Ex. L, Superseding Indictment, Count One ¶ 1.) Mr. Taylor both personally applied for loans and referred other applicants to Mr. Ragbir. (*Id.* at ¶ 12.) Mr. Ragbir was initially nervous to work with Mr. Taylor as HFC had a policy against working with real estate brokers, but he accepted the applicants' information and submitted the loan applications to the underwriter for review and appraisal. (Ex. M, Tr. of R. vol. 3, 79; Ex. L, Superseding Indictment, Count One ¶ 10.)

12. In 1999, several of the mortgage transactions that Mr. Ragbir had referred to the underwriter became the subject of an investigation. The investigation uncovered that "Robert

[1] Soon after Mr. Ragbir's criminal proceedings came to an end, HFC gained notoriety for its questionable business practices. In 2002, twenty Attorneys General, including the Attorney General of New Jersey, announced a record-breaking settlement with Household International, HFC's parent company, for its alleged predatory lending practices in the subprime mortgage lending market. (Ex. V, Announcement of the Household International Settlement.)

Taylor" was an alias for Robert Kosch, who was engaging in fraud by submitting materially false applications, and had recruited others to do the same. (Ex. L, Superseding Indictment, Count One ¶¶ 5-7.)

13. On July 27, 1999, Mr. Ragbir and his fellow employees were taken from their office at HFC to the West Orange Police Office for questioning. (Ex. M, Tr. of R. vol. 2, 38.) Mr. Ragbir gave two statements, fully cooperating with the police. (Ex. B, Ragbir Aff. ¶ 7.) While Mr. Ragbir's immediate supervisor, Vivian Francis, was fired around the time of the incident, no criminal charges were brought against HFC employees at that time. (Ex. M, Tr. of R. vol. 5, 23.)

ii. Indictment and Trial

14. The investigation led to the indictment of five individuals, including Mr. Ragbir, for wire fraud and conspiracy under 18 U.S.C. §§ 1343, 371, and 2. (Ex. K, Superseding Indictment.) Mr. Ragbir was surprised and upset to learn that he would be indicted, having cooperated with the police by describing his interactions with "Robert Taylor" (Mr. Kosch). (Ex. B, Ragbir Aff. ¶ 7.) Mr. Ragbir took his case to trial, where he and Mr. Kosch were originally tried as co-defendants.[2] (Ex. M, Tr. of R. vol. 4, 5.) After several days of trial, Mr. Kosch accepted a plea agreement. (*Id.*)

15. At trial, the government alleged that Mr. Ragbir was Mr. Kosch's "inside guy" at HFC for Mr. Kosch's scheme. (Ex. M, Tr. of R. vol. 1, 3.) The government did not allege that Mr. Ragbir received any money from Mr. Kosch, nor that he otherwise received any portion of the disbursements HFC provided to Mr. Kosch as a result of the false loan applications that Mr. Kosch submitted. (Ex. R, Presentence Investigation Report ¶ 40 ("Ragbir . . . did not receive any

[2] Three other individuals, whom Mr. Kosch had referred to Mr. Ragbir as loan applicants, were initially indicted as co-conspirators: Gina Cafone, Janice Cubellis, and Rema Perry. These three individuals pled guilty early in the proceedings and subsequently testified against Mr. Ragbir. During the proceedings, their credibility was called into question. (Ex. L, Tr. of R. vol. 11, 105–114 (Closing Arguments).)

financial benefit from Kosch for his involvement in this crime[.]").) Rather, the government alleged that Mr. Ragbir continued to take his salary and commissions from his company and thus failed to be forthright and honest with HFC about the high probability that Mr. Kosch was involved in illegal activity. (*Id.* ("Ragbir abused a position of trust."); *see also id.* at vol. 1 (Excerpts from the Government's Opening Statement).)

16. To support its theory, the government introduced and relied heavily on what it claimed to be a transcript of Mr. Ragbir's statements to the police. It argued that the statements constituted a "confession" by Mr. Ragbir. (Ex. M, Tr. of R. vol. 5, 190.) During the trial proceedings, Mr. Ragbir contested the accuracy of the statements, the characterization of the statements as a "confession," and the voluntary nature of the statements, arguing that they did not correctly reflect the information he had provided to the police. (*Id.* at vol. 11, 114–31 (Closing Arguments).) However, Mr. Ragbir's trial attorney, Patricia Lee, did not consult a forensic expert to review the statements. (Ex. B, Ragbir Aff. ¶ 8.)

17. After three weeks of testimony, the jury found Mr. Ragbir guilty of wire fraud and conspiracy to commit wire fraud. (Ex. O, Judgment of Conviction 1.)

iii. Jury Instructions

18. Several aspects of the jury instructions reflected the government's theory regarding Mr. Ragbir's involvement in the scheme. As described in greater detail below, the jury was instructed that to be criminal, Mr. Ragbir's conduct need not involve intent or even actual knowledge of the fraudulent scheme. Rather, "reckless disregard for the truth" was sufficient for conviction. (Ex. N, Jury Instruction 30.) The jury was also provided a "willful blindness" instruction stating that knowledge of the scheme could be inferred from Mr. Ragbir's "deliberate disregard" of "a high probability that illegal activity was occurring." (Ex. N, Jury Instruction 53;

Ex. M, Tr. of R. vol. 11, 56); *see also infra*, Part II(A)(i). Additionally, the jury was instructed to find Mr. Ragbir guilty of participating in a "scheme or artifice to defraud" if his actions departed "from fundamental honesty, moral uprightness, or fair play and candid dealings." (Ex. N, Jury Instruction 29); *see also infra*, Part II(A)(ii). The jury was further informed that the scheme "need not be fraudulent on its face." (*Id.*)

iv. Sentencing

19. The jury was not required to make any determination as to the loss resulting from the conduct charged. The issue of loss was therefore addressed only after Mr. Ragbir's trial, for the purpose of determining his sentencing range under the Sentencing Guidelines. (Ex. E, Lee Aff. ¶ 7.)

20. Prior to sentencing, the prosecution sent a letter to the Court proposing a formula for calculating loss, which was based on the United States Sentencing Guidelines § 2F1.1 (2000) (Application Note 8(b)). (Ex. P, Letter from AUSA Paula Dow to Judge Bassler Regarding Sentencing 6-7.) The letter proposed that the Court calculate the loss to HFC as the total out-of-pocket disbursements that HFC had made on indicted loans and other loans that were considered to constitute "relevant conduct," minus any repayments that were made and the total amount that HFC had recovered or could be expected to recover on those loans. (*Id.*) The parties and probation office had begun to collect information regarding these elements: the exact value of the disbursements HFC had made on the loans, how much of the loans had been repaid, and the values of the properties that had been put up as collateral for the loans. The documents that were collected demonstrated that the value of the collateral properties securing the indicted loans exceeded the total disbursements that HFC paid out on those loans. (*Compare* Ex. P, Letter from AUSA Paula Dow to Judge Bassler Regarding Sentencing 5-6 (listing HFC's disbursements on

indicted loans), *with* Ex. R, Presentence Investigation Report ¶¶ 16-18, 20-22 (identifying the collateral properties securing the indicted loans), *and* Ex. V, Documents Demonstrating the Value of Collateral Properties Securing the Indicted Loans.)

21. Mr. Ragbir was entitled to a factual hearing to establish the loss amount. *See United States v. Fatico*, 603 F.2d 1053, 1056 (2d Cir. 1979). Had a sentencing hearing taken place, Mr. Ragbir would have had an opportunity to show that the collateral properties securing the indicted loans had a total value greater than the sum of HFC's disbursements on those loans, and therefore there was no loss to HFC arising out of the counts of conviction. (*Compare* Ex. P, Letter from AUSA Paula Dow to Judge Bassler Regarding Sentencing 5-6 (listing HFC's disbursements on indicted loans), *with* Ex. R, Presentence Investigation Report ¶¶ 16-18, 20-22 (identifying the collateral properties securing the indicted loans), *and* Ex. V, Documents Demonstrating the Value of Collateral Properties Securing the Indicted Loans.).

22. However, before any sentencing hearing took place, Ms. Lee advised Mr. Ragbir to waive his right to a hearing on loss and to stipulate to a loss amount of between $350,000 and $500,000, which included losses arising out of both indicted and unindicted loans. (Ex. E, Lee Aff. ¶ 12; *compare* Ex. Q, Stipulation No.1, *with* Ex. L, Superseding Indictment, Counts Two-Seven ¶ 3.) She also told Mr. Ragbir that his *conviction* could result in deportation, leaving Mr. Ragbir with the understanding that, since he had been found guilty, his sentence was irrelevant to deportability. (Ex. E, Lee Aff. ¶ 14; Ex. B, Ragbir Aff. ¶ 9.) In fact, the question of whether or not the conviction was a deportable offense depended on the loss determinations that were to be made at sentencing, *see* 8 U.S.C. § 1101(a)(43)(M)(i) (providing that a fraud conviction is an aggravated felony only if the loss to the victim exceeds $10,000); *Nijhawan v. Holder*, 557 U.S. 29, 42 (2009) (holding that, for immigration purposes, the loss to the victim must be loss that is

"tied to the specific counts covered by the conviction"), but Ms. Lee did not inform Mr. Ragbir that this was the case.

23. Ms. Lee did not investigate how much loss was attributable to Mr. Ragbir's conviction, which was relevant to both criminal sentencing and immigration consequences. She also failed to inform Mr. Ragbir about the possibility of negotiating a loss calculation that differentiated between the loss tied to the counts of conviction and the loss tied to unindicted conduct, even though the unindicted loan amounts described in the stipulation total well over $400,000 and could account for all $350,000-$500,000 of the stipulated loss amount. (Ex. B, Ragbir Aff. ¶ 9; Ex. E, Lee Aff. ¶ 12; Ex. Q, Stipulations.)

24. Meanwhile, the Presentence Investigation Report used the disbursement sums referred to in the stipulation as a proxy for loss to HFC; it did not take into account any repayments on the loans or HFC's security interest in the collateral properties, which would have offset HFC's out-of-pocket disbursements. (*Compare* Ex. R, Presentence Investigation Report ¶¶ 17-22, *with* Ex. Q, Stipulation No.1.)

25. On September 12, 2001, Mr. Ragbir was sentenced to 30 months incarceration and ordered to pay $350,001 in restitution. (Ex. S, Tr. of Sentencing Hr'g 29–30.) During sentencing, the judge explained to Mr. Ragbir that he sentenced him "at the bottom of the guideline range to really reflect the fact that but for this . . . unfortunate experience, you are a law-abiding person. I was impressed with the support . . . you have in the community and from your family. You're not a criminal and I know that I'm never going to see you again." (*Id.* at 33.) Mr. Ragbir was then confined to house arrest, pending his appeal. (Ex. B, Ragbir Aff. ¶ 11.)

v. Appeals

26. On appeal to the Third Circuit, Mr. Ragbir's appellate counsel, Anthony J. Fusco,

Jr., raised several challenges to Mr. Ragbir's conviction. (Ex. U, Brief for Appellant, United States v. Ragbir, No. 01-3745 (3d Cir. Jan. 22, 2002) 43-45 [hereinafter Appellant's Br.].) However, the appellate attorney did not raise the objections to the jury instructions that trial counsel had preserved.

27. After exhausting his last direct appeal, Mr. Ragbir was ordered to surrender to the Bureau of Prisons in February of 2004. (Ex. B, Ragbir Aff. ¶ 13.) Mr. Ragbir served two years at the Metropolitan Detention Center Brooklyn prior to being transferred into DHS custody. (*Id.* at ¶ 15.)

C. Immigration Proceedings

28. Mr. Ragbir was placed in removal proceedings in 2006 on the basis of his conviction, which was deemed an aggravated felony. (Ex. B, Ragbir Aff. ¶¶ 9, 18.) An immigration judge ordered him to be deported from the United States without considering any of the evidence that his family and community submitted attesting to his good character and strong community ties, and the Board of Immigration Appeals ("BIA") affirmed. (*Id.* at ¶ 27.)

29. Mr. Ragbir was detained throughout his immigration case and was transferred to an immigration jail in Alabama, even though his family lived in New Jersey. (*Id.* at ¶ 21; Ex. H, Huffington Post, Tracking Immigrants in Detention.) He was released from detention in 2008 on an order of supervision. (Ex. B, Ragbir Aff. ¶ 4.) He is now subject to a final order of removal and has exhausted his appeals. *See Ragbir v. Holder*, 389 F. App'x 80 (2d Cir. 2010), *cert. denied*, 132 S. Ct. 95, 181 L. Ed. 2d 24 (2011); *see also Ragbir v. Lynch*, 640 F. App'x 105 (2d Cir. 2016).

30. Throughout it all, Mr. Ragbir has continued to put the needs of other immigrant community members before his own, becoming a national advocate for immigrant rights upon

his release from detention. (Ex. H, The Indypendent, Ravi Ragbir: Freedom Fighter; *id.*, ABC News, Hunger Strikes Used by Immigration Reform Advocates.) During the course of this work, Mr. Ragbir met Amy Gottlieb, a U.S. Citizen who leads the American Friends Service Committee's programs in the Northeastern United States. They were married on September 23, 2010. (Ex. C, Gottlieb Aff. ¶ 2.)

31. On March 15, 2012, Mr. Ragbir asked the BIA to reconsider, reopen and remand his immigration proceedings to consider adjustment of status through his U.S. citizen wife. (*Id.* at ¶ 10.) On May 15, 2012, the BIA issued a perfunctory opinion, denying his motion on several grounds. (Ex. K, BIA 2012 Decision.) The BIA instructed Mr. Ragbir to bring his claims to federal district court. (*Id.* at 3 ("The issues involving . . . the respondent's convictions are properly subject for a post-conviction motion to the federal criminal court.").)

32. In December 2011, Mr. Ragbir was granted a stay of removal. This was renewed in February 2013, March 2014, and January 2016 on the basis of Mr. Ragbir's resounding equities. (Ex. I, ICE Letter Granting Stay of Removal.) It is rare for ICE to grant this form of prosecutorial discretion in cases involving a criminal conviction; it is even less common for them to issue a multi-year stay in order to allow Mr. Ragbir to pursue avenues for relief. The stay of removal granted by ICE is evidence of the resounding equities in Mr. Ragbir's case—his application was supported by letters from members of the U.S. Congress, New York State Senate, New York City Council, clergy, community leaders, and hundreds of others in recognition of Mr. Ragbir's contributions to his community. (*Id.*; *id.*, Index of Exhibits Attached to Mr. Ragbir's Application for Deferred Action.)

D. Coram Nobis Proceedings

33. Mr. Ragbir filed his initial petition for coram nobis relief on November 30, 2012,

and soon thereafter the parties began to discuss the possibility of a resolution that would not involve litigation. (Ex. A, May 30, 2013 Ct. Order.) In light of these discussions, in February 2013, this Court granted the parties' request that the case be stayed until June 20, 2013. (*Id.*) On May 28, 2013, Mr. Ragbir informed this Court that discussions were ongoing and requested an extension of the stay until October 20, 2013. (*Id.*) Rather than grant an extension of the stay, on May 30, 2013, this Court issued an order administratively terminating the case and informing Mr. Ragbir "that administrative termination is not a 'dismissal' for purposes of the statute of limitations, and that if the case is reopened, it is not subject to the statute of limitations time bar if it was originally filed timely." (*Id.*) Mr. Ragbir submitted an amended petition along with a request that his case be restored to this Court's active calendar in February 2015.

34. Pursuant to further discussions, Petitioner and Respondent submitted a joint stipulation to voluntarily dismiss this action without prejudice pursuant to Fed. R. Civ. P. 41(a)(1)(A)(ii). This Court dismissed the action without prejudice on March 3, 2016. On May 13, 2016, Mr. Ragbir submitted a Presidential Pardon petition to the U.S. Department of Justice's Office of the Pardon Attorney. (Ex. J, Index of Exhibits Attached to Mr. Ragbir's Application for a Presidential Pardon). As of Jan. 20, 2017, no action was taken on the application. Mr. Ragbir now submits this petition, respectfully renewing his legal arguments for a writ of coram nobis.

CLAIMS OF RELIEF IN SUPPORT OF PETITION FOR WRIT OF CORAM NOBIS

MR. RAGBIR MERITS CORAM NOBIS RELIEF

35. A petitioner seeking coram nobis relief must meet three key requirements. First, the petitioner must no longer be in custody but continue to suffer the legal consequences from the underlying conviction. *See United States v. Stoneman*, 870 F.2d 102, 105 (3d Cir. 1989).

Second, fundamental errors at the trial court level must render the petitioner's conviction proceedings invalid. *Id.* Third, there must have been no remedy for the error that could have been raised at the time of petitioner's trial and sound reasons must exist for petitioner's failure to seek appropriate earlier relief. *Id.* Mr. Ragbir merits coram nobis relief because he meets these requirements.

I. ALTHOUGH HE IS NO LONGER IN CRIMINAL CUSTODY, MR. RAGBIR CONTINUES TO SUFFER THE LEGAL CONSEQUENCES OF HIS CONVICTION.

36. A final order of deportation stemming from a conviction is a sufficiently serious consequence for the purposes of a writ of coram nobis. *See Cabrera v. United States*, CIV. 10-2713-WJM, 2011 WL 2784419 (D.N.J. July 12, 2011); *Mashni v. United States,* 2006 WL 208564, at *3 (D.N.J. Jan. 25, 2006); *see also United States v. Akinsade*, 686 F.3d 248, 252 (4th Cir. 2012); *United States v. Esogbue*, 357 F.3d 532, 534 (5th Cir. 2004). Mr. Ragbir is a devoted husband to and father of United States citizens and has demonstrated a deep commitment to his family and community, and the ramifications of his deportation would be devastating. (Ex. C, Gottlieb Aff.; Ex. F, Deborah Ragbir's Letter in Support of Mr. Ragbir's Application for Deferred Action; Ex. I, Mr. Ragbir's Application for Deferred Action & Index of Attached Exhibits; Ex. J, Index of Exhibits Attached to Mr. Ragbir's Application for a Presidential Pardon.) It is the single conviction that is the subject of this petition, which forms the sole basis for his final order of deportation. Additionally, Mr. Ragbir has exhausted all possible appeals in his immigration case. *See Ragbir v. Holder*, 389 F. App'x 80 (2d Cir. 2010), *cert. denied*, 132 S. Ct. 95, 181 L. Ed. 2d 24 (2011); *see also Ragbir v. Lynch*, 640 F. App'x 105 (2d Cir. 2016).

II. FUNDAMENTAL ERRORS RENDER MR. RAGBIR'S CRIMINAL PROCEEDINGS INVALID.

A. Improper jury instructions allowed Mr. Ragbir to be convicted on the basis of conduct that is not criminal under the law.

37. When a defendant is convicted by a jury that was instructed it could return a guilty verdict on the basis of conduct that the Supreme Court later finds to be not criminal under the law, that error is fundamental enough to warrant coram nobis relief. *United States v. Chartock*, No. CRIM.A. 05-614-02, 2013 WL 3009719, at *4 (E.D. Pa. June 18, 2013) *aff'd*, 556 F. App'x 158 (3d Cir. 2014); *see also United States v. Peter*, 310 F.3d 709, 711 (11th Cir. 2002); *United States v. McClelland*, 941 F.2d 999, 1002-03 (9th Cir. 1991). There are two such sets of improper jury instructions in this case: one relating to *mens rea* and one relating to the definition of the "scheme or artifice to defraud."

i. Improper jury instructions allowed the jury to convict Mr. Ragbir without finding the *mens rea* required by the criminal statute.

38. At Mr. Ragbir's trial, the Court administered an improper willful blindness jury instruction for Counts 2 through 7 (all substantive counts in the indictment). The jury instructions first properly explained that to find Mr. Ragbir guilty under the wire fraud statute, 18 U.S.C. § 1343, the jury had to find that he acted knowingly, because knowing and willful participation in a "scheme or artifice to defraud" and "specific intent to defraud" was an element of the charged offense. (Ex. N, Jury Instruction 28.) However, the Court then improperly instructed the jury that this requirement would be satisfied if the jury found that Mr. Ragbir: (1) acted with a "deliberate disregard" for a "high probability that illegal activity was occurring" and (2) "failed to take action to determine" whether or not that illegal activity was in fact taking place. (Ex. N, Jury Instruction 53; Ex. M, Tr. of R. vol. 11, 56.)

39. In *Global-Tech Appliances, Inc. v. SEB S.A.*, the Supreme Court found that a nearly identical willful blindness jury instruction conflated knowledge with recklessness or

negligence, thus permitting conviction on less than the requisite *mens rea*. 131 S. Ct. 2060, 2071 (2011). *Global-Tech* held that a finding of "deliberate indifference to a known risk" is not enough to establish that a defendant acted knowingly. *Id.* at 2062. Rather, to find that a defendant acted knowingly, a jury must find that he or she made "active efforts . . . to avoid knowing about the infringing nature of the activities." *Id.* at 2071. Therefore, willful blindness instructions can only pass constitutional muster if they require the jury to find that the defendant (1) "subjectively believe(d) that there [was] a high probability that a fact exist[ed]," and (2) took "deliberate actions to avoid learning of that fact." *Id.* at 2063.[3]

40. The willful blindness instruction in Mr. Ragbir's case does not pass constitutional muster. The reference to "deliberate disregard" in the instruction permitted the jury to convict Mr. Ragbir without finding that possessed the requisite "subjective belief" that illegal activity was occurring. *See id.* at 2062-63. (*Cf.* Ex. N, Jury Instruction 53; Ex. M, Tr. of R. vol. 11, 56.) Further, the instruction's reference to a "fail[ure] to take action to determine whether or not" illegal activity was occurring did not require the jury to find that Mr. Ragbir took "deliberate actions to avoid learning" of illegal activity. *Global Tech*, 131 S. Ct. at 2071 (defining "deliberate actions" as "active efforts . . . to avoid knowing"). (*Cf.* Ex. N, Jury Instruction 53; Ex. M, Tr. of R. vol. 11, 56.) Thus, the jury instructions in Mr. Ragbir's case allowed the jury to convict him without finding that he had the requisite *mens rea*: knowledge. *Global-Tech*, 131 S. Ct. at 2070.

ii. Improper jury instructions on "scheme or artifice to defraud" allowed to the jury to convict Mr. Ragbir of honest-services fraud even though he did not receive bribes or kickbacks.

[3] Following the Supreme Court's decision in *Global-Tech*, the Third Circuit's model rules for willful blindness instructions advise courts to specify these two requirements, rather than asserting that mere conscious disregard of the risk of a fact's existence is sufficient. *See* Model Rules for Criminal Jury Instructions, *available at* http://www.ca3.uscourts.gov/sites/ca3/files/Chapter%205%20Rev%20Jan%202014.pdf.

41. At Mr. Ragbir's trial, this Court administered an improper honest services instruction concerning what constitutes a "scheme or artifice to defraud." The jury was improperly instructed that Mr. Ragbir could be found guilty of participating in a "scheme or artifice to defraud" if his actions simply departed "from fundamental honesty, moral uprightness, or fair play and candid dealings." (Ex. N, Jury Instruction 29.) At no time, however, was the jury instructed to find that Mr. Ragbir received any kickbacks or bribes for his actions. Thus, the jury was permitted to convict Mr. Ragbir for merely depriving HFC of its right to honest services, i.e., an account executive who was working in good faith to identify legitimate loan applicants and to protect the company against possible fraud.

42. In *Skilling v. v. United States*, 561 U.S. 358, 408-09 (2010), the Supreme Court held that a person can only be convicted of fraud under an honest services theory if that person was involved in a bribe or kickback scheme. The petitioner in *Skilling*, who had served as the CEO of Enron for six months shortly before it collapsed, *see* 561 U.S. at 368, argued that 18 U.S.C. § 1346, which defines "scheme or artifice to defraud" for the purposes of 18 U.S.C. §§ 1341-1351 as including "a scheme or artifice to deprive another of the intangible right of honest services," was unconstitutionally vague. 561 U.S. at 399. Alternatively, he argued that his indicted conduct, which involved misrepresenting Enron's financial well-being to the company's shareholders and the investing public, was not covered by that statutory definition. *Id.* In order to avoid invalidating the statute for vagueness, the Supreme Court imposed a limiting construction, holding that a scheme or artifice to deprive an employer of honest services is only criminal when the offending employee has received bribes or kickbacks from a third party who was not deceived. *Id.* at 412-13. Thus, Mr. Skilling's honest services fraud conviction was vacated; although he had enriched himself by deceiving Enron's shareholders and the public

about the company's fiscal health, he had never received any form of enrichment from a third party in exchange for his misrepresentations. *Id.* at 413-14.

43. Prior to *Skilling*, the Third Circuit (along with several other circuits) had adopted the broader definition of scheme or artifice to defraud, defining it to include "a departure from fundamental honesty, moral uprightness, or fair play and candid dealings in the general life of the community." *United States v. Goldblatt*, 813 F.2d 619, 624 (3d Cir. 1987). Pursuant to *Skilling*, this definition is now improper, at least without an additional finding that the defendant received bribes and kickbacks from the scheme. *See Skilling*, 561 U.S. at 412-13; *see also id.* at 418-19 (Scalia, J., concurring) (criticizing courts' prior definition of schemes to defraud in terms of violations of "moral uprightness, of fundamental honesty, fair play and right dealing" (internal quotation marks and citations omitted)).[4]

44. While Mr. Ragbir was not charged under the honest services fraud statute, the prosecution in his case offered the jury an honest services fraud theory. *Cf. United States v. Antico*, 275 F.3d 245 (3d Cir. 2001) (affirming an honest-services fraud conviction obtained under 18 U.S.C. § 1343, in a case where § 1346 had not been charged[5]), *abrogated by Skilling v. United States*, 561 U.S. 358 (2010) (abrogation recognized by *United States v. Andrews*, 681 F.3d 509, 518 (3d Cir. 2012)); *see also United States v. Redzic*, 627 F.3d 683 (8th Cir. 2010) (concluding that although § 1346 had not been charged and the phrase "honest services" was not used in the indictment, during the trial, or in the jury instructions, the defendant was lawfully convicted of honest services fraud when he was found guilty of accepting bribes in exchange for

[4] The Third Circuit's model rules for "scheme or artifice to defraud" instructions also now eschew such language. *See* Model Rules for Criminal Jury Instructions, *available at* http://www.ca3.uscourts.gov/sites/ca3/files/2013%20Chap%206%20Fraud%20Offenses%20final%20revision%202%202014.pdf. *See also United States v. Tartaglione*, No. CR 15-0491, 2017 WL 105743, at *1 (E.D. Pa. Jan. 11, 2017) (citing the same).

[5] *See* Pending Charges, *United States v. Antico*, No. 2:98-cr-00242-JD-1 (E.D. Pa. May 13, 1998).

conspiring to obtain commercial driver's licenses for unqualified individuals by submitting inaccurate and false paperwork). In this case, the government asserted that Mr. Ragbir had failed in his duty to protect his employer from fraud. (Ex. M, Tr. of R. vol. 1, 5-6 ("[Mr. Ragbir] is the account executive that's supposed to be verifying this personal information. At Household Finance he is the first line of defense to make sure the person sitting across from him is, in fact, a true person. It's his job to make sure that they give money to people that are good credit risks.").) However, at no point during the trial was it alleged that Mr. Kosch, or any other third party, paid Mr. Ragbir in exchange for his cooperation. (Ex. R, Presentence Investigation Report ¶ 40 ("While Ragbir was not an organizer, leader, manager, or supervisor of the offense, and did not receive any financial benefit from Kosch for his involvement in this crime, Ragbir abused a position of trust.").) In addition, Mr. Ragbir's indictment does not allege, or make any mention of, the sort of bribe- or kickback-scheme required to find him guilty of honest-services fraud under 18 U.S.C. § 1343. (Ex. L, Superseding Indictment.) Nonetheless, the jury was instructed to find him guilty of participating in a "scheme or artifice to defraud" if his actions simply departed "from fundamental honesty, moral uprightness, or fair play and candid dealings." (Ex. M, Jury Instruction 29.)

45. Because Mr. Ragbir did not receive any bribe or kickback from a third party, his conviction should be vacated under *Skilling*.[6] *See e.g., United States v. Aunspaugh*, 792 F.3d 1302, 1308 (11th Cir. 2015) (vacating convictions because jury instructions would have allowed

[6] The rule in *Skilling* is retroactive. New substantive rules, including "decisions that narrow the scope of a criminal statute by interpreting its terms," apply retroactively. *Schriro v. Summerlin*, 542 U.S. 348, 351-52 (2004) (citing *Bousley v. United States*, 523 U.S. 614, 620-21 (1998)). In *Skilling*, the Supreme Court narrowed the scope of honest services fraud to only "paradigmatic cases of bribes and kickbacks." 561 U.S. at 411. Thus, it is a new substantive rule that applies retroactively to past convictions. *See United States v. Jennings,* No. CIV. 11-150 RHK, 2011 WL 3609298, at *2 (D. Minn. Aug. 15, 2011) *aff'd,* 696 F.3d 759 (8th Cir. 2012) (citing *United States v. Scruggs,* No. 3.07CR192-B-A, 2011 WL 1832769, at *3 (N.D. Miss. May 13, 2011); *DeGuzman v. United States,* Civ. A. No. SA-10-CA-951, 2011 WL 777934, at *2 (W.D. Tex. Feb. 25, 2011); *Rodrigues v. United States,* Civ. No. 10-406-DAE, 2011 WL 529158, at *8 (D. Haw. Jan. 31, 2011).

the jury to convict even if they found that the defendant was self-dealing and did not receive a kickback); *United States v. Chartock*, No. CRIM.A. 05-614-02, 2013 WL 3009719 (E.D. Pa. June 18, 2013) *aff'd*, 556 F. App'x 158 (3d Cir. 2014) (granting coram nobis relief with respect to honest-services fraud convictions where the jury had not found that the defendant had received bribes or kickbacks.); *United States v. Lynch*, 807 F. Supp. 2d 224, 235 (E.D. Pa. 2011) (granting coram nobis on the basis that an improper interpretation of § 1343 at the trial court level constituted fundamental error); *United States v. Panarella,* CRIM.A. 00-655, 2011 WL 3273599, at *6 (E.D. Pa. Aug. 1, 2011) (holding that petitioners tried under a prior interpretation of the wire fraud statute were eligible for coram nobis relief, as they had been convicted for acts that current law does not make criminal); *United States v. Mandel*, 862 F.2d 1067, 1074–75 (4th Cir. 1988) (granting coram nobis relief on the basis of a conviction under a mail fraud theory that was later found to be improper).[7]

B. Mr. Ragbir was prejudiced by the ineffective assistance of counsel that he received, in violation of his Sixth and Fourteenth Amendment rights

46. Assistance of counsel that is so ineffective and prejudicial as to constitute a violation of a defendant's constitutional rights is a sufficiently fundamental error to warrant coram nobis relief. *See, e.g.*, *United States v. Orocio*, 645 F.3d 630, 636 (3d Cir. 2011), *abrogated on other grounds by Chaidez v. United States*, 133 S. Ct. 1103 (2012); *United States v. Golden*, 854 F.2d 31 (3d Cir. 1988); *United States v. Rad–O–Lite of Philadelphia, Inc.*, 612 F.2d 740, 744 (3d Cir. 1979); *see also Kovacs v. United States*, 744 F.3d 44, 49 (2d Cir. 2014)

[7] As noted in *Mandel*, courts recognizesthat the writ may be issued to correct fundamental errors of law. Such an error may occur when a significant change in the law following a conviction means that the defendant was convicted for conduct that is no longer illegal. Wilson v. United States, No. 4:04-CR-35-1H, 2016 WL 2888990, at *1 (E.D.N.C. May 16, 2016) (quoting *United States v. Interstate Gen. Co., L.P.*, 39 Fed.Appx. 870, 873 (4th Cir. 2002) (internal citations omitted)). *See also* United States v. Mcneill, No. 5:04-CR-135-FL-1, 2016 WL 7156492, at *1 (E.D.N.C. Dec. 7, 2016); Gaddy v. United States, No. 3:04-CR-281-RJC-1, 2015 WL 2401795, at *2 (W.D.N.C. May 20, 2015); Eastwood v. United States, No. 3:16-CV-00536-JAG, 2017 WL 462635, at *3 (E.D. Va. Feb. 3, 2017).

(citing *Chhabra v. United States,* 720 F.3d 395, 406 (2d Cir. 2013)); *United States v. Akinsade*, 686 F.3d 248, 256 (4th Cir. 2012). Mr. Ragbir had a Sixth Amendment right to effective assistance of counsel at trial and sentencing. U.S. Const. amend. VI; *Lafler v. Cooper*, 132 S. Ct. 1376 (2012). He also had a Fourteenth Amendment right to effective assistance of counsel on his first appeal. *Evitts v. Lucey*, 469 U.S. 387, 396 (1985). Both of these constitutional rights were violated, because the performances of Mr. Ragbir's trial and appellate attorneys (1) were deficient and fell below "an objective standard of reasonableness," *Strickland v. Washington*, 466 U.S. 668, 690 (1984), and (2) prejudiced Mr. Ragbir, such that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.* at 693. *See also id.* at 687 (establishing this two pronged inquiry to determine whether counsel's performance is ineffective).[8]

i. Mr. Ragbir was prejudiced by his trial attorney's ineffective assistance.

a. Mr. Ragbir was prejudiced when his trial attorney misadvised him about the immigration consequences of his conviction and stipulation to a loss in excess of $10,000.

47. In *Padilla v. Kentucky*, 559 U.S. 356 (2010), the Supreme Court held that defense counsel have an affirmative duty to advise defendants of the immigration consequences of their pleas and convictions. However, even before *Padilla*, it had long been held that attorneys act ineffectively when they *misadvise* their clients with respect to the immigration consequences of convictions. *See Padilla*, 559 U.S. at 386 (Alito, J., concurring) (noting that prior to *Padilla*, courts routinely held "that affirmative misadvice regarding the removal consequences of a conviction can give rise to ineffective assistance" under *Strickland*, and that a holding limited to this "would . . . not require any upheaval in the law"); *United States v. Castro–Taveras*, 841 F.3d

[8] Ineffective assistance of counsel claims against both trial and appellate counsel can be brought together. *See Johnson v. United States*, 759 F. Supp. 2d 534 (D. Del. 2011) (assessing ineffective assistance claims against different trial and criminal counsels); *United States v. Gray*, 558 F. Supp. 2d 589 (W.D. Pa. 2008) (same).

34 (1st Cir. 2016) (granting coram nobis relief and finding that the underlying principle for *Padilla's* misadvice holding was so embedded in Sixth Amendment framework at time *Padilla* was decided that reasonable jurists would have agreed that *Strickland* applied to misadvice claims on deportation consequences.); *Kovacs v. United States*, 744 F.3d 44, 49 (2d Cir. 2014); *United States v. Kwan*, 407 F.3d 1005, 1017 (9th Cir. 2005); *United States v. Couto*, 311 F.3d 179, 187-88 (2d Cir. 2002); *United States v. Nagaro-Garbin*, 653 F. Supp. 586, 590 (E.D. Mich.), *aff'd*, 831 F.2d 296 (6th Cir. 1987); *Downs-Morgan v. United States*, 765 F.2d 1534, 1540-41 (11th Cir. 1985) (collecting cases); *see also Dickerson v. Vaughn*, 90 F.3d 87, 92 (3d Cir. 1996) (finding that "misrepresentation of the applicable law" concerning the possibility of preserving an issue for appeal upon pleading nolo contendere constitutes ineffective assistance).[9]

48. Mr. Ragbir's trial attorney, Patricia Lee, misadvised him when she said that his conviction could lead to deportation, but did not explain that the immigration consequences of the conviction were dependent on the outcome of the loss determination. (Ex. E, Lee Aff. ¶ 14.) In other words, she treated Mr. Ragbir's potential deportability as a foregone conclusion once the guilty verdict was returned, leaving Mr. Ragbir with the mistaken understanding that his sentencing proceedings had nothing to do with whether or not he would face exile and permanent

[9] Because this petition raises an affirmative misadvice claim, this Court need not address the retroactivity concerns that may arise where a petitioner raises a claim regarding defense counsel's failure to provide any immigration advice during the criminal proceedings. In *Chaidez v. United States*, 133 S. Ct. 1103 (2013), the Supreme Court held that *Padilla's* holding (regarding the failure to advise about immigration consequences) does not necessarily apply retroactively to cases that were final at the time of the 2010 *Padilla* decision. However, the Court's holding on retroactivity was limited to cases where defense counsel failed to advise defendants of immigration consequences at all, rather than cases where defense counsel gave defendants affirmative misadvice. *Chaidez*, 133 S. Ct. at 1112. As noted above, *Padilla* noted that prior courts had long recognized affirmative misadvice as a breach of counsel's Sixth Amendment duty, whereas courts' treatment of failure-to-advise claims was less clear. Moreover, even with respect to failure-to-advise claims, *Chaidez* expressly reserved the question of whether *Padilla* could retroactively reach ineffective assistance challenges to federal convictions. *See Chaidez*, 133 S. Ct. 1103, 1113 n.16 (explaining that the Court declined to rule on this question because it had not been sufficiently raised below). This is in keeping with previous decisions which have left open the question of whether the bar on retroactivity of "new rules" applies to post-conviction challenges to federal convictions. *See Teague v. Lane*, 489 U.S. 288, 327 n.1 (1989); *Danforth v Minnesota*, 552 U.S. 264, 269 n.4 (2008). In any event, the Court need not address these issues because Mr. Ragbir's counsel provided him with affirmative misadvice about the immigration consequences of his case, a failing of her Sixth Amendment duty that has long been recognized by federal courts.

separation from his family. This information was incorrect.

49. Federal immigration law is clear regarding the immigration consequences of a fraud conviction where loss to the victim is found to exceed $10,000. Any conviction for a crime involving "fraud or deceit in which the loss to the victim or victims exceeds $10,000" is classified as an aggravated felony under 8 U.S.C. § 1101(43)(M)(1), and therefore a ground for mandatory deportation under 8 U.S.C. § 1227. For purposes of this threshold, the loss must be actual loss from the convicted conduct, rather than intended loss or loss from unindicted conduct. *See, e.g., Singh v. Attorney Gen. of U.S.*, 677 F.3d 503, 508 (3d Cir. 2012); *Nijhawan v. Holder*, 557 U.S. 29, 42 (2009) ("[L]oss must be tied to the specific counts covered by the conviction [and] cannot be based on acquitted or dismissed counts or general conduct." (internal quotation marks and citations omitted)). In the criminal context, any factual findings or disputes regarding loss calculations may be addressed at sentencing. *See United States v. Fatico*, 603 F.2d 1053, 1056 (2d Cir. 1979); *see also United States v. Badaracco*, 954 F.2d 928 (3d Cir. 1992); *United States v. Furst*, 918 F.2d 400 (3d Cir. 1990).

50. Thus, Ms. Lee should have not have advised Mr. Ragbir that he was deportable based on his conviction. The Supreme Court made clear in 2012 that a criminal defendant's Sixth Amendment right to effective assistance of counsel extends to sentencing. *Lafler v. Cooper*, 132 S. Ct. 1376 (2012). Having made the decision to discuss immigration consequences with him, Ms. Lee was obligated to advise Mr. Ragbir that it was the determination of loss—specifically as to whether the counts of convictions involved a loss exceeding $10,000—that would dictate whether or not he was deportable. Her advice about immigration consequences therefore constitutes affirmative misadvice in violation of her Sixth Amendment duties. *See Couto*, 311 F.3d at 183-84 (finding ineffective assistance where counsel advised Petitioner that they could

"deal with her immigration problem after the guilty plea," when that plea in fact led to "virtually . . . unavoidable deportation"); *Kwan*, 407 F.3d at 1016-17 (finding ineffective assistance where counsel told Petitioner that pleading guilty could technically lead to deportation, but it was not a serious possibility, and—when the laws changed making deportation a nearly inevitable consequence of pleading guilty—failed to inform him of this change, although it was still possible to withdraw the guilty plea); *United States v. Khalaf*, 116 F. Supp. 2d 210, 215 (D. Mass. 1999) (Counsel's "failure to read the statute and articulate [its] meaning to Petitioner" was deficient performance where "a plain reading of the statute . . . should have [made counsel] aware that a [judicial recommendation against deportation] was not available.") (citing *United States v. Mora-Gomez*, 875 F. Supp. 1208, 1213 (E.D. Va. 1995)); *see also Strader v. Garrison,* 611 F.2d 61 (4th Cir.1979) (finding ineffective assistance where counsel could have easily discovered in published material the applicable rule regarding the effect of a guilty plea on parole eligibility). *Cf. United States v. Fazio*, 795 F.3d 421, 428 (3d Cir. 2015); *Tomiwa v. United States*, No. 16-3342, 2016 WL 4472954, at *6 (D.N.J. Aug. 24, 2016).

51. Mr. Ragbir was prejudiced by his trial counsel's affirmative misadvice. But for Ms. Lee's deficient performance, there is a reasonable probability that the result of his proceedings would have been different. *See Strickland*, 466 U.S. at 694 (defining this as the standard for establishing prejudice in ineffective assistance of counsel claims). At a minimum, Mr. Ragbir would have exercised his right to a factual hearing on the question of loss, where he would have put the government to its burden of proof, and where he would have presented evidence that the loss attributable to indicted conduct was less than $10,000, because the value of the collateral properties securing the indicted loans exceeded the value of the disbursements that HFC had made on those loans. (Ex. B, Ragbir Aff. ¶ 9; *compare* Ex. P, Letter from AUSA Paula

Dow to Judge Bassler Regarding Sentencing 5-6 (listing HFC's disbursements on indicted loans), *with* Ex. R, Presentence Investigation Report ¶¶ 16-18, 20-22 (identifying the collateral properties securing the indicted loans), *and* Ex. U, Documents Demonstrating the Value of Collateral Properties Securing the Indicted Loans.). *See also United States v. Baxter*, No. CRIM.A. 11-681, 2015 WL 1344664, at *4 (E.D. Pa. Mar. 24, 2015) (value of collateral used to reduce loss amount in mortgage fraud case). Therefore, HFC could be expected to recover the value of its disbursements, and there was no loss to HFC tied to those loans, according to the formula put forward by the prosecution. (Ex. P, Letter from AUSA Paula Dow to Judge Bassler Regarding Sentencing 6-7.) Because of the losses associated with unindicted conduct, which are relevant for criminal sentencing purposes, this may not have led to a different prison sentence or order of restitution. Importantly, however, if the Court had explicitly found that the loss to HFC was attributable entirely to unindicted conduct, Mr. Ragbir's conviction would not have rendered him deportable.

52. Alternatively, Mr. Ragbir would have negotiated a loss stipulation that distinguished between the loss tied to the counts of conviction and the loss tied to unindicted conduct. (Ex. B, Ragbir Aff. ¶ 9.) In either case, his conviction would not have been a deportable offense under U.S.C. § 1101(43)(M)(1). *See Singh*, 677 F.3d at 508; *Nijhawan*, 557 U.S. at 42. This constitutes prejudice sufficient for a finding of ineffective assistance of counsel. *See Lafler*, 132 S. Ct. 1376. Thus, Mr. Ragbir's constitutional right to effective assistance of counsel was violated, warranting a vacatur of his conviction or an opportunity for a hearing on loss and restitution.

b. Mr. Ragbir was prejudiced by his trial attorney's failure to investigate and negotiate the amount of loss attributable to his conviction and by her advice to stipulate to an unreasonable loss amount that triggered mandatory deportation.

53. Ms. Lee's representation of Mr. Ragbir at sentencing also constitutes a failure to investigate and to negotiate, in violation of her Sixth Amendment duty to her client. "[T]he Sixth Amendment imposes on counsel a duty to investigate" both facts and the law in order to serve a client's interests, because investigation is a prerequisite to making "informed legal choices." *Strickland v. Washington*, 466 U.S. 668, 680 (1984). More precisely, defense counsel has a duty "to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 691. In addition, defense counsel has a Sixth Amendment duty to negotiate effectively in order to mitigate harm to the defendant, *see Lafler v. Cooper*, 132 S.Ct. 1376 (2012); *Missouri v. Frye*, 132 S.Ct. 1399 (2012), for example, by minimizing jail time, *see Glover v. United States*, 531 U.S. 198 (2001).

54. These duties are particularly clear at the penalty stage of a proceeding, if defense counsel is on notice that the prosecution intends to seek a particular sentence by proving relevant sentencing factors at the penalty stage of a proceeding, and defense counsel knows what specific sentencing factors the prosecution intends to prove. *See Rompilla v. Beard*, 545 U.S. 374, 383 (2005). In cases of fraud, any factual findings or disputes regarding loss calculations may be addressed at sentencing. *See United States v. Fatico*, 603 F.2d 1053, 1056 (2d Cir. 1979); *see also United States v. Badaracco*, 954 F.2d 928 (3d Cir. 1992); *United States v. Furst*, 918 F.2d 400 (3d Cir. 1990).

55. Here, sentencing (restitution and imprisonment) was dependent on the loss calculations in Mr. Ragbir's case. (Ex. E, Lee Aff. ¶ 13; Ex. Q, Presentence Investigation Report ¶ 51.) Moreover, as noted above, Mr. Ragbir's deportability was also dependent on the loss calculations at sentencing. *See supra*, Part II(B)(i)(a). Both issues came down to loss, and its precise calculations. Prior to sentencing, Ms. Lee received a letter that put her on notice

concerning which loans the government intended to offer evidence of at sentencing, and how it intended to calculate the loss attributable to each (including consideration of any interest that HFC had in the collateral properties). (Ex. O, Letter from AUSA Paula Dow to Judge Bassler Regarding Sentencing.) Yet, Ms. Lee failed to investigate the extent to which HFC suffered losses from those loans under the government's own formula. Rather than investigating, Ms. Lee advised Mr. Ragbir to forgo the sentencing hearing to which he was entitled, at which the government would have had the burden of proving HFC's losses, and instead advised him to stipulate to a loss of between $350,000 and $500,000. As a result, his conviction unnecessarily became a deportable one.

56. Without investigating, Ms. Lee could not have known that it was strategic, from a criminal sentencing perspective, to stipulate to this loss amount. Moreover, given that deportation was at stake, and that this stipulation almost ensured Mr. Ragbir's "banishment" from this country and "exile" from his family, *see Delgadillo v. Carmichael,* 332 U.S. 388, 390–91 (1947), advising Mr. Ragbir to accept such an agreement without any attempt to assess the ability of the prosecution to actually prove that magnitude of loss was a clear failure of Ms. Lee's duty to defend the rights of her client, and to negotiate effectively to mitigate harm to him.

57. Indeed, had Ms. Lee investigated, she would have found evidence that the loss to HFC was significantly offset by the security interest that HFC held in the properties underlying both the indicted loans and loans that were introduced at sentencing as "relevant conduct." Moreover, she would have found that the loss associated with the indicted loans was less than $10,000, because the value of the collateral properties securing the indicted loans, which HFC could be expected to recover, exceeded the value of HFC's disbursements on those loans. (*Compare* Ex. P, Letter from AUSA Paula Dow to Judge Bassler Regarding Sentencing 5-6

(listing HFC's disbursements on indicted loans), *with* Ex. R, Presentence Investigation Report ¶¶ 16-18, 20-22 (identifying the collateral properties securing the indicted loans), *and* Ex. U, Documents Demonstrating the Value of Collateral Properties Securing the Indicted Loans.) Consequently, she would have known that it was objectively unreasonable—as well as a violation of her duty to negotiate effectively—to agree to a stipulation that did not fully account for the amount of money that HFC could expect to recover, and did not distinguish between loss attributable to indicted and unindicted conduct.

58. Instead, the determination of loss attributable to Mr. Ragbir's conviction was never the subject of a factual inquiry and Ms. Lee stipulated to a loss amount in excess of $10,000, freeing the government of its burden to prove loss, and depriving Mr. Ragbir of the opportunity to show that loss tied to the counts of conviction was less than $10,000. Therefore, not only was the failure to investigate or negotiate objectively unreasonable, there is also "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.

c. Mr. Ragbir was prejudiced by his trial attorney's failure to consult a linguistics expert to assess the authenticity of the alleged "confession"

59. In some circumstances, counsel's failure to consult or rely on expert witnesses constitutes ineffective assistance of counsel. *Thomas v. Clements*, 789 F.3d 760, 772 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 1454, 194 L. Ed. 2d 575 (2016); *Harrington v. Richter*, 131 S. Ct. 770, 789 (2011); *see also Showers v. Beard*, 635 F.3d 625, 631 (3d Cir. 2011); *Miller v. Beard*, No. CV 10-3469, 2016 WL 5848728, at *20 (E.D. Pa. Oct. 5, 2016).

Given the centrality of the alleged "confession" to the government's case, Ms. Lee was ineffective when she failed to consult with a linguistics expert to determine whether the statement introduced at trial was a verbatim transcription of Mr. Ragbir's conversation with the

police, as the government claimed it to be. (Ex. B, Ragbir Aff. ¶ 8; Ex. M, Tr. of R. vol. 2, 190 & vol. 3, 26 (Test. of Det. Mignone).) As noted above, defense counsel has a duty "to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. Further, the reasonableness of investigative decisions depends critically on the defendant's own statements and actions, because the duty to investigate applies unless the defendant has given counsel reason to believe that a certain line of investigation or defense would be fruitless or harmful. *Id.*

60. Ms. Lee was aware of Mr. Ragbir's insistence that the statement introduced by the government at trial was not an accurate representation of the statements he gave to the police. (Ex. B, Ragbir Aff. ¶ 8.) Mr. Ragbir believed that he had been fully cooperative and forthcoming with the police, and had been surprised and upset to learn afterwards that the government would be indicting him for the offenses they were investigating. (*Id.* at ¶ 7.) He informed Ms. Lee that the alleged "confession" was inaccurate, and never gave her any reason to believe that challenging the alleged "confession" would be fruitless or harmful. (*Id.* at ¶ 8.) In fact, another witness also complained that the police wanted him to sign inaccurate and fabricated statements. (Ex. U, Appellant's Br. 34-35 (citing the transcript of a pre-trial hearing on the motion to suppress Mr. Ragbir's alleged "confession").) Ms. Lee was thus aware of the importance of the alleged "confession" and did challenge the statements during trial, but relied on the testimony of Mr. Ragbir's then-wife to assert that the language of the introduced statements was not consistent with Mr. Ragbir's speech. (Ex. M, Tr. of R. vol. 9, 48-51 (Test. of Sheila Ragbir); *id.* at vol. 11, 114–131 (Closing Arguments).) She failed, however, to consult with an independent expert in the field of linguistics, who could have determined more conclusively whether or not the introduced statements could possibly have been a verbatim

transcription of Mr. Ragbir's conversation with police, as the prosecution claimed. (Ex. M, Tr. of R. vol. 2, 190 & vol. 3, 26 (Test. of Det. Mignone).) As explained in the attached report by Professor Robert Leonard, a linguistic expert would have been able to demonstrate how the various inconsistencies between Mr. Ragbir's speech and the language of the alleged "confession" undermine its accuracy and validity. (Ex. G, Expert Decl. and Report of Prof. Robert Leonard ¶¶ 29-45). Given the prosecution's heavy reliance on the alleged "confession" at trial, and the wide availability of linguistic experts at the time of Mr. Ragbir's criminal trial (*id.* ¶¶ 24–27), this failure constitutes deficient performance.

61. This failure also prejudiced Mr. Ragbir because it deprived the jury of an opportunity to assess conflicting evidence on the issue of whether the statements allegedly provided by Mr. Ragbir were authentic. (Ex. G, Leonard Decl. ¶¶ 29-44 (presenting examples of relevant information that could have been introduced at trial to prove the inaccuracy of the alleged "confession")); *cf. Duronio v. United States*, No. 10-1574, 2012 WL 78201, at *14 (D.N.J. Jan. 10, 2012) (rejecting petitioner's ineffective assistance of counsel claim due to a lack of relevant information that an expert could have introduced at trial, and because an expert affidavit had been submitted to the court during trial). Had an expert opinion been presented to the jury during trial, there is a reasonable probability that the jury would not have found Mr. Ragbir guilty, given the centrality of the alleged "confession" to the government's case. *See Lewis v. Horn*, No. 00-CV-802, 2006 WL 2338409, at *12 (E.D. Pa. Aug. 9, 2006), *rev'd on other grounds*, 581 F.3d 92 (3d Cir. 2009) (holding that failure to introduce expert testimony amounted to prejudicial ineffective assistance of counsel). Thus, Ms. Lee's failure in this regard undermines confidence in Mr. Ragbir's conviction, satisfying the prejudice prong of *Strickland*. 466 U.S. at 694.

ii. Mr. Ragbir's appellate attorney provided ineffective and prejudicial assistance of counsel when he failed to raise trial counsel's objection to the willful blindness jury instruction

62. In *United States v. Mannino*, the Third Circuit held that failing to raise an issue on appeal that defense counsel had specifically preserved at the trial level is ineffective assistance of counsel when the issue is of obvious import and there is no "strategic or tactical justification for failing to pursue [it]." 212 F.3d 835, 843 (3d Cir. 2000). At trial, Mr. Ragbir's attorney objected to the willful blindness jury instruction, which—as explained above—permitted the jury to convict without finding that Mr. Ragbir acted knowingly, which was the requisite *mens rea* for the crime charged, arguing that it would eliminate the government's burden to prove knowledge. (Ex. L, Tr. of R. vol. 10, 3–5.)

63. On appeal, Mr. Ragbir's appellate counsel, Anthony J. Fusco, Jr., failed to object to the improper willful blindness jury instruction, despite trial counsel's preservation of this claim, and despite Mr. Ragbir's insistence that Mr. Fusco look into the issue of the jury instructions. (Ex. B, Ragbir Aff. ¶ 10; Ex. T, Appellant's Br.) Throughout the preparation of his appeal, Mr. Fusco assured Mr. Ragbir that he would look into any problems with the jury instructions. (Ex. B, Ragbir Aff. ¶ 10.) However, Mr. Fusco did not ultimately raise any objection to the jury instructions, and provided no justification for his failure to do so. (Ex. U, Appellant's Br.; Ex. B, Ragbir Aff. ¶ 10.)

64. Mr. Fusco's performance was therefore deficient. It also prejudiced Mr. Ragbir. The Supreme Court recognized in *Global-Tech* that, "[a]lthough the Courts of Appeals articulate the doctrine of willful blindness in slightly different ways, all agree [that] . . . the defendant must take deliberate actions to avoid learning of [the criminal activity.]" 131 S. Ct. 2060, 2063 (2011). Yet, in Mr. Ragbir's case, the jury was instructed that he could be convicted if they found that he

had "failed to take action" to determine whether or not illegal activity was occurring. (Ex. N, Jury Instruction 53; Ex. M, Tr. of R. vol. 11, 56.) Thus, had Mr. Fusco raised the objection to the willful blindness jury instruction that had been preserved by trial counsel, there is at least a reasonable probability that the result of Mr. Ragbir's appeal would have been different. *See Strickland*, 466 U.S. at 694; *see also Mannino*, 212 F.3d at 845 (discussing the standard for ineffective assistance of counsel on appeal claims).

III. MR. RAGBIR HAS SOUND REASONS FOR NOT SEEKING EARLIER RELIEF, INCLUDING THE FACT THAT HIS CONVICTION IS INVALID DUE TO FUNDAMENTAL ERROR THAT COULD NOT HAVE BEEN RAISED AT TRIAL.

65. Finally, Mr. Ragbir meets the third requirement for coram nobis relief because he filed his initial petition promptly after exhausting his remedies in challenging his removal order, and the arguments raised herein were foreclosed by precedent in the Third Circuit at the time of Mr. Ragbir's trial, and not made available until recently by the Supreme Court. The Court's decisions in *Global-Tech, Skilling*, and *Lafler* were not issued until 2010, 2011, and 2012, respectively.

66. Furthermore, sound reasons for not seeking earlier relief have been found when a petitioner has focused his efforts on challenging collateral consequence of the conviction that is the basis of the coram nobis—in this case, the deportation order that is premised on the conviction. *See United States v. Kwan*, 407 F.3d 1005, 1013-14 (9th Cir. 2005). Ever since immigration authorities took him from criminal custody, Mr. Ragbir has diligently pursued all avenues of relief from deportation, both in court and through administrative agencies. He first appealed the Immigration Judge's order of deportation to the Board of Immigration Appeals, which affirmed it. (Ex. B, Ragbir Aff. ¶ 27.) He then appealed the decision to the Second Circuit on the loss issue, but that court ruled against him, based on the Presentence Investigation

Report—which noted that the parties had stipulated to a loss amount of between $350,000 and $500,000—and his restitution order of $350,001. (*Id.*) He next petitioned the Supreme Court for certiorari, which was denied in October 2011. *See Ragbir v. Holder*, 389 F. App'x 80 (2d Cir. 2010), *cert. denied*, 132 S. Ct. 95, 181 L. Ed. 2d 24 (2011). Mr. Ragbir has also diligently pursued administrative relief through three requests for prosecutorial discretion, which were granted in December 2011, February 2013, March 2014, and January 2016 on the basis of Mr. Ragbir's resounding equities. (Ex. I, ICE Letter Granting Stay of Removal.) These stays provided Mr. Ragbir a previously unavailable opportunity to seek coram nobis relief in 2012. This petition is his final opportunity to correct the errors that occurred at his criminal trial and thereby prevent the devastating effects that deportation would have on his life and the lives of his family members.

* * *

67. Each of the errors described in Part II of this petition—including jury instructions that allowed the jury to convict Mr. Ragbir for conduct that is not criminal and the ineffective assistance of counsel that Mr. Ragbir received—is enough to constitute fundamental error; their combined effect is a "complete miscarriage of justice" that renders Mr. Ragbir's conviction invalid. *See United States v. Stoneman*, 870 F.2d 102, 105 (3d Cir. 1989) (quoting *Davis v. United States*, 417 U.S. 333, 346 (1974)). Moreover, because of these fundamental errors, Mr. Ragbir faces ongoing, grave legal consequences: he continues to be threatened with deportation and permanent separation from his U.S. citizen daughter, Deborah Ragbir, and his U.S. citizen wife, Amy Gottlieb, along with other family and community members in the U.S., due to this conviction.

68. Since his release from immigration detention in 2008, Mr. Ragbir has

reestablished himself as a father, husband, and public servant—devoting his life to faith-based organizations and immigrant groups throughout New York and New Jersey, all while diligently pursuing available forms of relief. Given his extensive ties to the United States, the imminent threat of his deportation, his conviction for conduct that is not criminal, the ineffective assistance of counsel he received, his numerous attempts to seek appropriate relief, and the severe consequences of his conviction on his life and the life of his family, Mr. Ragbir is entitled to coram nobis relief. His conviction therefore must be vacated or, in the alternative, he must receive an opportunity for a hearing on loss and restitution.

PRAYER FOR RELIEF

WHEREFORE, Petitioner respectfully requests this Court to:

(1) Assume jurisdiction over this matter; and

(2) Issue a Writ of Coram Nobis, vacating the judgment and sentence entered against the Petitioner, or providing other relief as appropriate.

Dated: February 17, 2017
Roseland, New Jersey

Respectfully submitted,

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