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We find that a public reprimand is too lenient given the facts and circumstances of this case. We therefore impose a 30-day suspension from the practice of law.

## CONCLUSION

Based upon our consideration of the record in this case, this court finds that Seyler has violated §§ 3-501.1, 3-501.3, 3-501.4, and 3-508.40 and his oath of office as an attorney. We order that Seyler should be and hereby is suspended from the practice of law for a period of 30 days, effective immediately. Seyler shall comply with Neb. Ct. R. § 3-316 and, upon failure to do so, shall be subject to a punishment for contempt of this court.

At the end of the 30-day suspension period, Seyler shall be automatically reinstated to the practice of law, provided that he has demonstrated his compliance with § 3-316 and further provided that the Counsel for Discipline has not notified this court that Seyler has violated any disciplinary rule during his suspension. We also direct Seyler to pay costs and expenses in accordance with Neb. Rev. Stat. §§ 7-114 and 7-115 (Reissue 2007) and Neb. Ct. R. §§ 3-310(P) and 3-323(B) within 60 days after an order imposing costs and expenses, if any, is entered by this court.

JUDGMENT OF SUSPENSION.

WRIGHT, J., not participating.

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## STATE OF NEBRASKA, APPELLEE, V. SERVIO DIAZ, APPELLANT.

808 N.W.2d 891

Filed March 2, 2012. No. S-11-254.

1. **Judgments: Proof: Appeal and Error.** One seeking a writ of error coram nobis has the burden to prove entitlement to such relief.
2. **Judgments: Appeal and Error.** The findings of the district court in connection with its ruling on a motion for a writ of error coram nobis will not be disturbed unless they are clearly erroneous.
3. **Appeal and Error.** An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court.
4. **Judgments: Constitutional Law: Legislature: Appeal and Error.** The common-law writ of error coram nobis exists in this state under Neb. Rev. Stat. § 49-101

(Reissue 2010), which adopts English common law to the extent that it is not inconsistent with the Constitution of the United States, the organic law of this state, or any law passed by our Legislature.

5. **Judgments: Evidence: Appeal and Error.** The purpose of the writ of error coram nobis is to bring before the court rendering judgment matters of fact which, if known at the time the judgment was rendered, would have prevented its rendition. It enables the court to recall some adjudication that was made while some fact existed which would have prevented rendition of the judgment but which, through no fault of the party, was not presented.
6. **Convictions: Proof: Appeal and Error.** The burden of proof in a proceeding to obtain a writ of error coram nobis is upon the applicant claiming the error, and the alleged error of fact must be such as would have prevented a conviction. It is not enough to show that it might have caused a different result.
7. **Judgments: Evidence: Appeal and Error.** A writ of error coram nobis reaches only matters of fact unknown to the applicant at the time of judgment, not discoverable through reasonable diligence, and which are of a nature that, if known by the court, would have prevented entry of judgment.
8. **Judgments: Appeal and Error.** The writ of error coram nobis is not available to correct errors of law.
9. **Effectiveness of Counsel.** A claim that defense counsel provided ineffective assistance presents a mixed question of law and fact, and, in particular, determinations regarding whether counsel was deficient and whether the defendant was prejudiced are questions of law.

Appeal from the District Court for Colfax County: MARY C. GILBRIDE, Judge. Affirmed.

Mark Porto, of Shamberg, Wolf, McDermott & Depue, for appellant.

Jon Bruning, Attorney General, and James D. Smith for appellee.

HEAVICAN, C.J., CONNOLLY, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ., and IRWIN and MOORE, Judges.

MILLER-LERMAN, J.

## NATURE OF CASE

Servio Diaz appeals the order of the district court for Colfax County which denied his motion for a writ of error coram nobis. Diaz sought relief on the basis that his counsel was ineffective when counsel failed to advise Diaz of potential deportation consequences of the plea that he entered in connection with his plea-based conviction in 2000. The court determined

that Diaz had not established entitlement to relief and denied the motion. We conclude that the error asserted by Diaz is not an appropriate basis for relief by a writ of error coram nobis. Therefore, although based on different reasoning, we affirm the district court's denial of Diaz' motion.

## STATEMENT OF FACTS

Diaz is a Honduran disaster refugee with authorization to reside in the United States. He has resided in the United States since 1994. In 2000, pursuant to a plea agreement, Diaz pled guilty to misdemeanor charges of attempted possession of a controlled substance, cocaine, and driving while intoxicated. He was sentenced to 2 years' probation, and his probation was terminated in 2002.

On September 30, 2010, Diaz filed a motion by which he sought to vacate the plea-based judgment. Diaz asserted that "his attorney failed to correctly advise him of the presumptively mandatory consequences he would face with regard to deportation when he entered his guilty plea." Diaz asserted that his conviction for attempted possession of cocaine was a deportable offense under federal law. Diaz asserted that he had received ineffective assistance of counsel and cited *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 1486, 176 L. Ed. 2d 284 (2010), in which the U.S. Supreme Court stated that "counsel must inform her client whether his plea carries a risk of deportation." Diaz finally asserted that he was "currently in removal proceedings pending removal to Honduras as a result of the conviction in this matter." Diaz prayed the court to vacate the judgment, thus allowing him to withdraw the plea.

In an order granting an evidentiary hearing, the court characterized Diaz' motion and stated that "his motion is, in essence, a writ of error coram nobis." Following the hearing, the court entered an order denying the relief requested by Diaz. The court noted that Diaz was no longer in custody and therefore not eligible for postconviction relief under Neb. Rev. Stat. § 29-3001 (Reissue 2008). The court determined that evidence adduced at the hearing demonstrated that under federal law, Diaz was deportable as a result of the conviction for attempted

possession of cocaine. However, the court determined that Diaz had not demonstrated that he was not advised that his conviction could have immigration consequences. The court stated that counsel should be presumed to have rendered competent advice at the time of a plea, and the court noted that "[t]he only evidence on this allegation is [Diaz'] self-serving statement that he received no advisement." The court noted that Diaz had not shown "that deportation proceedings have been initiated or that such proceedings are reasonably certain to be initiated" and that he had offered no evidence, other than his own testimony, regarding his immigration status. The court determined that Diaz had not established entitlement to relief by a writ of error coram nobis and denied the motion.

Diaz appeals the denial of his motion.

## ASSIGNMENT OF ERROR

Diaz claims that the district court erred when it denied his motion for a writ of error coram nobis.

## STANDARDS OF REVIEW

[1,2] One seeking a writ of error coram nobis has the burden to prove entitlement to such relief. See *State v. Lotter*, 266 Neb. 245, 664 N.W.2d 892 (2003). In postconviction appeals, a defendant requesting postconviction relief must establish the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous. *State v. Lee*, 282 Neb. 652, 807 N.W.2d 96 (2011). We logically extend this standard to the findings of the district court in connection with its ruling on a motion for a writ of error coram nobis, and such findings will not be disturbed unless they are clearly erroneous.

## ANALYSIS

As an initial matter, we note that the State suggests that Diaz' motion should be considered by this court as a motion to withdraw his plea rather than a motion for a writ of error coram nobis and contends that the district court lacked jurisdiction. We reject this suggestion. The State argues that because Diaz completed his sentence in 2002, the district court in 2010 lacked jurisdiction over a motion to withdraw his plea. The

State cites *State v. Rodriguez-Torres*, 275 Neb. 363, 368, 746 N.W.2d 686, 690 (2008), for the proposition that absent a legislatively authorized procedure, there is no recourse for defendants to withdraw their pleas and vacate judgments "years after having completed [their] sentences."

In response, Diaz argues that the State ignores our discussion of *Rodriguez-Torres* in *State v. Yos-Chiguil*, 278 Neb. 591, 772 N.W.2d 574 (2009). In *Yos-Chiguil*, we noted that the sole basis alleged by the defendant for withdrawal of the plea in *Rodriguez-Torres* was Neb. Rev. Stat. § 29-1819.02 (Reissue 2008), which requires the trial court, before accepting a plea, to advise a defendant that a conviction may have immigration consequences. In *Yos-Chiguil*, we further commented that in *Rodriguez-Torres*, we had held that § 29-1819.02 "did not create a statutory procedure pursuant to which a plea entered before July 20, 2002, could be withdrawn after the person convicted of the crime had already served his sentence." 278 Neb. at 595, 772 N.W.2d at 578. We further noted in *Yos-Chiguil* that "[b]ecause the issue was not presented to us [in *Rodriguez-Torres*], we did not address whether a common-law remedy existed for withdrawal of the plea in that circumstance." 278 Neb. at 595, 772 N.W.2d at 578. The issue was also not presented or decided in *Yos-Chiguil*.

We recently decided *State v. Gonzalez*, 283 Neb. 1, 807 N.W.2d 759 (2012), involving a motion to withdraw a plea. In *Gonzalez*, the defendant asserted that she received ineffective assistance of counsel in connection with a plea because counsel failed to inform her of the immigration consequences of her plea. We concluded in *Gonzalez* that, even after final judgment, the trial court had jurisdiction to consider the defendant's motion to withdraw her plea on the basis of such alleged ineffective assistance of counsel. Regardless of whether the distinction makes a difference, we note that the defendant in *Gonzalez* had not completed her sentence at the time she filed her motion to withdraw her plea, whereas Diaz had completed his sentence years before he sought relief in the case before us.

[3] Contrary to the State's argument, we do not consider the present case as involving a ruling on a motion to withdraw a plea; instead, it involves the appeal from an order

denying a request for a writ of error coram nobis, and we analyze it on this basis. An appellate court will not consider an issue on appeal that was not presented to or passed upon by the trial court. *State v. Rogers*, 277 Neb. 37, 760 N.W.2d 35 (2009).

The district court stated in an order granting the evidentiary hearing that Diaz had urged that his motion be considered as a motion for a writ of error coram nobis, and the court thereafter treated and disposed of the motion on this basis. Therefore, we consider only whether the court properly denied Diaz' motion for a writ of error coram nobis. We do not speculate on whether the court had authority to consider Diaz' claim through some other mechanism such as the motion to withdraw a plea that we recently found viable in *State v. Gonzalez, supra*, wherein the defendant had not completed her sentence.

Considering Diaz' motion as a motion for a writ of error coram nobis, as explained below, we conclude that error coram nobis was not a proper mechanism to raise the issue asserted by Diaz. Although our reasoning differs from that of the district court, we conclude that the district court properly denied the motion.

Diaz cites federal cases such as *U.S. v. Kwan*, 407 F.3d 1005 (9th Cir. 2005), *abrogated on other grounds, Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010), and *U.S. v. Esogbue*, 357 F.3d 532 (5th Cir. 2004), in support of his position that coram nobis relief is available for a defendant facing deportation to withdraw his or her plea on the basis of ineffective assistance of counsel. Diaz also notes that at least one state holds a similar view of the availability of coram nobis relief. See *State v. Tran*, 145 N.M. 487, 200 P.3d 537 (N.M. App. 2008) (relying on state rule of civil procedure that abolished and replaced common-law coram nobis). However, the common law in Nebraska and other states has not taken the same approach as the federal law in the development of coram nobis. See *People v. Hyung Joon Kim*, 45 Cal. 4th 1078, 202 P.3d 436, 90 Cal. Rptr. 3d 355 (2009). See, also, *Com. v. Morris*, 281 Va. 70, 705 S.E.2d 503 (2011).

[4-6] The common-law writ of error coram nobis exists in this state under Neb. Rev. Stat. § 49-101 (Reissue 2010), which

adopts English common law to the extent that it is not inconsistent with the Constitution of the United States, the organic law of this state, or any law passed by our Legislature. *State v. Lotter*, 266 Neb. 245, 664 N.W.2d 892 (2003). The purpose of the writ of error coram nobis is to bring before the court rendering judgment matters of fact which, if known at the time the judgment was rendered, would have prevented its rendition. *Id*. It enables the court to recall some adjudication that was made while some fact existed which would have prevented rendition of the judgment but which, through no fault of the party, was not presented. *Id*. The burden of proof in a proceeding to obtain a writ of error coram nobis is upon the applicant claiming the error, and the alleged error of fact must be such as would have prevented a conviction. See *id*. It is not enough to show that it might have caused a different result. *Id*.

[7,8] We have stated that a writ of error coram nobis reaches only matters of fact unknown to the applicant at the time of judgment, not discoverable through reasonable diligence, and which are of a nature that, if known by the court, would have prevented entry of judgment. *State v. Cottingham*, 226 Neb. 270, 410 N.W.2d 498 (1987). See *State v. Wilson*, 194 Neb. 587, 234 N.W.2d 208 (1975) (discussing fact not in existence at time of conviction). The writ of error coram nobis is not available to correct errors of law. *State v. El-Tabech*, 259 Neb. 509, 610 N.W.2d 737 (2000). Regarding errors of law in the coram nobis context, we have concluded that where a criminal defendant alleged he was denied the right to be present at a suppression hearing, the "allegations present[ed] no fact or facts unknown to the defendant and his counsel and not reasonably discoverable by the defendant, and the existence of which would have prevented the judgment," and that, instead, the allegations "present[ed] at most a question of error of law, which is not reachable by writ of error coram nobis." *State v. Turner*, 194 Neb. 252, 257-58, 231 N.W.2d 345, 349 (1975). Although the instant case does not concern a motion alleging legal error by a trial court, for completeness, we note that we have also concluded that a writ of error coram nobis is not the appropriate remedy for an alleged failure of the trial court to properly inform a defendant of his or her constitutional rights,

because such error would clearly be an error of law. *State v. Wilson, supra*.

[9] Diaz seeks coram nobis relief based on his assertion that his counsel provided ineffective assistance when counsel failed to advise him of potential deportation consequences. We have stated that a claim that defense counsel provided ineffective assistance presents a mixed question of law and fact and that, in particular, determinations regarding whether counsel was deficient and whether the defendant was prejudiced are questions of law. See *State v. Yos-Chiguil*, 281 Neb. 618, 798 N.W.2d 832 (2011). Granting relief to Diaz would run contrary to *State v. Schnatz*, 194 Neb. 516, 518, 233 N.W.2d 778, 780 (1975), in which the defendant sought to vacate his original county court judgment "because his attorney did not fully explain his legal rights"; we stated that the issue was a question of law that "is not cognizable under a writ of error coram nobis." Similar to the appellant in *Schnatz*, Diaz seeks relief from an error of law, not an error of fact, and his claim is not cognizable under a writ of error coram nobis.

Courts in other states agree that claims of ineffective assistance of counsel are not appropriate for coram nobis relief. The California Supreme Court observed: "That a claim of ineffective assistance of counsel, which relates more to a mistake of law than of fact, is an inappropriate ground for relief on *coram nobis* has long been the rule." *People v. Hyung Joon Kim*, 45 Cal. 4th 1078, 1104, 202 P.3d 436, 454, 90 Cal. Rptr. 3d 355, 376 (2009). See, also, *Com. v. Morris*, 281 Va. 70, 705 S.E.2d 503 (2011) (stating that alleged ineffective assistance of counsel with regard to immigration consequences is not error of fact). Because Diaz' challenge to his plea-based conviction involves a question of law and not solely an error of fact, relief was not available in a motion for a writ of error coram nobis.

The California Supreme Court, in a case where the defendant sought coram nobis relief from a plea-based conviction, observed:

> To qualify as the basis for relief on *coram nobis*, newly discovered facts must establish a basic flaw that would have prevented rendition of the judgment. . . . New facts

> that would merely have affected the willingness of a litigant to enter a plea, or would have encouraged or convinced him or her to make different strategic choices or seek a different disposition, are not facts that would have prevented rendition of the judgment.

*People v. Hyung Joon Kim*, 45 Cal. 4th at 1103, 202 P.3d at 453, 90 Cal. Rptr. 3d at 375. We agree with the reasoning in *Hyung Joon Kim* and apply it to this case.

If Diaz had been aware of the possible deportation consequences of his plea, it might have caused him to make different strategic choices, but it would not have prevented the court from rendering judgment. Diaz did not claim that judgment could not be entered due to an overriding legal impediment or flaw that would have prevented the court from rendering judgment. Diaz' motion for a writ of error coram nobis was not an appropriate method to resolve the issue he raises.

Because the ineffective assistance of counsel claim Diaz raises is not cognizable by a writ of error coram nobis, the district court should have denied the motion on this basis. Nevertheless, its denial was not error. In view of our analysis and disposition, we find it unnecessary to review the factual findings made by the trial court.

## CONCLUSION

We conclude that a writ of error coram nobis was not an appropriate method for Diaz to raise a challenge to his plea-based conviction on the basis that he received ineffective assistance when counsel allegedly failed to advise him of potential immigration consequences of his plea. Because coram nobis was not an appropriate vehicle for Diaz' claims, we conclude that the district court properly denied the motion. Although our reasoning differs from that of the district court, we affirm the denial of Diaz' motion for a writ of error coram nobis.

AFFIRMED.

WRIGHT, J., not participating.