

No. \_\_\_\_\_

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In The  
**Supreme Court of the United States**

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GARY BYRD,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

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**On Petition For Writ Of Certiorari  
To The United States Court Of Appeals  
For The Fifth Circuit**

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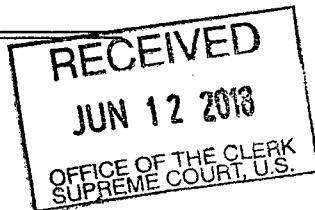
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**PETITION FOR A WRIT OF CERTIORARI**

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## **QUESTIONS PRESENTED**

- (1) In an application for a writ of error coram nobis should it be denied based on an unintentional time delay (where laches was not an issue) and the delay allowed to prevail over fairness and equity in a claim of actual innocence – where the time delay was harmless?
- (2) In the more than 60 years since the *Morgan* decision, ambiguity has arisen as to the scope of the writ and circuits have issued varying guidelines as to the proper application. Should a consistent and equitable approach be delineated by the Court?

## **PARTIES TO THE PROCEEDINGS**

All parties appear in the caption of the case on the cover page.

## TABLE OF CONTENTS

	Page
Questions Presented .....	i
Parties To The Proceedings .....	ii
Table of Contents .....	iii
Table of Authorities .....	iv
Opinion Below .....	1
Jurisdiction .....	1
Statement of the Case .....	1
Reasons For Granting The Petition .....	5
Summary .....	8
Conclusion .....	10

## APPENDICES

ORDER Denying Coram Nobis Relief .....	App. 1
Judgment .....	App. 3
Report and Recommendation .....	App. 5
Denial of Petition for Rehearing .....	App. 14
28 U.S.C. § 2255 .....	App. 16
Transcript .....	App. 17

## TABLE OF AUTHORITIES

	Page
<b>CASES</b>	
Byrd vs. United States, 131 L. Ed. 2d 313 (1994).....	3
Byrd vs. United States, 193 L. Ed. 2d 80 (2015) .....	6
Johnson vs. United States, 161 L. Ed. 2d 542 (2005).....	6
United States vs. Byrd, 31 F. 3d 1329 (CA 5 1994) .....	3
United States vs. Byrd, 697 Fed. Appx. 431 (CA 5 2017) .....	1, 4
United States vs. Dyer, 136 F. 3d 417 (CA 5 1998)....	7, 9
United States vs. Morgan, 98 L. Ed. 248 (1954) ...	5, 8, 9
United States vs. Parry, 649 F. 2d 292 (CA 5 1981) .....	6
United States vs. Stanford, 823 F. 3d 814 (CA 5 2016) .....	6
<b>STATUTES</b>	
18 U.S.C. § 2252(a)(2) .....	2
28 U.S.C. § 2255 .....	4, 5, 7, 9

**OPINION BELOW**

The opinion of the United States Court of Appeals for the 5th Circuit, which is unpublished, appears at 697 Fed. Appx. 431; 2017 U.S. App. LEXIS 18587, No. 16-31244 and in the appendix of this petition at pages App. 1.

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**JURISDICTION**

The district court in the Western District of Louisiana had jurisdiction over this federal criminal case pursuant to 18 U.S.C. § 3231. The court of appeals had jurisdiction over Petitioner's appeal pursuant to 28 U.S.C. § 1291. That court issued its opinion and judgment on September 26, 2017 and its denial of the petition for rehearing and rehearing en banc on November 30, 2017. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

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**STATEMENT OF THE CASE****Overview**

This petition for a writ of certiorari seeks review of the ruling of the Fifth Federal Circuit Court of Appeals (United States vs. Byrd, 697 Fed. Appx. 431; 2017 U.S. App. LEXIS 18587 No. 16-31244, September 26, 2017) which affirmed the district court's denial of an application for a writ of coram nobis. The motion for

rehearing and rehearing en banc were denied on November 30, 2017.

The conviction for which coram nobis was sought was rendered by Judge Richard Haik in the Western District of Louisiana in December of 1992 for one count, violation of 18 U.S.C.S. § 2252(a)(2) "Knowing Receipt of Child Pornography". The conviction had been based on the controlled delivery of a "sting tape" by postal authorities. An exhaustive search of the home and office of the defendant failed to locate any other child pornography or any other illegal items. The defendant had never touched the sting tape and was unaware of the delivery as it was delivered while he was returning from the New Orleans office of the Head Postal Inspector with whom he had intended to meet. The tape had subsequently been retrieved by the search team (directed by the Head Postal Inspector) without the defendant having been aware of its delivery and presence. Critical to the core of the coram nobis is the fact that the defendant had been involved in extensive litigation with the Department of Health and Human Resources of Louisiana claiming fraud and other irregularities on their part. When the "sting correspondence" began to arrive, the defendant quickly recognized it as being bogus. He mistakenly believed that the source of the mailings was the Louisiana D.H.H.R. mentioned above. He discussed these findings and conclusions with five separate individuals including a civil attorney, a nurse spouse of a physician, the widow of a local prominent attorney, the director of the local Catholic home for abused women, and a lay

Catholic worker. The defendants clear and unambiguous intent was to not receive the sting tape for possession but to immediately reject it and urge its investigation and use against whom he believed was sending it, the Louisiana D.H.H.R. At the trial the above five named witnesses were present and identified to the government on the prospective witness list. The defendant testified out of order with the purpose of laying the groundwork for the testimony of the five witnesses. In his testimony he provided the details of what each of the five witnesses had been told regarding his recognition of the "sting tape" and his planned refusal of delivery. After initially indicating his approval of the witnesses, the trial judge seemed to change positions and he refused to allow the jury to hear the testimony of the five witnesses. Consequently, their testimony was delivered into the record as a proffer. The trial ended with a conviction which was appealed to the Fifth Federal Circuit of Appeals. The Circuit Court affirmed the conviction at 31 F. 3d 1329, 1994 U.S. App. LEXIS 23921, No. 93-4998, September 1, 1994. Inexplicably, the panel did not address the trial judge's refusal to allow the jury to hear the testimony of the five exculpatory witnesses even after the defendant had testified prior and established the groundwork. The testimony of these five witnesses as a proffer may be found in the Appendix at pages 17 to 40. The motions for rehearing and rehearing en banc were denied. A Petition for writ of certiorari was denied at Byrd vs. United States, 514 U.S. 1052, 115 S. Ct. 1432, 131 L. Ed. 2d 313, 1995 U.S. LEXIS 2466 (1995), No. 94-7588. A motion for Habeas Corpus under 28

U.S.C. § 2255 was filed and pended before any ruling on the merits. A subsequent attempt to continue with that Motion was denied as time barred without the merits having been reached. Included in the merits argument was a detailed presentation of the error of the trial judge in blocking the testimony of the five exculpatory witnesses from the jury.

Subsequent to a second conviction in the Western District of Louisiana in 2013, for which the sentence was enhanced because of the 1992 conviction, the Defendant filed a Motion for a writ of error coram nobis with the District Court of Western Louisiana. The District Court misconstrued the filing as a successive filing under 28 U.S.C. § 2255 and dismissed the motion without prejudice at *United States vs. Byrd*, 2016 U.S. Dist. LEXIS 152969. Criminal No. 6:92-60025, Civil No. 6:16-1372, November 3, 2016, rehearing and reconsideration denied. This ruling was appealed to the Fifth Federal Circuit Court of Appeals which in *United States vs. Byrd*, 697 Fed. Appx. 431; 2017 U.S. App. LEXIS 18587, No. 16-31244, on September 26, 2017 corrected the District Court's misconstruction of the coram nobis writ as a motion under 28 U.S.C. § 2255 but denied the writ based on the finding that it could have been presented sooner. A Petition for Rehearing and Rehearing En Banc were denied by the Fifth Circuit Court of Appeals in *United States vs. Byrd*, on November 30, 2012.

It is this final ruling by the Fifth Federal Circuit of Appeals which affirms the denial of an application

for a writ of error coram nobis which is the basis for the petition for a writ of certiorari.

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### **REASONS FOR GRANTING THE PETITION**

In *United States vs. Morgan*, 98 L.Ed. 248 (Supreme Court January 4, 1954), the Supreme Court addressed the writ of error coram nobis. There has been an unwillingness of the Court to return to the issue since that 1954 decision and as a result ambiguity has arisen as to the scope of this important federal writ.

In *Morgan* it was pointed out that the writ of coram nobis was available at common law to correct errors of fact. It was allowed without limitation of time for facts that affect the validity and regularity of the judgment, and was used in both civil and criminal cases. As explained in Moore's Federal Practice § 672.02 (Matthew Bender 3d. ed.), in *Morgan* the Court held that pursuant to section 1651 a federal district court is empowered to vacate a federal conviction after the sentence for the conviction has expired when the movant suffers from an infirmity "of the same general character" as one that could be a ground for relief under § 2255 and the petitioner still faces adverse consequences from the existence of the conviction.

The case for which an application of writ of error coram nobis was filed was the 1992 conviction (Criminal No. 6:92-60025). The Petitioner became eligible to file the coram nobis when a second conviction (Criminal No. 6:12-00274) became final on October 5, 2015 at

*Byrd vs. United States*, 193 L. Ed. 2d 80, where the Supreme Court denied petition for a writ of certiorari. The enhancement of the sentence for this conviction was effected by the existence of this former conviction and this enhancement qualified as sufficient “collateral consequences” to enable the Petitioner to file the coram nobis on the prior conviction. His ability to file for relief in the Fifth Circuit was further strengthened by the Fifth Circuit ruling in *United States vs. Stanford*, 823 F. 3d 814 (5th Cir. 2016) which underscored and emphasized the right of a criminal defendant to present a complete defense. In the case at hand for which coram nobis is sought the District Judge had not allowed the testimony of five exculpatory witnesses to be heard by the jury notwithstanding the standard established by Fifth Circuit case *United States vs. Parry*, 649 F. 2d 292; 1981 U.S. App. LEXIS 11913 (5th Cir. 1981). The Judge’s refusal to permit the jury from hearing the exculpatory testimony prevented the defendant from presenting a complete defense. The proffered testimony of the five witnesses (see Appendix pages 17 to 40) corroborates the claim of actual innocence. The time frame during which one could raise the reversal or vacatur of a prior conviction in challenging the sentence of a subsequent conviction was addressed in *Johnson vs. United States*, 161 L. Ed. 2d 542 (2005). The application for a writ of error coram nobis was filed within this time frame. It was deposited into the inmate mailing system on September 24, 2016 and filed by the Clerk on September 28, 2016.

The defenses to coram nobis pled by the government were confusing partially because the rules and law governing coram nobis applications are ambiguous and some vary from circuit to circuit. The magistrate misconstrued the filing as a habeas corpus (28 U.S.C. § 2255) and recommended that it be dismissed without prejudice as a successive § 2255. The District Judge adopted the Magistrate's recommendations and ruled again the same way in a motion for reconsideration. This ruling was appealed to the Fifth Federal Circuit and interestingly the government did not file an opposition brief to the brief filed by the defendant. Each of the standard defenses raised by the government in the District court below had been refuted. The Fifth Circuit panel corrected the district court's mischaracterization of – the filing as a 28 U.S.C. § 2255, ruling that it was as the defendant had argued, a coram nobis. The panel then denied the motion offering only that "The Writ of coram nobis may be used to correct only fundamental errors which result in a complete miscarriage of justice, *Dyer*, 136 F. 3d at 430. Because Byrd's claims could have been presented sooner, he has not met this standard. See *id.*" In a Petition for Rehearing and a Rehearing En Banc, the defendant contrasted the facts found in his case with the facts found in *Dyer* (the case cited by the panel to support their denial of the coram nobis). The facts from the *Dyer* case and the facts from the defendant's case are aligned below for comparison:

Dyer	* Defendant
(1) Pled guilty	* (1) Went to trial actual innocence defence
(2) Waited nine years after legal basis to file	* (2) Filed within one year of legal basis to file
(3) Government pled laches and argued that it would be greatly prejudiced by delay	* (3) Government did not argue laches or claim any prejudice based on delay
(4) Government argued that it would be difficult to retry defendant	* (4) Government made no mention of attempting to retry the defendant and did not file a response brief.
(5) Defendant did not dispute Government's claim of prejudice from tactical delay	* (5) Defendant did not choose to delay but filed when he had the first clear sound basis to file.

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## SUMMARY

The Supreme Court has not comprehensively addressed a coram nobis case since 1954 in *United States vs. Morgan*, 98 L. Ed. 248 (Supreme Court January 4, 1954). Since then the parameters of and the requirements for filing a coram nobis petition have been addressed by the circuit courts with the result that their differences combined with an absence of Supreme Court guidance have resulted in multiple ambiguities. This confusion and lack of clarity was underscored and

emphasized in the case of the Petitioner where his filing in district court was misconstrued by both the Magistrate Judge and the District Judge as a habeas corpus under 28 U.S.C.A. § 2255 notwithstanding the fact that the Petitioner repeatedly advised both that he had filed a coram nobis petition. At the Fifth Federal Circuit Court of Appeals the recognition error was corrected but then the Court proceeded to deny the writ of error coram nobis by finding that the defendant could have filed it sooner and cited *United States vs. Dyer*, 136 F. 3d 417 (5th Cir. 1998). The Petitioner aligned the essential facts of *Dyer* and his case and asserts that the facts distinguish his case sufficiently from *Dyer* that his coram nobis was dismissed in error by the Fifth Circuit. This presumed error, in addition to the clear errors of the District Court, are likely substantially based on the lack of clear parameters of the requirements for filing a coram nobis petition. The Petitioner urges the Supreme Court to grant to him certiorari and thereby bring together the law for all of the circuits and to update and clarify the situation since the 1954 *Morgan* ruling. Such an equitable review would be consistent with his actual innocence.

The Petitioner's case offers the Court an excellent vehicle with which to clarify the parameters of coram nobis relief and to bring all of the circuits together for this ancient and important writ.

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## **CONCLUSION**

For the reasons given above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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