NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

RAS RAHIM
PETITIONER

V.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO
THE UNITED COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITON FOR CERTIORARI
Pro Se
RAS RAHIM (54889-019)
FCI Estill / P. O. Box 699
Estill, S.C. 2991

Petition for Certiorari

Questions Presented for Review

1. Is Heflin, 358U.S. 415, 3 L. Ed. 2d. 407, 79 S. Ct. 451 (1959), still the controlling precedent? Herein, this court held that the text of 28 U.S.C. 2255 did not allow prisoners to utilize section 2255 to collaterally attack any portion of their "consecutive sentencing scheme," that the prisoner was not "currently under." . . .

2. Is the writ of Coram Nobis, codified at 28 U.S.C. 1651(a), the All Writs Act, the proper avenue for federal inmates seeking to challenge a portion of a consecutive sentencing scheme, in which, the federal post- conviction remedy 28 U.S.C. 2255 is unavailable, inadequate, and ineffective to test the legalities of a defendants sentence or conviction due to custody concerns?

3. Does this court's decisions in Johnson, 135 U.S. 2551 (2015) and Dimaya, 584 U.S. __(2018), striking down similarly worded residual clauses of the Armed Career Criminal Criminal Act, 18 U.S.C. 924(e), and the United States Code definition statute for Crime of Violence, 18 U.S.C. 16(b) for violating Fifth Amendment due process protections also void 18 U.S.C. 924(c)(3)(b) residual clause?

4. Does petitioner's predicate crimes of armed bank robbery, under 18 U.S. 2113(a), (d), and simple carjacking, under 18 U.S.C. 2119(1) satisfy 18 U.S.C. 924(c)(3)(A) elements clause, when both predicates can be committed "by intimidation?"

List of Parties Below

The caption set out above contains the names of all parties.

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Statutory Material

Table of Authorities

Text, Treaties, and Law Reviews

Citations of Opinions and Orders in Case

The original conviction of petitioner in the United States District for the Northern District of Georgia was not reported, but is set forth at page A1 of the appendix.

The original conviction of the petitioner was appealed to the United States court of appeals for the 11th Circuit, which affirmed the conviction in all respects in an opinion reported at 431 T. 3d. 753 (11th Cir., 2005). Also set forth on page A2 of appendix.

The decision of the United States District Court for the Northern District of Georgia on petitioner's writ of Coram Nobis 28 U.S.C.1651 (a) is available at A3 of the appendix.

The opinion of the Court of Appeals below is reported in ___F. 3d. _____(11th Cir., 2018), Appeal Number: 17-13382-EE (citation unavailable), and is also available at page A4 of the appendix.

The order denying Petition for Rehearing and Petition for Rehearing En Banc in the above mentioned action number was dated March 29, 2018 and is available at page A5 of the appendix.

Jurisdictional Statement

The judgment of the United States Court of Appeals for the 11th Circuit was entered on January 19, 2018. Rehearing was sought and denied on March 29, 2018. The jurisdiction of this court is invoked under 28 U.S.C.S. 1254 and 28 U.S.C.S. 1651(a).

Constitutional Proviscolian

1. The Fifth Amendment, United States Constitution, provides: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. The statutes under which petitioner was prosecuted, though nothing turns on its terms, were as follows:

> **Count One**: 18 U.S.C. 2113(a), (d), which provided -
>
> (a) whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another, or obtains or attempts to obtain by extortion any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association -
>
> shall be fined under this title or imprisoned not more than 20 years, or both.
>
> (d) whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined under this title or imprisoned not more than 25 years or both.

Count Two: 18 U.S.C. 924(c)(1)(A)(ii), which provided -

except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly, or dangerous weapon or device for which a person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such a crime of violence or drug trafficking crime -- (ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years.

Count Three: 18 U.S.C. 2119(1), which provided -

Whoever, with intent to cause death or serious bodily harm takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall --

(1) be fined under this title or imprisoned not more than 15 years, or both.

Count Four: 18 U.S.C. 924(c)(1)(C)(iii), which provided -

See above (**Count Two**) for introduction to 924(c)(1)(A) -- (iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

3. The statute for which petitioner was not prosecuted - but was sentenced for - in lieu of Count Four was 18 U.S.C. 924(c)(1)(C), which provided:

In the case of a second or subsequent conviction under this subsection, the person shall --

(i) be sentenced to a term of imprisonment of not less than 25 years.

4. The statute under which petitioner sought post- conviction relief was 28 U.S.C. 1651(a)

A Writ of Coram Nobis. All Writs Act

(a) The Supreme Court and all courts established by acts of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ of rule nisi may be issued by a justice or judge of a court which has jurisdiction.

Statement of Case

I. Course of proceedings in the section 1651(a), writ of Coram Nobis case now before this court.

On November 10, 2004, in a case then pending in the United States District Court for the Northern District of Georgia, entitled United States v. Ras Rahim, criminal case number 4:03-CR-00045-HLM-WEJ, petitioner was found guilty by a jury on an indictment of four counts charging violation of (1) 18 U.S.C. 2113(a), (d); (2) 18 U.S.C. 924(c)(1)(A)(iii); 18U.S.C. 2119; 18U.S.C.(1)(A)(iii), (app. A6)

On February 16, 2005, the District Court entered judgment and petitioner was sentenced to 481 months imprisonment totaling, 97 months to run concurrently for counts (1), and (3), 84 months to run consecutive to counts (1), and (3) for count (2) and lastly, 300 months for count (4) to run consecutive to all other counts. This judgment was affirmed by the United States Court of Appeals for the 11th Circuit, United States v. Ras Rahim 431 F. 3d. 753 (11th Circuit, 2005). A petition to this court for certiorari was denied, 547 U.S. 1090 (2006). Petitioner was serving the second leg of his consecutive sentencing scheme when the writ of Coram Nobis, Section 1651(a) was filed in the district court. The petitioner is presently still incarcerated.

On July 3, 2017, petitioner filed the writ at bar under 28 U.S.C. 1651(a), writ of Coram Nobis, to vacate and set aside the judgment of conviction. (app. A9). No answer to the motion was required. No hearing was required.

On July 12, 2017, the district court entered its order denying the writ of Coram Nobis under 1651(a). (app.A3).

On July 26, 2017, petitioner filed a notice of appeal. Both parties submitted briefs in support of their positions. (app. A10, A11, A12). On January 29, 2018 the United States Court of Appeals for the 11th circuit affirmed the district court's decision. (app. A4).

On March 29, 2018, the Court of Appeals for the 11th Circuit denied petitioner's timely filed petition for rehearing and rehearing enbanc. (app. A5). A copy of both petitions is available in appendix at A13 - 14.

II. Relevant Facts Concerning the Underlying Convictions

The relevant facts are contained in petitioner's writ of Coram Nobis (app. A9). During petitioner's criminal trial in the district court, the government offered as proof that petitioner was in fact guilty of all counts of indictment, witness testimony and the firearm that petitioner possessed. Petitioner was found guilty of armed bank robbery, carjacking and companion charges of firearm in connection with both offenses mentioned above.

The district court trial lasted a week. The jury deliberated for a day before returning a verdict of guilty on all counts.

One important point needs noting here. Petitioner was indicted and convicted by very specific 924(c) counts, and the jury instructions included fact specific questions as to counts (2), and (4), for count (2) 18 U.S.C. 924(c)(1)(A)(iii), "did defendant brandish a firearm?" For count (4) 18 U.S.C. (c)(1)(A)(iii) the question was, "did defendant discharge a firearm in commission?'" No where in petitioner's indictment or jury instructions was 18 U.S.C. 924(c)(1)(C)(i) - which subjected petitioner to a mandatory minimum of 25 years rather than the 10 year sentence - mentioned.

III. **Existence of Jurisdiction Below**

Petitioner was convicted in the District Court for the Northern District of Georgia on four counts of his criminal indictment:

(1) armed bank robbery, under 18 U.S.C. 2113(a), and (d);

(2) firearm in connection with count one (brandishing), under 18 U.S.C. 924(c)(1)(a)(ii);

(3) simple carjacking, under 18 U.S.C. 2119(1)

(4) firearm in connection with count four (discharging, under 18 U.S.C. 924(c)(1)(a)(iii)

A writ of Coram Nobis, 28 U.S. C. 1651(a), was appropriately made in that court, and duly appealed to the 11th Circuit. Upon affirming the district court's denial, a petition for rehearing and rehearing enbanc was filed to and denied by the 11th Circuit.

IV. The Court of Appeals Has Decided A Federal Question In a Way That Conflicts With the Applicable Decision of This Court

This is primarily a "residual clause" case. At the time of petitioner's criminal trial, this court had not yet examined the "residual clause" of any statute pertaining to the definition of what qualifies as a "crime of violence." After petitioner's conviction became final, this court granted certiorari in United State v. Johnson, 135 U.S. 2551(2015), in which the court held that the similarly worded residual clause of the Armed Career Criminal Act, 18 U.S.C. 924(e) was void for vagueness. In United States v. Welch 136 U.S. __(2016), it was held that the decision in Johnson was to apply retroactively because Johnson was considered a substantive change in law which gave the courts the power to punish beyond what Congress intended, thus satisfying the Teague Rule of retroactivity. See Teague v. Lane, 489 U.S. 288, 207 (1989). Of course, the petitioner sought review 28 U.S.C. 2244, to the 11th Circuit for permission to file a

successive 28 U.S.C. 2255 motion. This was denied even though the 11th Circuit conceded that circuit precedent might be in error. (See app. A8). This brings us to the 11th Circuit's conflict with this court's decision in United States v. Morgan 346 U.S. 502, 513, 74 S. Ct., 247, 98 L. Ed. 248 (1954), and United States V. Heflin, 358 U.S. 415, 79 S. Ct. 451, 3 L. Ed. 2d. 407 (1959).

In petitioner's original action, writ of Coram Nobis, under 28 U.S.C. 1651(a), the district court never addressed the merits of the writ but instead relied on 11th Circuit precedents which are at variance with this court's previous holding in Heflin. The district court denied the Coram Nobis writ relying on Alilkani v. United States, 200 F. 3d. 732m 734 (11th Circuit, 2000). "First, the writ is appropriate only when there is and was no other available avenue of relief." The district court was of the opinion that "because federal prisoners may make use of the statutory remedy of 28 U.S. C. 2255, coram nobis relief is unavailable to them." United States v. Chaff, 269 F. Apps 878, 879 (11th Circuit, 2008) (per curiam). Petitioner cited this court's holding in Heflin that 2255 was unavailable to attack any portion of a conviction that a person was not currently under. (app. A9). The district court ignored Heflin but instead relied on United States v. Garcia, 181 F. 3d. 1274, (11th Cir. 1999) wherein the 11th circuit held, "Coram Nobis relief is unavailable to a person, such as appellant, who is still in custody." The district court denied petitioner's writ on this basis. (app. A3).

Thus, in response to the district court's decision, petitioner appealed to the 11th Circuit. In this appeal, petitioner cited this court's opinion in Morgan, 346 U.S. 502 (1954). "[T]he contention is made that 2255 of title 28, U.S.C. providing that a prisoner 'in custody' may, at any time move the court which imposed the sentence to vacate it, if "in violation of the

Constitution or laws of the United States, should be construed to cover the entire field of remedies in the nature of Coram Nobis in federal courts. We see no compelling reason to reach that conclusion." (emphasis added)(app. A10) The 11th Circuit and government chose to ignore the fact that nowhere in Morgan does this court express any opinion that to obtain coram nobis relief a petitioner must no longer be in custody to seek relief via coram nobis.

Petitioner, in both his initial brief to the 11th Circuit of Appeals and again in more depth in his reply brief to the government's position, he unsuccessfully argued this court's position in Heflin, 358 U.S. 415 (1959) according to "the Lawyers' Edition of Supreme Court Annotations." The title's "construction of 28 U.S.C. 2255" (41 L. Ed. 2d. 1193), and "Federal Post-Conviction Remedy," (143 L. Ed. 2d., 1055), are of the opinion that as far as Section 2255 is concerned, Heflin - not Peyton v. Rowe - is controlling precedent when it comes to what qualifies as 'in custody' for 2255 purposes. Under title Federal Post-Conviction Remedy, 143 L. Ed. 2d. 1055, subsection "Other Matters" IV, there is a specific Subsection 16 which outlines this court's holding in Heflin and nowhere mentions Peyton v. Rowe or any of its progeny. The 11th Circuit Court of Appeals chose to not accept this and affirmed that district court's denial because the circuit court was of the opinion that Peyton's progeny - Garlotte V. Fordice, 515 U.S. 39, 41 (1995) wherein this court held that, "where a prisoner is serving consecutive sentences, he is considered 'in custody' under each sentence" (app. A4). This of course would seem to foreclose any argument of merit but, this court has on occasion held that not all claims under 2255 will necessarily be treated as would an identical claim under habeas corpus.

After, the above mentioned affirmation, petitioner filed a timely petition for rehearing and rehearing enbanc, specifically and clearly focused on the fact that the Court of Appeal's decision was in direct conflict with the Supreme Court of the United States. (app. A13 - 14). The Court of Appeals denied the rehearing petitions.

Thus, in reaching its decision to affirm, the court below decided the settled principles through the following: United states v. Morgan, 346 U.S. 502 (1954), which held that the writ of Coram Nobis was available as a means to attack a conviction if no other means were available. Alongside United States v. Heflin, 358 U.S. 502 (1954), which held that a defendant serving consecutive sentences could not utilize 28 U.S.C. 2255 to attack any portion of a sentence in which a defendant was not currently "under," lastly, Russell v. United States, 464 U.S. 16, 23 (1983) which held that "where Congress includes particular language in one section of a statue but omits it under another section of the same act. It is generally presumed that Congress acts intentionally, and purposely in the disparate inclusion or exclusion." (Alteration and internal quotation marks omitted). These were not to be applied to the case at bar because:

1. The petitioner was not entitled to coram nobis relief because U.S.C. 2255 was made available to him; (app. A3)

2. This court's decisions showed, according to the 11th Circuit, that Heflin was no longer controlling and thus does not apply to petitioner's case. (app. A3 - A4)

Petitioner respectfully asserts that all aspects of this decision are erroneous and at variance with this court's decisions as explained in the argument below.

Argument for The Allowance of Writ

I. THE COURT OF APPEALS ERRED IN AFFIRMING THE DENIAL OF PETITIONER'S WRIT OF CORAM NOBIS BY THE DISTRICT COURT ON A BASIS THAT THE COURT BELIEVED PETITIONER WAS 'IN CUSTODY" FOR 28 U.S.C. 2255 PURPOSES WHICH IS IN DIRECT CONFLICT WITH THIS COURT'S HOLDINGS

Heflin's Legacy

A) The mere fact that a prisoner is currently in prison, serving a series of consecutive federal sentences, does not necessarily equate to satisfying the "in custody" requirement of the "Federal Post Conviction Remedy" or 28 U.S.C. 2255. Petitioner believes that this is the crux of the whole dispute and is the foundation of the Court of Appeals' decision (app. A4). Such reasoning is not only at variance with this court's decision in United States v. Heflin, 358 U.S.C. 415, 3 L. Ed. 2d. 407, 79 S. Ct. 451 1959, but also delves into such constitutional issues of a separation- of-powers. Whereas this court in Heflin, was of the overwhelming opinion that Congress intended, that to be eligible for relief under 28 U.S.C. 2255, a petitioner must be in custody under that particular sentence when seeking such relief. This court was convinced that the actual text of 28 U.S.C. 2255 which read, ' A prisoner in custody under a sentence of a court established by an Act of Congress . . . ." could only be interpreted one way - which was to only allow inmates to utilize 28 U.S.C. 2255 to attack whatever portion of a consecutive sentencing scheme a defendant was actually serving. If this court overwhelmingly agreed that it was

congressional intention to draft the text of 28 U.S.C. 2255 this way, it can only be reasonably assumed that this court would be of the position that it is up to Congress, not to the lower courts to re-write the text of 28 U.S.C. to be more definitive as to what qualifies as "in custody." In Dimaya v. Sessions, 584 U.S. __(2018), Judge Gorsuch, on page 8 of his opinion, stated "[C]onstitution assigns judges the judicial power to decide cases and controversies, Art. III S2, that power does not license judges to craft new laws to govern future conduct, but only to "discern the course prescribed by law as it currently exists."

Petitioner avers that it was this court's holding - in Heflin - that set the bar for obtaining relief via 28 U.S.C. 2255 based on congressional intent. To date, Congress has shirked its duty in addressing this custody issue in its text, besides on numerous occasions amending the statute.

If this court's own decision in Heflin still holds as precedent, then appellate courts across the country are at odds with the Supreme Court and only this court can address this issue.

The Stare Decisis of Peyton-Garlotte

B) The government position is simple and relies squarely on a Latin term "stare decisis." In their belief that this court's decision, Heflin was no longer controlling in 28 U.S.C. 2255 but the court is of the overwhelming opinion that Peyton v. Rowe, 391 U.S. 54 (1968) had essentially overruled or overturned Heflin. In Peyton v. Rowe, it was held that a "[p]etitioner serving consecutive sentences may attack conviction underlying sentence yet to be serve," again, we mention, Garlotte V. Fordice, 515 U.S. 39, 115 (1995). "[P}eyton extended to petitioner's serving consecutive sentences who challenge conviction underlying sentence already served."

I.d. at 46-47. The "Government" in their brief of opposition to Rahim's appeal in the 11th Circuit Court of Appeals was of the belief that the "federal habeas statute' with which Peyton and its progeny were concerned, was the same as Heflin in 28 U.S.C. 2255. Rahim is of the belief that the Court of Appeals is both legally wrong and exceeds its power by ignoring this court's holding in Heflin. As stated above, this court was concerned with the actual text that Congress used in drafting 28 U.S.C. 2255.

The lower courts have erroneously been applying Peyton v. Rowe to 28 U.S.C. 2255 motions, and here is why. In Peyton, this court held that "a prisoner serving consecutive sentences is 'in custody' under any one of them" for purposes of the habeas statute. [citation omitted].

The habeas statue in Peyton was 28 U.S.C. 2254 which read in part: The Supreme Court, a justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a state court . . .(emphasis added).

It is clear that this statue is a reflection of 28 U.S.C. 2241(c), (d) which reads in part: (c)(1) "he is in custody under or by color of the authority of the United States" . . .or (d) "where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a state court." . . .

The Error

C) It is clear that the lower courts have assumed that the "federal habeas statute' that was involved in Peyton and it progeny, extended to the "federal post-conviction remedy" or 28 U.S.C. 2255.

Petitioner will concede that "generally," 28 U.S.C. 2255 is in a "symbiotic relationship, a 'what's good for the goose, is good for the gander,' with the traditional writ of habeas corpus. But, this court has held in several instances that this relationship is not always so: Blackledge v. Allison, (1977) 431 U.S. 63, 52 L. Ed. 2d. 136, 97 S. Ct. 1621, where the Supreme Court, in affirming a judgment that reversed the summary dismissal of a state prisoner's petition for a writ of habeas corpus, observed that in considering a motion under 28 U.S.C. 2255 at trial judge's recollection of the events at issue may enable the judge to summarily dismiss the motion, even if the judge could not similarly dispose of a habeas petition that challenged a state conviction and presented identical allegations. Note United States v. Addonizio, (1979 442 U.S. 178, 60 L. ed. 2d. 805, 99 S. Ct. 2235. This court said that 28 U.S.C. 2255 provides a remedy for federal prisoners within the jurisdiction of the sentencing court that is equally as broad as the remedy provided by a habeas corpus petition filed in the district of confinement. While the remedy under 2255 is in this sense comprehensive, it does not encompass all claimed errors in conviction and sentencing as the scope of an attack under 2255 remains far more limited compared to the scope of habeas corpus with respect to claims that do not allege a lack of jurisdiction or a constitutional error...

Subsection Conclusion

D) Petitioner is of the strong belief that this court never intentionally overturned Heflin because the issue of a person being "in custody" for 28 U.S.C. 2255 has never been corrected or amended by Congress, to address this court's concern in Heflin. Thus, the same concerns remain.

This court has held that "where Congress includes particular language in one section of a statue but omits it under another section of the same act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion" (alteration and internal quotation marks omitted) (Russell v. United States, 464 U.S. 16, 23 (1983).

If this logic holds, and Congress has failed to act in changing the strict language of Section 2255, would it not only be reasonable to believe that this was intentional and it also supports the petitioner's claim of conflict between the Court of Appeals for the Eleventh Circuit and this Supreme Court of the United States?

Petitioner is of the belief that he is not "in custody" for obtaining relief via U.S.C. 2255 because he is not "currently under a sentence" but like Heflin serving consecutive sentences. Thus 2255 is unavailable to him.

II. THE COURT OF APPEALS ERRED BY DETERMING THAT PETITIONER IS NOT ENTITLED TO CORAM NOBIS RELIEF

Petitioner finds that the Court of Appeals below, in struggling with the complexities of

the case at bar, failed to recognize the significance of Heflin above, the Court of Appeals failed to recognize that, the decision and precedent was both ancient and settled. Thus, the lower court's holding that 28 U.S.C. 2255 was available to petitioner, was flawed. The expansion of Peyton v. Rowe and it's progeny to include Section 2255 in decisions regarding the "in custody" requirement are foreclosed by this court's decision and any attempt by the lower courts would usurp Congress' intention.

If, this is in fact, a correct argument, then petitioner is entitled to collaterally attack his sentence of conviction via the writ of Coram Nobis, 28 U.S.C.1651(a). In Morgan 346 U.S. 502 (1954) this court held false the idea that the enactment of 28 U.S.C. 2255 was to - in a sense - abolish or make novel the ancient writ of Coram Nobis. In Morgan, the court explained several factors which must be present to render the original proceedings invalid and irregular through the writ of Coram Nobis and they are generally as follows:

- the petitioner bears the burden of proving the original proceedings were invalid,
- there is no other available avenue to seek remedy,
- there must be a civil disability,
- the conviction was based on an error of sufficient magnitude to justify relief, and finally
- the petitioner must have exercised reasonable diligence in trying to remedy the matter.

Satisfying Coram Nobis Requirement

Because the Government and both lower courts were of the belief that petitioner was

"in custody" for Section 2255 purposes, they failed to adjudicate the merits of petitioner's claims. So for this court's aid, petitioner will - in an abridged version - lay out the procedural hurdles he has satisfied:

A) Custody Issue: As stated above, petitioner - at the time of original filing - is not "in custody" for 28 U.S.C. 2255 purposes. This was conceded by Government in their brief in opposition to petitioner's appeal to the 11th Circuit. (See app. A11). Petitioner had not yet begun his 300 month sentence for Count (4). In his original action, petitioner cited Heflin and United States v. Deal, 508 U.S. 129, 124 (1993). Petitioner unsuccessfully argued that since this court in Deal separated 18 U.S.C. 924 (c) counts on the same indictment to obtain a much harsher sentencing scheme then it would only be reasonable to assume that this court would agree to allow separate attacks, therefore bolstering Heflin. Also see, Moon v. United States, 272 F. 2d. 530 (D.C. Cir. 1959); Deckard v. United States, 381 E. 2d. 77 (8th Cir. 1967); United States v. Taylor, 648 F. 2d 565 (9th Cir. 1981).

B) Absence Of Available Remedies: There is no available remedy. As shown above and in appendix (app. A7 - A8). Petitioner pursued conventional means available to federal prisoners for attacking sentences. Petitioner filed several applications seeking permission to file a second or successive 2255 in the 11th Circuit via 28 U.S.C. 2244. All were denied (see app. A7). As petitioner has argued above, even if the Court of Appeals granted him a new Section 2255 according to Heflin, he would not be eligible for relief because he was not in custody for purposes of the particular sentence being challenged. Alternatively, there is no recourse or

avenue in which an individual can seek review if an appellate court makes a decision that is erroneous as implicated by 11th Circuit Judge Martin' opinion in the response to petitioner's 28 U.S.C. 2244 application(app. A8, 13-14).

This court, prior to the 1995 AEDPA enactment held that "the writ of habeas corpus commands general recognition as the essential remedy to safeguard a citizen against imprisonment by state or nation in violation of his constitutional rights. To make this protection effective for unlettered prisoners without friends or funds, federal courts have long disregarded legalistic requirements in examining applications for the writ and judged the papers by the simple statutory tests of whether facts alleged that entitle the applicant relief" in Morgan citing Darr v. Burford, 339 U.S. 200, 238, 94 L. Ed. 761 (1950).

C) Civil Disabilities: Heavier penalties for subsequent convictions are considered civil disabilities. See Morgan 346 U.S. at 513. Petitioner is posed to serve a harsher penalty because he was convicted of two counts of 18 U.S.C. 924(c) under the same indictment thus transforming the latter 924(c)(1)(A)(iii) conviction into 924(c)(1)(C). As a result, instead of a 10 year consecutive sentence for the original count (4), petitioner is subjected to the enhanced penalty of 25 years consecutive under the latter 924(c). This court, in United States v. Deal, 508 U.S. 129, 124 (1993) held that multiple 18 U.S.C. convictions on the same indictment are to be treated as separate and independent "convictions" thus triggering the enhanced penalty under 18 U.S.C. 924(c)(1)(C)(i) for second or subsequent convictions.

This court could surely agree with petitioner's reasoning that by utilizing this court's holdings in Heflin, and Deal, the writ of Coram Nobis is the perfect remedy. It is important to

note that with this logic, a petitioner would be able to make an examination of either 924(c) conviction due to their separation. So in petitioner's case, he could challenge both predicates of bank robbery and carjacking since both are factors affecting a civil disability.

D) Fundamental Error: The error in this case stems from the original conviction. At the time District Court Judge Harold Murphy had no way of knowing whether a statutory residual clause could be unconstitutionally vague and thus violate due process. As petitioner will show below, the decision in Johnson, 135 U.S. 2551 (2015) was both a substantive change in law that would affect 18 U.S.C. 924 (e) Armed Career Criminal Act, and also impacted statutes such as 18 U.S.C. 16(b), Dimaya v. Sessions, 584 U.S._-(2018). This struck down a similarly worded statute that affected immigration law. Petitioner concedes that Dimaya had not been decided at the time of the original Coram Nobis action and was thus not included. Given hindsight with this court's opinion in Dimaya, it is only reasonable to believe that the "residual clause" of 18 U.S.C. 924(c)(3)(b) is also unconstitutionally vague.

Petitioner, in his Coram Nobis, and initial appeal argued that the striking down of the residual clause of the ACCA would also strike down the 924(c) clause as well. This results because of this court's reasoning in Johnson and again in United States v. Welch, 136 U.S.__(2016) which held that the decision in Johnson was a "substantive change" in law under the Teague Rule by punishing a defendant beyond what Congress intended as punishment for a firearm's offense. Similarly, the residual clause by its vagueness violated the Constitutional 5th Amendment right of due process. Petitioner argued that the similarities of both section 924 statues was clear and are as follows: 1) both statues are firearm possession cases; 2) both

statues allow for the courts to punish a defendant to beyond the 10 years. This was the intent of Congress. There are a few exceptions where a penalty beyond 10 years can be implemented. However, it is clear that due process must be satisfied to go beyond 10 years. For example:

- 18 U.S.C. 924 (b) penalizes an individual who possesses a firearm with intent to commit a felony. Maximum penalty is 10 years.

- 18 U.S.C. 924(g) is similar to both above statutes and to 924 (c) possessing a firearm with intent to engage in drug crimes or "crimes of violence." Maximum penalty 10 years

- 18 U.S.C. 924(k) is almost a verbatim replica of section 924 (c) except that there is a maximum penalty of 10 years.

There is an interesting twist with this section in United States v. Bell, 855 F. Supp. 239, May 17, 1994 (7th Cir. D.C.). In Bell, the defendant was also charged and convicted of armed bank robbery under 18 U.S.C. 2113(a),(d).

There are more firearm statues which petitioner could include but respects the fact that this court is well aware of the United States Code. Petitioner will hereafter expand on how both 18 U.S.C. 2113(a), (d) and 18 U.S.C. 2119(1) would be affected if the residual clause of 18 U.S.C. 924(c)(3)(b) were to be struck down.

E) Reasonable Diligence: A petition for a writ of Coram Nobis has no strict statue of limitations, but the petitioner must exercise reasonable diligence. See example Dyer v. United States, 136 F. 3d 417, 427 (5th Cir., 1998). It cannot be said that petitioner has not actively sought to seek remedy from the given forty years and one month sentence - especially since this court's decision in Johnson.

III. This court's guidance is needed in directing the lower courts indecision in whether or not this court's striking down of the residual clauses in Johnson and now in Dimaya effectively strikes down the 18 U.S.C. 924)(3)(b) "residual clause."

To date, petitioner is unaware of any circuit which has expressly ruled that 18 U.S.C. 924 (c)(3)(b) is constitutional but he is aware of three circuit courts which have struck down the "residual clause" of 924(c). the 7th, 9th, and 10th Circuits have ruled that the residual clause of 924(c) is unconstitutionally vague. The only serious question is this: What crimes remain or qualify?

IV. The circuits below have differed as to whether or not "intimidation," as used in simple carjacking statute 18 U.S.C. 2119(1), qualifies under 18 U.S.C. 924(c)(3)(A) element's clause.

In plain English, intimidation does not have an element of "strong physical force," as defined in Curtis Johnson v. United States, 559 U.S. 133 (2010). It does not necessarily even mean that intimidation is a threat of violence at all. See definitions -

Intimidation: to make timid or fearful; to frighten, to compel or deter; by or as if by threats; synonyms - cow, bulldoze, bully, browbeat (The Merriam-Webster Dictionary, 2004).

Or . . .

Intimidation: unlawful coercion; extortion (Black's Law Dictionary, 3rd Pocket Ed., 2006).

And . . .

Coercion: 1. restrain, repress; 2. Compel; 3. Enforce (Merriam-Webster Dictionary, 2004).

And . . .

Coercion: Compulsion by physical force or threat of physical force; and act such as signing a will not legally valid if done under coercion. See duress; undue influence; conduct that constitutes the improper use of economic power to compel another to submit to the wishes of one who wields it (Black's Law Dictionary, 3rd Pocket Ed., 2006).

Petitioner will concede that Black's Law definition of coercion does include the words "physical force" or a "threat of physical force." Petitioner would argue that 11th Circuit Appeals Court Judge Jill Pryor, J.D. said it best. Petitioner will quote her dissent, in re: Smith ___3d____(2016) which involved 18 U.S.C. 2119(1) carjacking, the same statute in which petitioner is asking this court for its clarification.

> "the federal offense of carjacking [could] cover more conduct than does the elements clause of 924(c). [I]t is [certainly] possible to prove that a defendant had the intent to commit death or serious bodily harm without proving that he used, attempted to use, or threatened to use physical force against the victim. As the Supreme Court explained in Holloway [v. United States, 526 U.S. 1, 11 (1999)], a defendant could still be found guilty of carjacking in a "case in which the driver surrendered or otherwise lost control over his car' without the defendant ever using, attempting to use, or threatening to use physical force so long as the government could satisfy the intent element. The government could do so by - for example - looking outside defendant's charged conduct and at his prior bad acts" (Smith at 13).

Petitioner is of the belief that it is under this court's decision in United States v. Holloway, 526 U.S.1 (1999), "intimidation,' as written in statutes, "by force and violence or by intimidation," does not necessarily entail the type of 'strong physical force' as described in Johnson 559 U.S. 133 (2010) . If petitioner understands this court's holding in Holloway correctly, an "empty threat or intimidation bluff" could satisfy the "by intimidation" element. An "empty threat" could be simply too broad and could cover any range of conduct even in its most innocent interpretation. It could be "threat of exposure."

One example could be a case wherein a group of "criminals" engaging in prostitution were targeting and threatening their clients with exposure to their families and co-workers unless the clients surrendered their vehicles. No physical force accompanied this threat, and the " conditional intent" element of carjacking could be satisfied by a past conviction for aggravated assault. A case like this would constitute an empty threat with no "strong physical force' used, attempted, or threatened to be used.

Now, let's look at an "intimidating bluff' scenario. In this example, we will use a gas station as the crime scene. Defendant X enters the store as Victim B pulls into the parking stall next to the store's entrance and leaves the car "operating" so that passengers can listen to the radio, and benefit from the air conditioning. Defendant X - who is 6ft. and solid muscle snatches a packet of cigarettes from behind the counter and leaves the store. He enters Victim B's vehicle. The passenger takes notes of the defendant's size but yells at him to "get out!" However, Defendant X just looks over at the passenger and says, "why don't you get out?"

The passenger complies and the defendant drives away. According to Merriam-Webster, the word bluff means to frighten, or deceive by a pretense or a mere show of strength. A mere show of strength would not satisfy the elements clause of 924(c)(3)(A).

The lower courts have split on this matter and this courts discretion is needed to settle the issue as to whether intimidation had an element of used, attempted, or threatened use of physical force. This Court's discretion is needed to clarify as to whether 18 U.S.C. 2119(1) "simple carjacking" qualifies as a crime of violence under 18 U.S.C. 924(c)(30(A) elements clause.

V. This Court's discretion is needed to clarify whether armed bank robbery under 18 U.S.C. 2113(a), (d) which entails "the use" of a firearm weapon qualifies as a crime of violence under 924(c)'s elements clause.

Petitioner will incorporate the same argument from above as to the same element in the bank robbery statute and carjacking which reads "by force and violence, or by intimidation." (emphasis added). As previously argued, petitioner is of the belief that bank robbery by intimidation does not have to have an element of strong physical force because a bank robbery can be committed by using a note. For example, a note that read "give me all the money, or else" would satisfy the element of bank robbery by intimidation. The bank robbery statute allows for a conviction under this same statue for extortion which anyone could agree does not involve strong physical force. This will be illustrated.

Of course, petitioner was convicted of armed bank robbery which adds the element, "assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device." Petitioner will borrow from 11th Circuit of Appeals' Judge Martin's opinion in petitioner's 28 U.S.C. 2244 application (app. A8). This Court in United States v. Bailey, 516 U.S. 137 (1995) considered what it meant to "use" a firearm in connection to a firearms offence 18 U.S.C. 924(c)(1). Bailey held that the use of a firearm could include "brandishing, displaying, bartering, striking with, and most obviously, firing, or attempting to fire, a firearm." This court also went on to say that even an offender's reference to a firearm in his possession could satisfy the "use" requirement (emphasis added). Neither, displaying, bartering with, or referencing a firearm, has an element of strong physical force. Petitioner will concede that under the unconstitutionally vague residual that it is possible that even bartering with a firearm could be violent somehow, but when looking at the statute plainly it would seem that Subsection (d) of 2113, criminalizes just as much nonviolent physical force as actual violent physical force with no way to discern by the statute or indictment alone which "use" did petitioner employ during his bank robbery.

Petitioner asks that this court strike down armed bank robbery as a predicate statute for 924(c) companion conviction due to the uncertainty of what actual conduct is being punished under the statute.

VI. The 11th Circuit has decided important questions of federal law that either run counter to, or have not been, but should be settle by this court and

are a firm basis for granting certiorari in this case.

1. The 11th Circuit has made a highly questionable ruling on the availability of Coram Nobis to challenge petitioner's, unserved portion of his consecutive federal - federal sentence because of their holding that petitioner was in fact, "in custody" for 28 U.S.C. 2255 purposes is in conflict with this court's holding in Heflin.

2. This petition presents to this court a more fundamental question for review. May the "residual clause" of 18 U.S.C. 924(c)(3)(b), survive this court's striking down of the similarly worded residual clauses of 18 U.S.C. 924(e), Armed Career Criminal Act and 18 U.S.C. 16(b), the United State Code's definition for crimes of violence, for violating a defendant's constitutional 5th amendment rights to due process under the void-for-vagueness doctrine.

3. Petitioner has the potential of serving 481 months total, which is exactly, 1 month over the combined statutory maximum for both armed bank robbery (25 years) and simple carjacking (15 years). Petitioner is serving 32years in 18 U.S.C. 924(c) consecutive sentences. If either predicate does not qualify as a crime of violence under the elements clause of 924(c)(3)(A), then petitioners sentence would qualify as a fundamental defect and demands justice. It is important that this court correct the errors of the 11th Circuit.

4. Both challenged predicates would have a nationwide impact and resolve any conflicts among the circuits -

A) 18 U.S.C. 2113(a), (d) - Armed bank Robbery

B) 18 U.S.C. 2119(1) - Simple Carjacking

5. Any questions as to why this Court should review Count One - Armed Bank Robbery, is that he has fully exhausted that sentence and his belief that his Court's holding in Heflin is controlling, thus making section 2255 ineffective. Coram Nobis relief is available.

Conclusion

The judgment below is unique because it was made in clear conflict of this court's holdings in Heflin, Morgan, Johnson, and now Dimaya. As such, it represents a breach of the protections guaranteed by the Fifth Amendment to the Constitution. The decisions of this Court were designed to both protect a citizen from being convicted by the Government through the use of vague statues, which promotes arbitrary enforcement and harsh penalties beyond what Congress intended, unless due process is clearly satisfied. Moreover, the decisions of this Court stress the importance of justice. It goes against the very foundation of this nation's thrust against tyranny if, petitioner's convictions of possessing a firearm in connection to a crime of violence are no longer valid. Then the principle that a "conviction does not gain validity with age" should apply.

1) 28 U.S.C. 2255 is both ineffective and unavailable for petitioner to challenge his conviction.

2) The residual clause of 18 U.S.C. 924(c)(3)(b) is unconstitutionally vague in light of Johnson and Dimaya.

3) Intimidation - does not have an element of use, attempted use, or threatened use of strong physical force.

4) the writ of Coram Nobis is available in petitioner's extraordinary situation to correct a fundamental defect.

Petitioner has served over 15 years on a 40 years., 1 month consecutive sentencing scheme. He has expressed remorse for all of the pain that his actions caused. He has programmed (?) while in prison and has remained incident-report free while being incarcerated in America's most dangerous penitentiaries. He has become a practicing Buddhist. He asks that this Court serve justice as is required.

This petition for a Writ of Certiorari, should, therefore, be granted.

Respectfully Submitted,

22 June Date

Ras Rahim

Ras Rahim (54889-019)

FCI Estill / P.O. box 699

Estill, SC 29918

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-13382
Non-Argument Calendar

D.C. Docket No. 4:03-cr-00045-HLM-WEJ-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RAS RAHIM,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Georgia

(January 29, 2018)

Before WILLIAM PRYOR, ROSENBAUM, and ANDERSON, Circuit Judges.

PER CURIAM:

Ras Rahim, a federal prisoner currently serving a total sentence of 481 months' imprisonment, appeals from the district court's denial of his pro se petition for a writ of error *coram nobis*. On appeal, Rahim argues that the district court erred by denying his petition because he was not considered "in custody" on his challenged sentence pursuant to 18 U.S.C. § 924(c).

Although this appeal concerns the denial of Rahim's petition for a writ of error *coram nobis*, we briefly review relevant earlier proceedings involving Rahim to place his appeal into context.

In 2004, Rahim was convicted of armed bank robbery, in violation of 18 U.S.C. § 2113(a) and (d); use of a firearm during a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(ii); theft of a motor vehicle by force and intimidation, in violation of 18 U.S.C. § 2119; and use of a firearm during a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A)(iii). Rahim was sentenced to a total term of imprisonment of 481 months, which consisted of 97 months as to Counts 1 and 3, to run concurrently; 84 months as to Count 2, to be served consecutively to Counts 1 and 3; and 300 months as to Count 4, to be served consecutively to Counts 1, 2, and 3.

Rahim appealed, and this Court affirmed his convictions and sentences. The Supreme Court denied certiorari.

In 2007, Rahim filed a motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255. The district court denied Rahim's § 2255 motion on the merits. Rahim then filed a motion to alter judgment, which the district court denied.

Rahim subsequently filed several other motions seeking to amend or file additional § 2255 motions. All were denied, and no certificates of appealability were granted.

In July 2017, Rahim filed the instant *pro se* petition for a writ of error *coram nobis*, seeking to vacate his § 924(c) convictions based on the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), and *Mathis v. United States*, 136 S. Ct. 2243 (2016). Rahim argued that a writ of error *coram nobis* was the proper vehicle because he sought relief from issues that rendered his proceedings irregular or invalid. He argued that we erred in denying his applications to file second or successive § 2255 motions. Rahim also argued that he was not currently "in custody" for his second § 924(c) conviction because he had not yet started serving that sentence. He further contended that this was his only remedy because this Court made an error in his previous proceedings.

The district court denied Rahim's petition for a writ of error *coram nobis*. It determined that Rahim was not entitled to *coram nobis* relief because he remained in federal custody. The district court rejected Rahim's position to the contrary

because Rahim was still in custody on at least one of his sentences. Instead, the district court concluded that Rahim must pursue his claims under § 2255. But the district court declined to construe Rahim's petition as a § 2255 motion because Rahim had already filed one § 2255 motion that had been denied, and he had not received permission from this Court to file a second or successive § 2255 motion.

Rahim now appeals the district court's denial of his petition for a writ of error *coram nobis*.

We review a district court's denial of a petition for a writ of error *coram nobis* for an abuse of discretion. *Alikhani v. United States*, 200 F.3d 732, 734 (11th Cir. 2000).

The All Writs Act, 28 U.S.C. § 1651(a), provides federal courts the authority to issue writs of error *coram nobis*. *United States v. Mills*, 221 F.3d 1201, 1203 (11th Cir. 2000). "A writ of error *coram nobis* is a remedy available to vacate a conviction when the petitioner has served his sentence and is no longer in custody, as is required for post-conviction relief under 28 U.S.C. § 2255." *United States v. Peter*, 310 F.3d 709, 712 (11th Cir. 2002). Conversely, where a petitioner is still "in custody," he is not entitled to *coram nobis* relief. *United States v. Garcia*, 181 F.3d 1274, 1274 (11th Cir. 1999). The Supreme Court has held that where a prisoner is serving consecutive sentences, he is considered "in custody" under each sentence. *Garlotte v. Fordice*, 515 U.S. 39, 41 (1995).

Here, the district court did not abuse its discretion by denying Rahim's petition for writ of error *coram nobis*. Because Rahim is still in federal custody serving consecutive sentences, *coram nobis* relief is unavailable to him. Accordingly, we affirm.

AFFIRMED.

11th Circuit Order Affirming District Court's Denial of Writ of Coram Nobis

January 29, 2018

(App. A 4)