No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

GUY ENNIS SMITH,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether this Court's decision in *United States v. Alvarez*, 132 S. Ct. 2357 (2012), which found the false speech and writing subsection of the Stolen Valor Act, 18 U.S.C. § 704(b), unconstitutional, has any effect on the subsection that criminalized the unauthorized wearing of military medals, 18 U.S.C. § 704(a). The Fourth and Ninth Circuits have held that there is an effect, and this case presents those questions for this Court. *See United States v. Hamilton*, 699 F. 3d 356 (4th Cir. 2012); *United States v. Swisher*, 811 F.3d 299 (9th Cir. 2016) (*en banc*).

Whether the lower courts threshold determination of a present harm or collateral consequence to satisfy the Writ of Error Coram Nobis, conflicts with this Court's threshold determination of harm or collateral consequence in *Morgan*.

TABLE OF CONTENTS

Section **Page**

TABLE OF CONTENTS – *CONT.*

TABLE OF AUTHORITIES

Cases **Page(s)**

TABLE OF AUTHORITIES – *CONT.*

Cases **Page(s)**

Statutes

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Guy Ennis Smith, respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit. *See United States v. Smith*, No. 17-12412, 2018 WL 6434386 (11th Cir. December 7, 2018) (Pet. App. A-1).

OPINION BELOW

The United States Court of Appeals for the Eleventh Circuit issued its decision on December 7, 2018. The Eleventh Circuit's opinion is provided in Appendix A-1 (App. A1). The district court order denying the writ is provided in Appendix A-2 (App. A2).

JURISDICTION

The Eleventh Circuit issued its opinion on December 7, 2018. *See* Pet. App. A-1. The jurisdiction of this Court us invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Section 1651 of Title 28 provides:

(a) The Supreme Court and all courts established by Act 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 or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

Section 704 of Title 18 provides, in relevant part:[1]

[1] At time of Mr. Smith's arrest, § 704 provided: "Whoever knowingly **wears**, manufactures, or sells any decoration or medal authorized by Congress for the armed forces of the United States, or any of the service medals or badges awarded to the members of such forces, or the ribbon, button, or rosette of any such badge, decoration or medal, or any colorable imitation thereof; except when authorized under

(a) In General.—
Whoever knowingly purchases, attempts to purchase, solicits for purchase, mails, ships, imports, exports, produces blank certificates of receipt for, manufactures, sells, attempts to sell, advertises for sale, trades, barters, or exchanges for anything of value any decoration or medal authorized by Congress for the armed forces of the United States, or any of the service medals or badges awarded to the members of such forces, or the ribbon, button, or rosette of any such badge, decoration or medal, or any colorable imitation thereof, except when authorized under regulations made pursuant to law, shall be fined under this title or imprisoned not more than six months, or both.

STATEMENT OF THE CASE

This case arises from Mr. Smith's attempt to vacate his 49 year-old misdemeanor conviction from 1970, which resulted in probation, of violating 18 U.S.C. § 704(a).

In his Petition for Writ of Error Coram Nobis and at his evidentiary hearing, Mr. Smith explained that he pleaded guilty in 1971 to violating 18 U.S.C. § 704(a) by wearing a Purple Heart medal without due authorization. He was fined and sentenced to probation for six months, with consideration to terminate the probation once the fine was paid. Mr. Smith paid the fine, the probation was terminated, and the case was over. *See* Doc. 28, Defense Exhibits 1-4 (stipulated to by the parties).

Over 40 years later the Supreme Court's decision in *United States v. Alvarez*, 567 U.S. 709 (2012), which he contends rendered his 1971 conviction "non-criminal"

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regulations made pursuant to law, shall be fined not more than $250 or imprisoned not more than six months, or both." 18 U.S.C. § 704 (1970) (emphasis added). In 1994, § 704 was amended and this language became § 704(a). *See* Pub. L. No. 103-322, 108 Stat. 1796, 2113. In 2013, Congress struck the word "**wears**" from § 704(a). *See* Pub. L. 113-12, § 2(a)(1).

and "void," was not available to him to seek relief from this conviction before then. Doc. 36 at 4-7.

Mr. Smith provided multiple grounds to satisfy the elements for coram nobis relief. The first being the lower court's lack of jurisdiction to a non-offense and that a conviction in and of itself is sufficient to warrant relief. Second, that under Florida's Administrative Codes for parole eligibility, he would be eligible for parole consideration based on the historical record in his parole file, if he were to show a substantial change in his circumstances, such as the removal of a conviction. *See* Fla. Admin. Code R. 23-21.012(1)(c)(1) and (e) (Inmate Initiated Review of Presumptive Parole Release Date); Fla. Stat. § 947.174(1)(b)-(c) and (2) (Subsequent Interviews). Lastly, he argued that removal of his § 704(a) conviction would lower his salient factor score which the Commission considers along with two other factors in calculating a Presumptive Parole Release Date (PPRD), thus establishing a present harm.

At his evidentiary hearing, Mr. Smith presented his archived district court records from his 1971 conviction in violation of § 704(a). These *Shepard* (*v. United States*, 544 U.S. 13 (2005)), documents were stipulated by the parties. *See* Doc. 28, Defense Exhibits 1-4. He also presented documentation from his Commission file. The historical records in his parole commission file listed only three prior convictions that were considered by the Commission in the calculation of his PPRD. The historical records reflected that the Commission had included the 1971 conviction at issue. Doc. 28, Defense Exhibit 6 (stipulated to by the parties).

The Government asserted that Mr. Smith's salient factor score would remain unchanged as long as he had three or more prior convictions. To support their argument the Government called Laura Tully with the Florida Parole Commission. Ms. Tully serves as the director of field services for the Commission. During her direct examination, Ms. Tully relied on a Florida Crime Information Center (FCIC) and National Crime Information Center (NCIC) report of Mr. Smith's criminal history, that she had printed three days prior to the hearing to counter the historical record in his Florida parole file.

Ms. Tully identified four priors, not including his § 704(a) conviction, two of which had never been documented in Mr. Smith's historical records, that she alleged would prevent a reduction in Mr. Smith's salient factor score. Doc. 32 at 44-46. However, on cross examination, Ms. Tully conceded that if the § 704(a) conviction were to be vacated and subsequently removed from Mr. Smith's criminal history the Commission may consider such a change as substantial, warranting a review of his file for reconsideration in determining a new PPRD.

During the evidentiary hearing and in his post evidentiary hearing briefing Mr. Smith challenged the constitutionality of § 704(a) both facially and as applied. Docs. 32 at 29; 37 at 4-8. He stated that the conduct at issue in his 1971 conviction "had no intent to deceive at its heart." *Id*. In addition, Mr. Smith stated that he "did not defraud or deceive anyone and received no pecuniary gain." *Id*., at 4. As for the conduct at issue, he "was wearing a civilian denim jacket which was adorned with numerous pins, patches, and medals, of which two (2) items violated this law by the

simple act of *wearing* them." *Id*. (emphasis added). He stated in his filings that he never appeared at any public event in any uniform nor did he wear his civilian jacket with intent to pose as a veteran or medal recipient nor benefited therefrom.

Indeed, the *Shepard* documents Mr. Smith presented do not reflect any conduct other than the mere fact that he knowingly wore a medal without authorization. Doc. 28, Defense Exhibit 1-4.

Mr. Smith explained that during his term of state incarceration he had been successful in the removal of inaccurate criminal history arrests and convictions. Several of these inaccurate arrests and convictions had appeared on his F.C.I.C. and N.C.I.C. report. *Id*. at Defense Exhibits 8, 13; Doc. 41, Exhibit 2. Mr. Smith had "succeeded in correcting the alleged conviction for carrying a concealed weapon from Dade County to reflect the withdrawal of prosecution filed." *Id*. Finding that the threshold for parole consideration is less than three convictions as Mr. Smith had contended, vacating his § 704(a) conviction would make him eligible for consideration as per the Florida Administrative Codes and Statutes.

On appeal, Mr. Smith argued that relief pursuant to a writ of error coram nobis is available after a sentence has been served because "the results of the conviction may persist [and] [s]ubsequent convictions may carry heavier penalties, civil rights may be affected." *United States v. Morgan*, 346 U.S. 502, 512-13 (1954). Furthermore, he argued that the lower court was without jurisdiction to accept his guilty plea to a non-offense, citing *United States v. Alvarez*, 567 U.S. 709 (2012). *See* Initial Brief of Appellant at 8-12 (filed July 24, 2017). Mr. Smith, in arguing the issue of jurisdiction

challenged the constitutionality of § 704(a) both facially and as applied, based on this Court's decision in *Alvarez*, suggesting that § 704(a) requires a limiting construction before it can be constitutionally applied. *See* Initial Brief of Appellant at 22-27 (filed July 24, 2017).

Mr. Smith also argued, that his 1971 § 704(a) conviction was causing him a present harm that was more than incidental, as the historical record in his parole file revealed the Florida Parole Commission had indeed relied upon his § 704 conviction when determining his parole eligibility. Mr. Smith again, relied heavily upon this Court's decision in *Morgan* as well as the decision in *United States v. Peter*, 310 F.3d 709, 712 (11th Cir. 2002) (citing *Morgan*, 346 U.S. at 509 n. 15 (quoting *United States v. Mayer*, 235 U.S. 55, 69 (1914))), to support his arguments that the § 704(a) conviction was causing him a present harm. *See* Initial Brief of Appellant at 12-18 (filed July 24, 2017).

Under a clear error standard the Eleventh Circuit concluded that the lower courts findings that Mr. Smith likely has multiple prior criminal offenses that would support his salient-factor score and PPRD even if his § 704(a) conviction were vacated. And, that the district court had not clearly erred in concluding that Mr. Smith's § 704(a) conviction is not causing him a present harm, and as such, that he was not entitled to *coram nobis* relief. *See* App. A-1 pp. 6-10.

The court below did not reach the question of whether Mr. Smith's § 704(a) conviction is unconstitutional in light of this Court's decision in *United States v. Alvarez*, 567 U.S. 709, 730 (2012) (holding 18 U.S.C. § 704(b) unconstitutional because

it infringed upon speech protected by the First Amendment), because the court disposed of Mr. Smith's appeal based on the lower courts findings that Mr. Smith was not suffering from a present harm. *See* App. A-1 p. 2.

REASONS FOR GRANTING THE WRIT

I. This Court should grant review to determine whether this Court's decision in *United States v. Alvarez*, which involves 18 U.S.C. § 704(b), suggests that § 704(a) also requires a limiting construction before it can constitutionally be applied, and in doing so renders Mr. Smith's § 704(a) conviction invalid.

This Court's decision in *United States v. Alvarez* addressed the constitutionality of 18 U.S.C. § 704(b), a different from the subsection at issue in Mr. Smith's case, 18 U.S.C. § 704(a). However, the *Alvarez* decision points to the way in which non-textual limiting constructions, *mens rea* requirements, and the need for a showing of harm can alleviate the effects of an overbroad statutory text.

In *Alvarez*, this Court held that § 704(b) of the "Stolen Valor" Act was an unconstitutional content-based restriction on free speech that violates the First Amendment to the U.S. Constitution. In pertinent part, § 704(b) provided, "Whoever falsely represents himself or herself, verbally or in writing, to have been awarded and decoration or medal authorized by Congress for the Armed Forces of the United States . . . shall be fined under this title, imprisoned for not more than six months, or both." 18 U.S.C. § 704(b). A conviction for falsely claiming to have been awarded the Congressional Medal of Honor warranted enhanced penalties. 18 U.S.C. § 704(c)(1).

Xavier Alvarez was prosecuted under and convicted of violating the Stolen Valor Act after he falsely claimed that he was awarded the Congressional Medal of

Honor. He contended that the statute was an unconstitutional violation of his rights under the First Amendment.

In finding the law unconstitutional, this Court explained that the "mere potential for the exercise" of an unlimited power to criminalize false speech has a chilling effect on speech that the First Amendment cannot permit. 132 S. Ct. at 2548 (plurality op.). As Justice Breyer observed in his opinion concurring in the judgment, which Justice Kagan joined, "[T]he threat of criminal prosecution for making a false statement can inhibit the speaker from making true statements, thereby 'chilling' a kind of speech that lies at the First Amendment's heart." *Id*., at 2553 (Breyer, J., concurring in the judgment). In essence, the chilling effect results from an overly broad reading of the statutory prohibition of speech falsely claiming the receipt of a military decoration or medal.

This Court's plurality suggested that, constitutional or not, § 704(b) would need a limiting construction to alleviate overbreadth concerns because, otherwise, it "applies to a false statement made at any time, in any place, to any person." 132 S. Ct. at 2547 (plurality op.). Applying § 704(b) to a theatrical performance represents one example of unconstitutional overreach. *Id*. (citing *Milkovich v. Lorain Journal Co*., 497 U.S. 1, 20 (1990)). More generally, "[t]he statute seeks to control and suppress all false statements on this one subject in almost limitless times and settings … entirely without regard to whether the lie was made for material gain." *Id*.; *see also id.*, at 2547-48 ("Were the Court to hold that an interest in truthful discourse alone is sufficient to sustain a ban on speech, *absent any evidence that the*

speech was used *to gain a material advantage*, it would give the government a broad censorial power unprecedented in this Court's cases or in our constitutional tradition.") (emphasis added).

In his opinion concurring in the judgment, Justice Breyer, joined by Justice Kagan, also saw the need to limit the scope of § 704(b). He began by "read[ing] the statute favorably to the Government as criminalizing only false factual statements made with knowledge of their falsity and with the intent that they be taken as true." 132 S. Ct. at 2552-53 (Breyer, J., concurring in the judgment). That limiting construction was not enough. Even Justice Alito, in a dissent that was joined by the late Justice Scalia and Justice Thomas, saw that § 704(b) cannot be applied as written: "[T]he Act applies only to statements that could reasonably be interpreted as communicating actual facts; it does not reach dramatic performances, satire, parody, hyperbole, or the like." 132 S. Ct. at 2557 (Alito, J., dissenting).

Justice Breyer also pointed to the importance of "*mens rea* requirements that provide breathing room" for constitutionally protected activity. *Id*., at 2553; *see also id*., at 2557 (noting that the plurality, concurrence, and Government all "seemingly accept" that "a conviction under the Act requires proof beyond a reasonable doubt that the speaker actually knew that the representation was false." (Alito, J., dissenting)). However, *mens rea* requirements are not failsafe; "a speaker might still be worried about being prosecuted for a careless false statement, even if he does not have the intent required to render him liable. *Id*., at 2555 (Breyer, J., concurring in the judgment).

Justice Breyer noted that, "in virtually all" of the statutes that allow for the prohibition of false statements, "limitations of context, requirements of proof of injury, and the like, narrow the statute to a subset of lies where specific harm is more likely to occur." *Id.*, at 2555. "[L]imitations like those "help to make certain that its threat of liability or criminal punishment to roam at large, discouraging or forbidding the telling of the lie in contexts where the harm is unlikely or the need for the prohibition is small." *Id*.

In sum, *Alvarez* squarely rejects the notions that (1) the facial scope of § 704(b) covers only criminal conduct, and (2) "falsely" standing alone is a sufficient *mens rea* element of the crime. In the same way, the scope of § 704(a) must be narrowed so that it does not sweep in lawful conduct, and "knowingly" wearing an unauthorized medal is not sufficient to identify criminal conduct. Thus, Mr. Smith's offense of wearing a medal on his jacket was not criminal conduct, rendering his conviction invalid.

A. The Fourth and Ninth Circuit Courts of Appeals have concluded that § 704(a) requires similar limitations to be constitutional both facially and as applied.

Since this Court's decision in *Alvarez*, the Fourth and Ninth Circuit Courts of Appeals have applied its reasoning to claims that § 704(a) is unconstitutional. Both courts have concluded that, just as extra-statutory contextual limitations and *mens rea* requirements were needed to sustain § 704(b), they are needed to sustain the constitutionality of § 704(a).

In *United States v. Hamilton*, 699 F. 3d 356 (4th Cir. 2012), the Fourth Circuit rejected facial and as applied challenges to the constitutionality of § 704(a). Hamilton

was convicted of two counts of violating § 704(a) as well as making false statements in support of a claim for service-related disability and converting government property in the form of disability benefits.

The § 704(a) convictions arose from Hamilton's 2010 appearance at a Vietnam Veterans' Recognition Ceremony in the dress-blue uniform of "a United States Marine Colonel, including an officer's sword and belt, and white gloves." *Id.* at 365. The uniform was "adorned" military medals including two Navy Crosses, four Silver Stars, and seven Purple Hearts, none of which Hamilton had earned. *Id.* Accordingly, Hamilton's actions went far beyond those of Mr. Smith's.

The Fourth Circuit joined the Ninth Circuit's decision in *United States v. Perelman*, 695 F.3d 866 (9th Cir. 2012), *overruled by United States v. Swisher*, 811 F.3d 299 (9th Cir. 2016), decision in holding that "persons violate the insignia statutes if they wear a military uniform without authorization, or wear military medals or imitations of such medals, respectively, only when they do so with the intent to deceive." *Hamilton*, 699 F.3d at 368. The absence of such a limiting construction "could lead to absurd results" like those set out above. *Id.*

However, even though the court in *Hamilton* affirmed the conviction under § 704(a), the court felt the need to impose non-statutory limitations on § 704(a) to keep it from reaching non-criminal conduct. Furthermore, Congress struck the word "wears" from § 704(a) in 2013. Possibly in consideration of the decisions in *Perelman* and *Hamilton*, at the time, suggesting that Congress sought to avoid the absurd and unconstitutional application s of § 704(a), *e.g.*, prohibiting the grandchildren of

medal-winners to wear the medals, prohibiting military-themed costumes, etc.

Subsequently, in *United States v. Swisher*, 811 F.3d 299 (9th Cir. 2016), the En Banc Ninth Circuit rejected a facial challenge to the constitutionality of 18 U.S.C. § 704(a). While Swisher falsely claimed to have suffered from PTSD, as he alleged, as a result of his participation in a secret combat mission in North Korea. *Swisher*, 811 F.3d at 304. Swisher alleged he had been awarded the Purple Heart. *Id.* Because of his alleged receipt of the Purple Heart and other medals, and the falsified DD-214 form Swisher had provided to the Veterans Administration he was granted a total of $2,366 a month in benefits which he received for approximately a year before the fraud was discovered. *Id.* at 305. He was prosecuted for obtaining disability payments under false pretenses and for wearing the Purple Heart without proper authorization. At the conclusion of his trial the jury found Swisher guilty on all counts. *Id.* The Ninth Circuit affirmed his conviction and sentence on appeal. *Id.* at 306.

Swisher challenged his conviction through a motion under 28 U.S.C. § 2255 and claimed that his conviction for wearing the medals violated the First Amendment under the reasoning of the Ninth Circuit's intervening decision in *United States v. Alvarez*, 617 F.3d 1198 (9th Cir.2010). The district court denied the motion and an appeal followed. *See United States v. Swisher*, 790 F.Supp.2d 1215, 1245–46 (D. Idaho 2011); *United States v. Swisher*, 771 F.3d 514 (9th Cir. 2014).

While Swisher's appeal was pending, this Court affirmed the Ninth Circuit's decision in *Alvarez*, and held that § 704(b) unconstitutionally infringes upon speech protected by the First Amendment. *See Alvarez*, 567 U.S. 709 (2012). Nevertheless,

the Ninth Circuit subsequently distinguished *Alvarez*, and held that § 704(a) survived First Amendment scrutiny. *See United States v. Perelman,* 695 F.3d 866, 871–72 (9th Cir. 2012). Bound by *Perelman*, a three-judge panel rejected Swisher's constitutional challenge to § 704(a). *Swisher*, 771 F.3d at 524. In his petition for rehearing, Swisher argued that § 704(a) was unconstitutional under the reasoning set forth in *Alvarez* and asked the Ninth Circuit to overrule its contrary decision in *Perelman*.

The Ninth Circuit in applying the principles of this Court's decision in *Alvarez* to Swisher's facial challenge to § 704(a), first inquired whether this statute regulates speech. Finding it clearly did, *Swisher*, 811 F.3d at 314, the Ninth Circuit determined whether § 704(a) is a content-based or content-neutral restriction of symbolic speech. *Id.* The *Swisher* court concluded that § 704(a) is a content-based regulation of false symbolic speech, closely analogous to § 704(b). Indeed, both statutes bar lies about having received a military medal. Accordingly, the *Swisher* court reviewed the constitutionality of § 704(a) under the tests enunciated in the plurality and concurring opinions in *Alvarez*. *Id.*

The Ninth concluded that *Alvarez* clarified that lies do not fall into a category of speech that is excepted from First Amendment protection. *Swisher*, 811 F.3d at 317-18 (citing *Alvarez*, 567 U.S. at 720-22 (Kennedy, J., plurality opinion); *id.* at 732-33 (Breyer, J., concurring)). Given that clarification, the Ninth's analysis followed a familiar road. Content-based prohibitions of speech and symbolic speech are analyzed under the same framework, and so *Alvarez* dictates our conclusion that § 704(a) violates the First Amendment. Accordingly, as with Swisher's conduct, Hamilton's

actions went far beyond those of Mr. Smith.

The Ninth Circuit joined the Fourth Circuit's *Hamilton* decision in holding that "persons violate the insignia statutes if they wear a military uniform without authorization, or wear military medals or imitations of such medals, respectively, only when they do so with the intent to deceive." *Hamilton*, 699 F.3d at 368. The absence of such a limiting construction "could lead to absurd results" like those set out above. *Id*.

B. Mr. Smith's act of knowingly wearing an unauthorized Purple Heart medal is not, standing alone, within the constitutional sweep of § 704(a).

As the Ninth and Fourth Circuits held in *Hamilton* and *Swisher* respectively, "wearing" in § 704(a) cannot be applied directly as written. Read according to its terms, the 1970 version of § 704(a) and its prohibition of "wearing" unauthorized medals would sweep in grand-children, actors, protesters, and others, so a "facial" challenge must partake of an as-applied review before being considered "facially." Section 704(a) could not lawfully be applied to them.

Likewise, it cannot lawfully have been applied to Mr. Smith's conduct. As the record below reflects, his "crime" consisted of wearing the Purple Heart medal on a denim jacket that was "festooned with numerous patches, pins, and medals." The medal was thus part of a fashion statement or was there because Mr. Smith liked the way it looked. As the Fourth and Ninth Circuits concluded, wearing the medal like that was not a crime, and Mr. Smith could not lawfully plead guilty to it. Mr. Smith's conduct is plainly less culpable than the conduct of Hamilton and Swisher.

II. Whether the lower courts threshold determination of a present harm for a Writ of Error Coram Nobis, conflicted with this Court's threshold determination of harm in *Morgan*.

The petition for writ of error coram nobis is "an extraordinary remedy of last resort" available for the "review of errors 'of the most fundamental character.'" *United States v. Mills*, 221 F. 3d 1201, 1203 (11th Cir. 2000) (quoting *United States v. Mayer*, 235 U.S. 55, 69 (1914)). At common law, "[i]t 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." *United States v. Morgan*, 346 U.S. 502, 506 (1954)(internal quotation omitted).

"Fundamental" errors do not include those that can be addressed by a motion for new trial, such as claims of "prejudicial misconduct in the course of the trial, the misbehavior or partiality of jurors, and newly discovered evidence." *Mayer*, 235 U.S. at 69. Relief via coram nobis is available to a petitioner who is no longer subject to the consequences, including custody, of a conviction because "the results of the conviction may persist. Subsequent convictions may carry heavier penalties, civil rights may be affected." *United States v. Peter*, 310 F. 3d 709, 712 (11th Cir. 2002)(quoting *Morgan*, 346 U.S. at 512-13). In Mr. Smith's case, the 1970 conviction at issue has affected his eligibility for parole consideration, not once, twice, but three times based on the historical record in his parole commission file.

This court as well the Eleventh Circuit have held that coram nobis relief is available when conduct that forms the basis for a conviction is subsequently held not to be a crime. In *Peter*, the Eleventh Circuit reversed the dismissal of a coram nobis

petition submitted by Peter, who had pleaded guilty in 1996 to a charge of racketeering based on predicate acts of mail fraud. He was charged with making misrepresentations in license applications submitted to the Florida Division of Alcoholic Beverages and Tobacco in violation of 18 U.S.C. § 1341. In 2000, after Peter had served his sentence, the Supreme Court held that such licenses did not constitute property within the meaning of § 1341. *See Cleveland v. United States*, 531 U.S. 12 (2000). Thus, Peter pleaded guilty to conduct that was not a federal crime.

Peter observed, "One type of claim that has historically been recognized as fundamental, and for which collateral relief has accordingly been available, is that of 'jurisdictional' error." *Peter*, 310 F. 3d at 712. A federal district court lacks jurisdiction "to accept a guilty plea to a 'non-offense.'" *Id*. at 713 (citing *United States v. Meacham*, 626 F. 2d 503, 510 (5th Cir. 1980)); see also *Peter*, 310 F.3d at 714 ("[T]he indictment consisted only of specific conduct that, as a matter of law, was outside the sweep of the charging statute"). Accordingly, this Court reversed the district court's dismissal of Peter's coram nobis petition.

In *United States v. Brown*, 117 F. 3d 471 (11th Cir. 1997), the court held that relief pursuant to 28 U.S.C. § 2255 was appropriate for a petitioner who pleaded guilty in 1992 to, among other things, money laundering through currency structuring without an admission that he knew his conduct was illegal. The Eleventh Circuit construed Brown's coram nobis petition as a claim under § 2255 because Brown, who was serving the supervised release portion of his sentence, was still in custody. In 1994, this Court held that knowledge of illegality "is an essential element

of the crime of currency structuring" 117 F. 3d at 473 (citing *Ratzlaf v. United States*, 510 U.S. 135 (1994)). Because Brown "was misinformed about the critical elements of the offense with which he was charged," he stated a claim that his plea was involuntary, and he was entitled to relief, although the court made it clear that he could be re-prosecuted if the Government so chose. *Id*., at 479-80.

Thus, coram nobis relief is available to Mr. Smith. Assuming, *arguendo*, *Alvarez* and its effect on § 704(a) is correct, his guilty plea relates to conduct that is not a crime. As the Eleventh Circuit held in *Peter* and in *Brown*, and this Court's holding in *Morgan*, that is the kind of fundamental error for which coram nobis is suited. Mr. Smith could not have raised this issue before the Supreme Court decided *Alvarez* in 2012. *Cf. Schacht v. United States*, 398 U.S. 58, 61 (1970) ("Our previous cases would seem to make it clear that 18 U.S.C. § 702, making it an offense to wear our military uniforms without authority is, standing alone, a valid statute on its face."). He has long since completed his sentence for this offense, but the conviction has a continuing effect on his eligibility for parole consideration. Thus, Smith properly stated a claim for coram nobis relief.

B. Mr. Smith's 1971 conviction in violation of 18 U.S.C. § 704(a) is detrimentally affecting his chances of parole or otherwise causing him a present harm

Mr. Smith's state sentence was life imprisonment without the possibility of parole for 25 years. His term of incarceration began on October 19, 1978, and he has remained incarcerated for the last 38 years. The mandatory term of 25 years without parole eligibility was satisfied in 2002. Thus, in November 2002, Mr. Smith had his

first Commission review to determine his eligibility for a Presumptive Parole Release Date (PPRD).

The Commission, in calculating a PPRD, must consider three factors: (1) Salient Factors score;[2] (2) Severity of Offense Behavior [relating to the present state offense]; and (3) Aggravating or Mitigating factors. Each factor is assigned a number of months and those months are added to the original "time in custody" which then provides a PPRD. *See* Fla. Admin. Code R. 23-21.012 at (1)(c)1-4 (Inmate Initiated Review of Presumptive Release Date).

Based on the historical record, the Florida Parole Commission had weighed Mr. Smith's § 704(a) conviction against him at all three of his subsequent parole review hearings. At his evidentiary hearing, Mr. Smith presented his parole commission file, along with the Florida Administrative Codes that outlined the responsibility of the Florida Parole Commission when an inmate presents verifiable documentation that would support reconsideration by the Commission of an inmates parole eligibility. Had the lower court granted the writ of error coram nobis, the removal of the 1971 conviction would have triggered an accelerated review of Mr. Smith's parole eligibility. *See* Fla. Stat. § 947.1174(1)(b)-(c), (2)-(3); *see also* Fla. Admin. Code R. 23-21.015(9)-(10).

A recalculation of Mr. Smith's salient factor score, or an opportunity for an accelerated parole hearing three years sooner than his current 2020 hearing date

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[2] Salient Factors are the indices of an offender's present and prior criminal behavior and related factors found by experience to be predictive concerning parole outcome. *See* Fla. Admin. Code R. 23-21.002 at ¶ 44 (Definitions).

demonstrate collateral consequence from his federal conviction. Indeed, Florida court's require that "an inmate's PPRD should not be determined on an erroneous [NCIC or post sentence investigation] report." *See Rolle v. Florida Parole & Prob. Comm'n*, 426 So. 2d 1082, 1083 (Fla. Dist. Ct. App. 1983). The relief Mr. Smith seeks will provide the opportunity to have his salient factor score properly calculated. *See Moore v. Florida Parole & Prob. Comm'n*, 289 So. 2d 719, 720 (Fla. 1974) (holding "[w]hile there is no absolute right to parole, there is a right to a proper consideration for parole. And this should be free from the consequences of a conviction not meeting the standards. . . .").

Moore dealt with a contention that a parole denial was based upon prior convictions that were allegedly invalid due to Sixth Amendment violations. *Id.* The Florida Supreme Court in *Moore* issued a writ requiring the Commission to show cause as to why it should not be compelled to reconsider the eligibility of petitioner for parole without consideration of the aforementioned prior convictions. *Id. Moore* highlights that prior invalid convictions may materially affect eligibility for an earlier PPRD.

Similarly, Mr. Smith sought a fair opportunity to have the Commission consider his eligibility without his invalid federal conviction. The lower courts applied a threshold determination that runs afoul with this Court's collateral consequence (or harm) analysis. The question here is whether removal of Mr. Smith's § 704(a) conviction would affect the Commission's review of his parole eligibility when calculating his salient factor score. This Court's precedent in *Alvarez* and *Morgan*, as

well as the Florida Administrative Rules, and Statutes provide guidance in answering this question in the affirmative. The Florida Administrative Codes afford Mr. Smith the opportunity to petition for a rehearing upon a showing of a substantial change of circumstances. *See* Fla. Admin. Code R. 23-21.012(1)(c)(1) and (e) (Inmate Initiated Review of Presumptive Parole Release Date) Fla. Stat. § 947.174(1)(b)-(c) and (2) (Subsequent Interviews).

Several circuit courts have held that relief is appropriate no matter how seemingly insignificant a collateral consequence may be. *See Holloway v. United States*, 393 F.2d 731, 732 (9th Cir. 1968) (citing *Mathis v. United States*, 369F.2d 43 (4th Cir. 1996) ("A defendant may be harmed by an invalid conviction even after he has served his sentence . . . coram nobis [is] a remedy to prevent 'manifest injustice' *even where the removal of a prior will have little present effect on the petitioner*.")) (emphasis added). As explained in *Peter* "coram nobis relief is available after sentence has been served because the results of the conviction may persist. Subsequent convictions may carry heavier penalties, civil rights may be affected." *Peter*, 310 F.3d at 732 (quoting *Morgan*, 346 U.S. at 512-13). This case is an excellent vehicle for considering this important issue.

CONCLUSION

Alvarez highlighted the importance of contextual limitations, *mens rea* requirements, and a showing of harm. In the same way, the Fourth and Ninth Circuits held that an essential element of a § 704(a) violation is an intent to deceive.

Mr. Smith's conduct is not within the as-applied scope of § 704(a) because it lacks all of those elements of criminality.

Mr. Smith denied that he had any intent to deceive. He further denied having defrauded or deceived anyone and having derived any pecuniary benefit. The Government presented no evidence that anyone was harmed by Mr. Smith's conduct. He did not appear in uniform at any public event, nor did he have the intent to pose as a veteran. Instead, he simply wore "a civilian denim jacket festooned with numerous pins, patches, and medals," including an unauthorized Purple Heart medal. Absent the intent to deceive or any other aggravating element, his conduct was non-criminal, and he could not plead guilty to a non-crime. Thus, the lower court lacked jurisdiction to accept a guilty plea. Thus, the conviction itself carries collateral consequences that merit relief.

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX