IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-11561-GG

NASSER GHELICHKHANI,

Plaintiff - Appellant

versus

UNITED STATES OF AMERICA,

Defendant - Appellee

Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: WILSON, WILLIAM PRYOR, and HULL, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

ORD-42

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-11561
Non-Argument Calendar

D.C. Docket Nos. 9:17-cv-81045-DMM; 9:07-cr-80125-DMM-1

NASSER GHELICHKHANI,

Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(October 30, 2018)

Before WILSON, WILLIAM PRYOR, and HULL, Circuit Judges.

PER CURIAM:

Nasser Ghelichkhani, proceeding pro se, appeals the dismissal of his petition for a writ of *coram nobis* under 28 U.S.C. § 1651(a) as untimely. He argues that his petition was timely because severe stress prevented him from filing his petition within seven years of his release from federal custody. He also asserts that some of the facts stated in his petition were previously unknown to him and that he feared that his case would be remanded for further criminal proceedings. We affirm the district court's dismissal of Ghelichkhani's petition for a writ of *coram nobis*.

I.

We review a district court's denial of *coram nobis* relief for abuse of discretion. *United States v. Peter*, 310 F.3d 709, 711 (11th Cir. 2002).

The All Writs Act, 28 U.S.C. § 1651(a), provides a federal court with authority to issue a writ of error *coram nobis*, which allows a petitioner to vacate a conviction after he has served his entire sentence. *United States v. Mills*, 221 F.3d 1201, 1203 (11th Cir. 2000); *Peter*, 310 F.3d at 712. *Coram nobis* relief is available after the sentence has been served because "the results of the conviction may persist. Subsequent convictions may carry heavier penalties, civil rights may be affected." *United States v. Morgan*, 346 U.S. 502, 512–13 (1954). The *coram nobis* writ is an extraordinary remedy that is only available where (1) no other avenue of relief is or was available, and (2) the petitioner presents a fundamental

error that made his criminal proceedings irregular and invalid. *Id.*; *Alikhani v. United States*, 200 F.3d 732, 734 (11th Cir. 2000). In addition, the petitioner must present "sound reasons for failing to seek relief earlier." *Mills*, 221 F.3d at 1204.

The district court did not abuse its discretion in dismissing Ghelichkhani's petition for a writ of *coram nobis* as untimely. Ghelichkhani failed to provide any sound reasons as to why he waited over seven years after he was released from federal custody to file his petition. *Mills*, 221 F.3d at 1204; *Peter*, 310 F.3d at 711. Ghelichkhani's claim that he was unable to file his petition sooner because he was unable to think about his criminal proceedings without suffering severe stress is belied by his prior litigation history. Ghelichkhani is a prolific pro se filer. His litigation history reveals that he has filed multiple pro se collateral attacks on his conviction and sentences, including a premature motion to vacate under 28 U.S.C. § 2255, a petition for habeas corpus, and numerous motions requesting sentence reductions, immediate release, or the disqualification or recusal of the district court judge.

Ghelichkhani's claim that some of the facts relied upon in his petition were previously unknown to him earlier is similarly unconvincing. He fails to state what facts were unknown to him or why they were not previously discoverable. Without presenting sound reasons for failing to seek relief earlier, Ghelichkhani is not entitled to relief by writ of *coram nobis*. *See Morgan*, 346 U.S. at 512–13.

Moreover, Ghelichkhani fails to show that no other avenue for relief is or was available to him, or that there was a fundamental error that made his criminal proceedings irregular or invalid. *Alikhani*, 200 F.3d at 734. Accordingly, the district court did not abuse its discretion, and we affirm.

AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.:17-CV-81045-MIDDLEBROOKS/WHITE
07-CR-70125

NASSER GHELICHKHANI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

ORDER ADOPTING REPORT AND RECOMMENDATION

THIS CAUSE comes before the Court on Magistrate Judge Patrick A. White's Report and Recommendation ("Report"), which was issued on September 26, 2017. (DE 3). Petitioner did not file objections to the Report, but the Respondent filed a copy of a document it received, which appears to be Petitioner's Notice of Appeal to the Eleventh Circuit. (DE 4). In the Notice of Appeal, Petitioner addresses the Report, and I have considered Petitioner's arguments as Objections.

Petitioner filed a petition for writ of error *coram nobis* pursuant to 28 U.S.C. § 1651. (DE 1). The Report recommends that the petition should be dismissed and that no certificate of appealability should be issued. Upon a careful, *de novo* review of the Report, the Objections, and the record, the Court agrees with the Report's recommendations to dismiss Petitioner's petition for writ of error *coram nobis*, and that to the extent a certificate of appealability ruling is necessary, it should not be issued.

Accordingly, it is

ORDERED AND ADJUDGED:

(1) The Report (DE 3) is **RATIFIED, AFFIRMED, and ADOPTED**.

(2) Petitioner's Petition (DE 1) is **DISMISSED.**

(3) A Certificate of Appealability is **DENIED**.

(4) All pending motions are **DENIED as MOOT**.

(5) The Clerk of Court shall **CLOSE** this case.

DONE AND ORDERED in Chambers in West Palm Beach, Florida, this 30 day of October, 2017.

DONALD M. MIDDLEBROOKS
UNITED STATES DISTRICT JUDGE

Copies to: Counsel of Record;
Nasser Ghelichkhani, pro se
2107 N. Dixie Hwy
West Palm Beach, FL 33407

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 17-81045-Civ-MIDDLEBROOKS
(07-80125-Cr-MIDDLEBROOKS)
MAGISTRATE JUDGE P. A. WHITE

NASSER GHELICHKHANI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

REPORT OF MAGISTRATE JUDGE

I. Introduction

The petitioner, Nasser Ghelichkhani, a prolific *pro se* filer, who is no stranger to this court, has filed this latest "Petition for Writ of Error *Coram Nobis*," pursuant to 28 U.S.C. §1651 on September 18, 2017.[1] Review of the petition reveals that the petitioner is attacking the constitutionality of his conviction for false representation of United States Citizenship, entered following a guilty in **case no. 07-80125-Cr-Middlebrooks**, together with the constitutionality of the sentence entered following revocation of supervised release in 2009.

This cause has been referred to the undersigned for consideration and report pursuant to 28 U.S.C. §636(b)(1)(B),(C); S.D.Fla. Local Rule 1(f) governing Magistrate Judges; S.D. Fla. Admin. Order 2003-19. No order to show cause has been issued

[1]Petitioner is not a prisoner, nor is he currently "in custody," so taht the mailbox rule does not appeal.

because, on the face of the petition, it is evident the petitioner is entitled to no relief. See Rule 4,[2] Rules Governing Habeas Corpus Proceedings.

Because summary dismissal is warranted and the movant is not entitled to *coram nobis* relief, no order to show cause has been issued in the instant case and, therefore, the government was not required to file any additional response. See Broadwater v. United States, 292 F.3d 1302, 1303-04 (11th Cir. 2002) (a district court has the power under Rule 4 of the Rules Governing Section 2255 Cases to summarily dismiss a movant's claim for relief so long as there is a sufficient basis in the record for an appellate court to review the district court's decision).

Before the Court for review are the movant's petition for writ of *coram nobis*, along with all pertinent portions of the underlying criminal file.[3]

II. Claims

This court, recognizing that movant is *pro se*, afforded him liberal construction pursuant to Haines v. Kerner, 404 U.S. 419 (1972). The *coram nobis* petition (DE#1), no model of clarity, is a rambling narrative in which the movant complains about his arrest,

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[2]Rule 4 of the Rules Governing Section 2255 Petitions, provides, in pertinent part, that "[I]f it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court, the judge must dismiss the petition and direct the clerk to notify the petitioner...."

[3]The court may take judicial notice of its own records in habeas proceedings, McBride v. Sharpe, 25 F.3d 962, 969 (11th Cir. 1994), Allen v. Newsome, 7985 F.2d 934, 938 (11th Cir. 1986), together with the state records, which can be found on-line. See Fed.R.Evid. 201; see also, United States v. Glover, 179 F.3d 1300, 1302 n.5 (11th Cir. 1999)(finding the district court may take judicial notice of the records of inferior courts).

his conviction entered following a guilty plea, and the resulting sentence entered following revocation of probation proceedings. Petitioner appears to seek an Order vacating the judgment and dismissing the charge. Petitioner also appears to ramble on, complaining about information contained in his file with the Immigration and Customs Enforcement ("ICE") office, and seeks an order from this court directing ICE to correct its files so that there is no mention therein that the petitioner was previously convicted of an aggravated felony.

III. Procedural History

Movant was charged by Information and convicted of providing false representation of United States citizenship, in violation of 18 U.S.C. §911, entered following a guilty please in case no. 87-80125-Cr-Middlebrooks. (Cr-DE#s1,53,62,76,77). Following a change of plea proceeding, he was adjudicated guilty and sentenced to a total term of 5 years probation. (Cr-DE#62,77). The Judgment was entered on October 8, 2008. (Cr-DE#62). On April 30, 2009, following revocation of probation proceedings, the district court entered an order reinstating probation, but with additional restrictions. (Cr-DE#91). Less than two months later, petitioner was alleged to have violated the terms and conditions of probation. (Cr-DE#s103,104). Following revocation proceedings held on August 12, 2009, the district court entered an Order revoking petitioner's probation and remanding petitioner to the BOP for a term of six months imprisonment, which "shall be increased by official detention of 446 days," to be followed by a term of one year supervised release. (Cr-DE#114).

A petition was filed on October 16, 2009, seeking revocation of petitioner's supervised release on the basis that the petitioner

had failed to report to the probation officer within seventy-hours following his release from custody by the BOP on October 5, 2009. (Cr-DE#146). After revocation proceedings were concluded, an order was entered on December 3, 2009, revoking petitioner's supervised release and remanding petitioner to the BOP for a term of nine months imprisonment, with no supervision to follow upon release from imprisonment. (Cr-DE#161). Petitioner appealed, but on February 23, 2010, the Eleventh Circuit granted the government's motion to dismiss, finding in relevant part, as follows:

> Any sentencing issues in these appeals were mooted by the district court's December 3, 2009, order revoking Appellant's supervision and providing that he will be released without supervision when he completes his nine-month prison sentence. There is no suggestion that Appellant will suffer any collateral consequences from the district court's determination that Appellant violated his conditions of supervision, and such consequences are not presumed. See United States v. Duclos, 382 F.3d 62 (1st Cir. 2004); United States v. Kissinger, 309 F.3d 179 (3d Cir. 2002); cf. Spencer v. Kemna, 523 U.S. 1, 118 S.Ct. 978 (1998). Because Appellant can no longer obtain any effective relief from either of these appeals, the Government's motion to dismiss the appeal as moot is GRANTED....

(Cr-DE#171).

After further collateral motions were filed and denied, and following his release from imprisonment, the petitioner returned to this court, filing the instant writ of error *coram nobis* on or

about September 18, 2017.[4] (Cv-DE#1).

IV. Discussion

Petitioner has filed this petition, seeking *coram nobis* relief. Certain common-law writs may be used to "fill the interstices of the federal post-conviction remedial framework." United States v. Holt, 417 F.3d 1172, 1175 (11th Cir. 2005)(quotations omitted). The writ of *audita querela*, Latin for "the complaint having been heard," was an ancient writ used to attack the enforcement of a judgment after it was rendered. BLACK'S LAW DICTIONARY 126 (9th ed. 2009). The common law writ was typically employed by a judgment debtor in a civil case against the execution of a judgment because of some defense or discharge arising subsequent to the rendition of the judgment or the issue of

[4]It is worth mentioning that the petitioner filed a prior §2255 motion which was dismissed without prejudice because of the pendency of a direct appeal. Petitioner never sought to collaterally attack his conviction and resultant sentence by way of a §2255 motion thereafter. At this juncture, he is no longer in custody under the conviction and sentence under attack here, and as such, he cannot use §2255 to challenge the expired sentence and related conviction. See 28 U.S.C. § 2255(a). To come within §2255's scope, the movant must be in custody under the sentence being challenged, and relief under §2255 is unavailable for a sentence that has been completed. See Diveroli v. United States, 803 F.3d 1258, 1262 (11th Cir. 2015) (stating that movant must be in custody); United States v. Peter, 310 F.3d 709, 712 (11th Cir. 2002) ("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. Hay, 702 F.2d 572, 573 (5th Cir. 1983) ("Because Hay has completed his sentence, relief is unavailable under 28 U.S.C. §2255."); Counts v. United States, 441 F.2d 1377, 1378 (5th Cir. 1971) ("[T]his motion is not properly within the scope of Section 2255 since petitioner has completed serving the sentence he now seeks to have vacated."); Hollinger v. United States, 345 F.2d 179, 179 (5th Cir. 1965) ("A proceeding under 28 U.S.C.A. §2255 can be maintained only if the applicant is serving the sentence which is under attack."); Sun v. United States, 342 F. Supp. 2d 1120, 1125 (N.D. Ga. 2004) (holding that §2255 "relief is not available to individuals that have completely served their federal sentence"). The "custody" requirement is jurisdictional. Diaz v. Fla. Fourth Judicial Circuit ex rel. Duval Cty., 683 F.3d 1261, 1263 (11th Cir. 2012) (discussing custody requirement under 28 U.S.C. §2254); Serrato v. United States, No. 1:14-CV-1871-ODE-JSA, 2014 WL 6705459, at *2 (N.D. Ga. Nov. 26, 2014) (finding that jurisdiction was lacking because the movant was not in custody on the relevant conviction at the time he filed his § 2255 motion).

the execution. See id. See also Gonzalez v. Sec. for the Dep't of Corr's, 366 F.3d 1253, 1289 (11th Cir. 2004)(Tjoflat, J., dissenting). The writ of *audita querela* was abolished, however, in the civil context by the Federal Rules of Civil Procedure. See Fed.R.Civ.P. 60(b).

However, federal courts have authority to issue a writ of error *coram nobis* under the All Writs Act, Title 28, Section 1651(a). United States v. Mills, 221 F.3d 1201, 1203 (11th Cir. 2000). See also Bonadonna v. Unknown Defendant, 181 Fed.Appx. 819, 822 n.2 (11th Cir. 2006). The Supreme Court recognized long ago that a writ of *coram nobis* is available to correct errors "of the most fundamental character" that have occurred in a criminal proceeding. United States v. Morgan, 346 U.S. 502, 512, 74 S.Ct. 247, 98 L.Ed. 248 (1954). Such "extraordinary" relief is only available, however, "under circumstances compelling such action to achieve justice." Id. at 511, 74 S.Ct. 247.

In other words, a writ of error *coram nobis* may only issue where (1) "there is and was no other avenue for relief;" and, (2) "the error involves a matter of fact of the most fundamental character which has not been put in issue or passed upon and which renders the proceeding itself irregular and invalid." Alikhani v. United States, 200 F.3d 732, 734 (11th Cir. 2000); Mills, 221 F.3d at 1203; Jimenez v. Trominski, 91 F.3d 767, 768 (5th Cir. 1996). Consequently, the bar for *coram nobis* relief is high. Alikhani v. United States, 200 F.3d 732, 734 (11th Cir. 2000); see also, United States v. Louis, 463 Fed.Appx. 819, 820 (11th Cir. 2012).

As such, the remedy has traditionally been reserved "to bring before the court factual errors 'material to the validity and regularity of the legal proceeding itself,' such as the defendant's

being under age or having died before the verdict." Carlisle v. United States, 517 U.S. 416, 426, 116 S.Ct. 1460, 134 L.Ed.2d 613 (1996)(*quoting* United States v. Mayer, 235 U.S. 55, 69, 35 S.Ct. 16, 59 L.Ed. 129 (1914)). It is "difficult to conceive of a situation in a federal criminal case today where that remedy would be necessary or appropriate." Carlisle, 517 U.S. at 429 (*quoting* United States v. Smith, 331 U.S. 469, 476 n.4, 67 S.Ct. 1330, 91 L.Ed. 1610 (1947)). A lack of subject matter jurisdiction has been recognized as fundamental, for which *coram nobis* relief may be proper as a matter of law. See Alikanai, 200 F.3d at 734; United States v. Peter, 310 F.3d at 715. However, a writ of error *coram nobis* "is only appropriate when claims could not have been raised by direct appeal, or the grounds to attack the conviction become known after a completed sentence when §2255 relief is unavailable." Sun v. United States, 342 F.Supp.2d 1120, 1126 (N.D. Ga. 2004). Further, the Eleventh Circuit has also made clear that *coram nobis* relief is available only if the petitioner "presents sound reasons for failing to seek relief earlier." Jackson v. United States, 375 Fed.Appx. 958, 959 (11 Cir. 2010)(affirming denial of petition); see also United States v. Morgan, 346 U.S. 502, 512 (1954).

Petitioner has offered no reason why he has waited over 8 years since his initial judgment of conviction was entered and over 7 years since his judgment was amended on December 3, 2009, revoking his supervised release and imposing a term of 9 months imprisonment. The appeal of the 2009 judgment was dismissed by the appellate court on February 23, 2010, and it does not appear that certiorari review was pursued. Consequently, that proceeding became final at the latest on or about May 24, 2010, when the 90-day period for seeking certiorari review expired, following dismissal of the appeal by the Eleventh Circuit.

Petitioner has not alleged here any entitlement to review based on a newly recognized right made retroactively applicable by the United States Supreme Court to cases on collateral review. He also does not allege, let alone demonstrate, that there is any newly discovered facts, or any impediment created by the government which prevented an earlier filing. Without presenting sound reasons for failing to seek relief earlier, petitioner is not entitled to review of his claims here. See United States v. Morgan, 346 U.S. 502, 512 (1954).

When a petitioner cannot establish all the *coram nobis* requirements, then dismissal is appropriate without consideration of the merits. In other words, dismissal is warranted where the petitioner fails to meet even one of the *coram nobis* requirements, as listed above. Rodriguez-Lugo v. United States, 458 Fed.Appx. 688 (9th Cir. 2011)(affirming dismissal given delay in filing petition in 2009 to challenge his 1979 guilty plea, so that it was barred by latches); Foont v. United States, 93 F.3d 76, (2d Cir. 1996)(affirming dismissal of *coram nobis* petition without reaching the merits because district court did not abuse its discretion in finding petitioner failed to demonstrate sound reason for his 5-year delay in seeking the writ); see also, Sun, 342 F.Supp.2d at 1126.

Consequently, as applied here, this petition is subject to dismissal on the basis of timeliness alone. See generally Rojas v. United States, 2012 WL 3150052, *6-7 (S.D.Fla. July 16, 2012), *adopted and affirmed* Rojas v. United States, 2012 WL 3150079 (S.D.Fla. Aug. 1, 2012)(finding that *coram nobis* petition filed over one year after *Padilla* was decided was untimely, given that petitioner had offered "no sound reasons" why petition was not filed within one year of *Padilla*, and noting that it would be

inequitable to require habeas petitioners to file within one year, but allow *coram nobis* petitioners a longer period); see also Rodriguez v. United States, 2012 WL 6082477, *10 (S.D.N.Y. Dec. 4, 2012)(finding untimely a *coram nobis* petition filed more than two years after *Padilla* where petitioner provided no "justification for delay").

It is also pointed out that petitioner's status as an unskilled layperson does not excuse the delay.[5] See generally Johnson v. United States, 544 U.S. 295, 311, 125 S.Ct. 1571, 1582 (2005)(stating that "the Court has never accepted *pro se* representation alone or procedural ignorance as an excuse for prolonged inattention when a statute's clear policy calls for promptness."). See also Rivers v. United States, 416 F.3d at 1323 (holding that while movant's lack of education may have delayed his efforts to vacate his state conviction, his procedural ignorance is not an excuse for prolonged inattention when promptness is required); Carrasco v. United States, 2011 WL 1743318, *2-3 (W.D.Tex. 2011)(finding that movant's claim that he just learned of *Padilla* decision did not warrant equitable tolling, although movant was incarcerated and was proceeding without counsel, because ignorance of the law does not excuse failure to timely file §2255 motion).

Even assuming, without deciding, that this petition were deemed timely filed, the petitioner would not be entitled to the extraordinary relief he seeks, the vacation of his conviction. in order to obtain relief, petitioner must demonstrate "(1) 'there is

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[5]Pro se filings are subject to less stringent pleading requirements, and should be liberally construed with a measure of tolerance. Mederos v. United States, 218 F.3d 1252, 1254 (11th Cir. 2000). However, the policy of liberal construction for pro se litigants' pleadings does not extend to a "liberal construction" of the one-year limitations period.

and was no other available avenue of relief,' and (2) 'the error involves a matter of fact of the most fundamental character which has not been put in issue or passed upon and which renders the proceeding itself irregular and invalid.'" Jackson v. United States, 375 Fed.Appx. 958, 959 (11th Cir. 2010)(*quoting* Alikhani, 200 F.3d at 732, 734 (11th Cir. 2000)). No such showing has been made here.

Regardless, in analyzing the requirements for *coram nobis* relief, a reviewing court must presume that the underlying proceedings were correct. See Morgan, 346 U.S. at 512, 74 S.Ct. 247. Since the bar for *coram nobis* relief is high, even exceeding that of a habeas petitioner, successful *coram nobis* petitions are exceedingly rare. See United States v. Stoneman, 870 F.2d 102, 106 (3d Cir. 1989)(stating that the burden placed on a petitioner seeking a writ of *coram nobis* exceeds the corresponding burden placed on a habeas petitioner); Jimenez, 91 F.3d at 768 n.6.

In Peter, a rare case where *coram nobis* relief was granted, the Eleventh Circuit found that the facts supporting the guilty plea did not constitute an offense in light of a Supreme Court case decided after Petitioner's sentence had expired. Peter, 310 F.3d at 711. Because the district court lacked jurisdiction to accept a guilty plea to a "non-offense," the Eleventh Circuit held in Peter that "a writ of error *coram nobis* must issue to correct the judgment that the court never had power to enter." Id. at 716. Also, a writ of error *coram nobis* may be justified in light of a retroactive dispositive change in the law. See United States v. Mandel, 862 F.2d 1067 (4th Cir. 1988); see generally Brooks v. United States, 2 M.J. 1257 (Army Ct. M. Rev. 1976)(when the exceptional circumstance alleged is a subsequent court decision, that decision must necessarily have retroactive application or

extraordinary relief will be denied); United States v. Hay, 702 F.2d 572 (5th Cir. 1983).

However, if a claim relies on a case that was decided after the petitioner's conviction and sentence became final and the case is not retroactive, then the petitioner "has not suffered such compelling injustice that would deserve relief pursuant to a writ of error *coram nobis*." United States v. Swindall, 107 F.3d 831 (11th Cir. 1997). See also United States v. Williams, 158 Fed.Appx. 249 (11th Cir. 2005). Petitioner has made neither argument here. It is also unclear on what basis, if any, he maintains that his guilty plea is void. Petitioner has failed to demonstrate that any "error involve ... matters of fact of the most fundamental character which have not been put in issue or passed upon..." Alikhani, 200 F.3d at 734.

In other words, as the Eleventh Circuit has explained, "[s]ubject matter jurisdiction defines the court's authority to hear a given type of case," and that "Congress bestows that authority on lower courts by statute." Alikhani v. United States, 200 F.3d at 734. For federal offenses, Congress did so in 18 U.S.C. §3231, providing district courts with "original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States." 18 U.S.C. §3231. As such, for purposes of the court's subject-matter jurisdiction, all that is required is that "[t]he United States filed an indictment [information] charging Alikhani with violating 'laws of the United States.'" Alikhani v. United States, 200 F.3d at 734. Thus, the district court had jurisdiction to enter judgment for violation of the mail fraud statute in accordance with §3231. Id. at 734-35. Since it appears that the petitioner's arguments here, like the petitioner in Alikhani, were not jurisdictional and could not be raised for

the first time in a *coram nobis* petition, relief must be denied. Id.; see also, United States v. Sanchez, 269 F.3d 1250, 1273-75 (11 Cir. 2001)(*en banc*); United States v. Cromartie, 267 F.3d 1293, 1295-97 (11th Cir. 2001); McCoy v. United States, 266 F.3d 1245, 1248-49 (11th Cir. 2001).

Here, petitioner was charged and pleaded guilty to one count of providing false representation of United States citizenship. (Cr-DE#62). The Indictment that follows the statute is nevertheless insufficient if it fails to sufficiently apprise the defendant of the charged offense. United States v. Sharpe, 438 F.3d 1257, 1263 (11th Cir. 2006). Thus, if an indictment tracks the language of the criminal statute, it must include enough facts and circumstances to inform the defendant of the specific offense being charged. United States v. Bobo, 344 F.3d 1076, 1083 (11th Cir. 2003). This is necessary "not only to give the defendant notice as guaranteed by the [S]ixth [A]mendment, but also to inform the court of the facts alleged to enable it to determine whether the facts are sufficient in law to support a conviction." See Belt v. United States, 868 F.2d 1208, 1211 (11th Cir. 1989). The charging instrument, however, need not "allege in detail the factual proof that will be relied upon to support the charges." United States v. Crippen, 579 F.2d 340, 342 (5th Cir. 1978). Here, no error can be gleaned from review of the Indictment.

Further, to the extent movant suggests he is actually innocent, and thus the petition should be granted, this also warrants no relief. "To establish actual innocence, [a habeas petitioner] must demonstrate that ... 'it is more likely than not that no reasonable [trier of fact] would have convicted him.'" Schlup v. Delo, 513 U.S. 298, 327-328, 115 S.Ct. 851, 867-868, 130 L.Ed.2d 808 (1995)." Bousley v. United States, 523 U.S. 614, 623,

118 S.Ct. 1604, 140 L.Ed.2d 828 (1998). Schlup observes that "a substantial claim that constitutional error has caused the conviction of an innocent person is extremely rare.... To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence-whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence-that was not presented at trial. Because such evidence is obviously unavailable in the vast majority of cases, claims of actual innocence are rarely successful." Schlup, 513 U.S. at 324. "Actual innocence" requires the petitioner to show "factual innocence, not mere legal insufficiency." Bousley, 523 U.S. at 623.

Petitioner has not established that he was charged with a non-offense, nor has he demonstrated any new and reliable evidence of his actual innocence. His rambling arguments are more akin to a claim of legal innocence, not factual innocence.[6] Moreover, the Indictment was not fatally defective, and petitioner's attempt to challenge it, at this late stage, warrants no relief. As noted by the Supreme Court, *coram nobis* is inapplicable if the petitioner merely wishes to re-litigate criminal convictions. See United States v. Addonizio, 442 U.S. 178, 186-188, 99 S.Ct. 2235, 60 L.Ed.2d 805 (1979). This is also what the petitioner appears to be doing in this proceeding.

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[6]The standard of *Schlup* is not equivalent to the standard of Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), which governs claims of insufficient evidence. House v. Bell, 547 U.S. 518, 538, 126 S.Ct. 2064, 2078 (2006), *citing*, Schlup v. Delo, 513 U.S. 298 (1995). The Supreme Court stated in *House* that when confronted with a challenge based on trial evidence, courts presume the jury resolved evidentiary disputes reasonably so long as sufficient evidence supports the verdict. Id. Because a *Schlup* claim involves evidence the trial jury did not have before it, the inquiry requires the federal court to assess how reasonable jurors would react to the overall, newly supplemented record. Id.

To the extent the petitioner has filed this *coram nobis* petition requesting an Order from the court directing ICE to correct information within its files which formed the basis for denial of the petitioner's application(s), the petition is also subject to dismissal. *Coram nobis* is not the proper vehicle for seeking the relief sought. See 8 U.S.c. §1421(c).[7]

V. Certificate of Appealability

Although under *coram nobis*, no certificate appealability is required, to the extent that it is necessary in this case, it is further recommended that a certificate of appealability should not issue.[8]

VI. Conclusion

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[7]Title 8 U.S.C. § 1421(c), which provides that a person may seek *de novo* review by a district court of a denial of a naturalization application. An alien can become a United States citizen "only upon the terms and conditions specified by Congress" because "the power to make someone a citizen of the United States has not been conferred upon the federal courts ... as one of their generally applicable equitable powers." I.N.S. v. Pangilinan, 486 U.S. 875, 883-84, 108 S.Ct. 2210, 100 L.Ed.2d 882 (1988); see also 8 U.S.C. §1421(d) ("A person may only be naturalized as a citizen of the United States in the manner and under the conditions prescribed in this title and not otherwise.").

[8]A certificate of appealability is required in two circumstances: (A) when "the detention complained of arises out of process issued by a State court," or (B) when the appellant challenges "the final order in a proceeding under section 2255". 28 U.S.C. §2253(c)(1)(A), (B). Petitioner fits into neither category set forth in §2253(c)(1), and therefore does not require a COA to proceed on appeal in this matter. Even if he does require a COA, a COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. §2253(c)(2). The petitioner "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," Tennard v. Dretke, 542 U.S. 274, 282, 124 S.Ct. 2562, 159 L.Ed.2d 384 (2004)(citation and internal quotation marks omitted), or that "the issues presented are adequate to deserve encouragement to proceed further," Miller-El v. Cockrell, 537 U.S. 322, 327, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003). See also Eagle v. Linahan, 279 F.3d 926, 935 (11th Cir. 2001). Because the undersigned finds that there has been no substantial showing of the denial of a constitutional right, a certificate of appealability should be denied. See 28 U.S.C. §2253(c)(2).

Movant has not demonstrated entitlement to relief by writ of *coram nobis* or otherwise. It is therefore recommended that: this Petition for Writ of Error *Coram Nobis* be DISMISSED; final judgment be entered, no certificate of appealability issue, and, this case closed.

Objections to this report may be filed with the District Judge within fourteen days of receipt of a copy of the report.

Signed this 26th day of September, 2017.

UNITED STATES MAGISTRATE JUDGE

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