NO. _____

In the Supreme Court of the United States

RANDOLPH GEORGE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for an Extraordinary Writ of Mandamus to the United States Court of Appeals for the Ninth Circuit

PETITION FOR EXTRAORDINARY WRIT OF MANDAMUS

COREY EVAN PARKER, ESQ.
COUNSEL FOR PETITIONER
LAW OFFICE OF COREY EVAN PARKER
1230 ROSECRANS AVENUE, SUITE 300
MANHATTAN BEACH, CA 90266
(424) 456-3193
COREY@COREYEVANPARKERLAW.COM

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QUESTION PRESENTED

In light of the fact that the First, Fifth, Sixth, Seventh, Ninth, and Eleventh Circuits disagree on the question whether in a 28 U.S.C. § 2255 petition a petitioner can challenge a restitution order or order imposing costs of imprisonment based on a meritorious ineffective assistance of counsel [IAC] claim where such a challenge does not claim a right to be released from custody,

And in light of the fact that it has been long held (*Townsend v. Sain*, 372 U.S. 293 (1963)) that "Where newly discovered evidence is alleged in a habeas application, evidence which could not reasonably have been presented to the state trier of facts [because of IAC], the federal court must grant an evidentiary hearing,"

THE QUESTION PRESENTED HERE IS:

Whether in a case like this one, where the petitioner was procedurally forced into filing an error coram nobis proceeding and denied the opportunity to file a petition under 28 U.S.C. § 2255 to vacate his sentence, claiming that his counsel was ineffective at trial and at sentencing, and where his petition was denied on the grounds that Section 2255 relief was unavailable because he had finished his sentence on his conviction and was no longer in custody, is it error for the court to deny his petition for writ of error coram nobis, seeking to vacate his convictions?

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The opinion below is the December 3, 2018 unpublished Opinion by the United States Court of Appeals for the Ninth Circuit affirming the denial of Petitioner Randolph George's petition for writ of error coram nobis and motion for rehearing. *See* Appendix 1, *United States v. George*, 744 F.App'x 481 (9th Cir. 2018); 2018 U.S. App. LEXIS 33895; 2018 WL 6311687.

JURISDICTION

As stated in Sup. Ct. R. 20, this Court has jurisdiction to issue a Writ of Mandamus as authorized by the All Writs Act, 28 U.S.C. § 1651.

The basis for federal jurisdiction in the court of first instance (the United States District Court for the Northern District of California) was 28 U.S.C. § 1651(a).

RULE 20.3 STATEMENT

Petitioner seeks the issuance of an Extraordinary Writ of Mandamus to both the 9th Circuit and the District Court for the Northern District of California to allow a hearing and grant his petition under 28 U.S.C. § 2255 to vacate his sentence, whereby he claims that his counsel was ineffective at trial and

sentencing, reversing the denial of his petition, which denial was rendered on the grounds that Section 2255 relief was unavailable because he had finished his sentence on his conviction and was no longer in custody.

The Petitioner turns to this Court, as the only one that can provide the relief he seeks, as his coram nobis motions have been denied at both the District and Circuit courts. As noted by the District Court, "Coram nobis is an extraordinary writ, used only to review errors of the most fundamental character." *Matus-Leva v. United States*, 287 F.3d 758, 760 (9th Cir. 2002). (App.6a) Thus, Petitioner properly brings to this court this petition for an extraordinary writ of mandamus as his final resort.

STATUTORY PROVISIONS INVOLVED

- **28 U.S.C. § 1651–Writs**

  (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.

- **28 U.S.C. § 2255**

  A prisoner in custody under sentence of a court established by Act of Congress claiming the right

> to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

STATEMENT OF THE CASE

A. Facts Material to Consideration of the Questions Presented

During the years 1991, 1992, and 1993, Petitioner Randolph George ("George") was affiliated with Media Venture Partnership, which brokered the sale of radio stations and, through its affiliate Media Venture Management, Inc., handled court-appointed receiverships for financially troubled radio stations being sold off to satisfy debts owed to the stations' creditors. George was appointed to serve as the receiver. George's receiver fees, which were negotiated with the interested parties and approved by the court at the start of the receivership, were paid on an interim basis during the administration of the receivership, usually monthly.

George served as the court-appointed receiver for five different stations during the relevant period: Reno Broadcasting from October of 1990 to January of 1992, Royal Broadcasting from May of 1991 until

1994, KXGO Radio Station from March of 1991 to December of 1992, Diamond Broadcasting from May 1993 to May of 1994, and JJN Broadcasting in 1994. In addition to brokerage commissions and income from other sources, George was paid $90,001.42 in receiver fees in 1991, $125,432.66 in 1992, and $154,595 in 1993.

George retained numerous attorneys and accountants to assist him with the receiverships to assure compliance with court orders and reporting duties. The primary accounting firm was Antonini Professional Corporation ("APC"). In addition to managing the receivership accountings and the filing of tax returns for the receivership corporations, APC managed George's personal accounts and provided him with personal tax advice.

When George refinanced the mortgage on his residence in March of 1994, he submitted copies of apparent tax returns for 1991 and 1992, listing the receiver fees as personal income for those years. George also submitted a Statement of Income and Expenses for 1993, listing receiver fees as his personal income. These returns were later alleged to be fraudulent documents allegedly fabricated by George for purposes of obtaining the refinancing of his mortgage.

On January 13, 1995, the Internal Revenue Service (IRS) sent George a written inquiry regar-ding his 1991 and 1992 returns, asserting they had not been filed. George responded that the returns indeed had been filed in December of 1994. This was later asserted to be a false response. George also responded to a subsequent IRS inquiry, asserting that the APC accounting firm was to have completed the returns,

but that it went out of business and another firm was working on the returns. This, too, was later asserted to be a false response but post-trial was shown by George to be true both by decla-rations from his former accountants and by factual correspondence.

George allegedly later prepared the 1991 and 1992 returns himself, with the support of his accoun-tants, filing them on October 16, 1995. In any event, neither George's returns nor his spouse's for 1991 and 1992 reported the receiver fees received during those years. George asserted that a question had arisen about how the receiver fees should be reported for 1991 and 1992. He contended that APC believed, and advised, that pursuant to the receiver-ship orders and pursuant to California law, the receivership payments were not taxable income to George nor tax deductible expenses for the corpora-tions until the fees were no longer contingent. He contended that APC had determined that the receiv-er fees were contingent for all the receiverships until 1993, when all interested parties approved George's fees. Accordingly, he contended, no receiver fee payments were reported either on the corporate tax returns, which were prepared and filed by his ac-countants, or on George's personal tax returns for 1991 and 1992, on which, George contended, his accountants advised him to report the receivership fees, in the same manner they had been reported on the corporate tax returns.

No return was filed by George or his wife for tax year 1993. George contended that the delay in prepar-ing the 1993 return was due both to the com-plexity of his 1993 tax return and to personal problems (which included being forced out of his home by a fire

and a daughter's suffering severe medical problems) that the 1993 tax return had not yet been filed by the time the IRS audit had commenced. The IRS auditor said the 1993 tax re-turn could be filed with him and that he would give George thirty days to do so. George contended that his attorney, John Youngquist, advised him not to file the 1993 tax return while there was still an outstanding dispute with the IRS.

The auditor almost immediately thereafter referred his findings for prosecution. The George's 1994 joint tax return reported $23,000 in receiver fees, the amount of receiver fees the receivership courts had approved for that year and which had not been contested by any interested parties. The prosecution contended that the 1991, 1992, and 1994 returns, filed after George was paid the receiver fees and approximately one year after the last receiver-ship was approved by the court, supposedly failed to report the more than $300,000 in receiver fees George earned during the 1991, 1992, and 1993 tax years. However, the notion there was a supposed failure connoted there was a duty to have reported the fees in 1991, 1992, and 1994. The duty to report in 1994 was discharged; it was the duty to report in 1991 and 1992 that was contested.

The government maintained that when an IRS revenue agent initially interviewed George regarding his 1991 and 1992 returns on July 16, 1996, George did not disclose his employment as a receiver and did not disclose either the $90,001.42 of receiver fees from 1991 or the $125,432.66 of receiver fees from 1992. The government further argued that during a second interview on February 28, 1997, George admitted he had earned the receiver fees, but only after he was

confronted with the allegedly fraudulent tax returns submitted to the lender in 1994 in support of his mortgage application. However, this is only what the government maintained and argued.

What George evidenced was that the IRS agent never asked him anything about how much he had earned or from what. The agent's notes of conversations back that up. But at trial, of course, the government would say what it wants the jury to believe, never mind that the IRS auditor had made numerous mistakes and misrepresentations in his notes that were easily proven to be mistakes and misrepresentations.

On August 30, 2001, George was indicted on three tax violations. He was charged in Counts One and Two with filing false tax returns for the tax years 1991 and 1992, respectively, in alleged violation of 26 U.S.C. § 7206(1). He was charged in Count Three with failing to file a tax return for the tax year 1993, in alleged violation of 26 U.S.C. § 7203.

On November 13, 2002, after a one week-jury trial, George was convicted of all charges. On May 19, 2004, George was sentenced to 15 months' imprisonment, a one-year term of supervised release, a $20,000 fine, a special assessment of $125, and restitution in the amount of $70,000. George appealed his conviction and his sentence. *See United States v. George*, 420 F.3d 991 (9th Cir. 2005).

The Ninth Circuit Court of Appeals affirmed George's conviction but ordered a limited remand with respect to his sentence under *United States v. Ameline*, 409 F.3d 1073 (9th Cir. 2005) (en banc). On remand, the district court imposed the same sentence, and the Ninth

Circuit later affirmed in a second appeal. *See United States v. George*, 226 F.App'x 771 (9th Cir. 2007).

On April 25, 2008, George filed a petition under 28 U.S.C. § 2255 to vacate his sentence, claiming that his counsel was ineffective at trial and sentencing. After extensive briefing, but without an evidentiary hearing, the district court found that George had not been prejudiced and denied his motion. On April 7, 2009, the district court granted a certificate of appealability on the issue of whether George received ineffective assistance of counsel at sentencing, but denied a certificate of appealability on the question whether George received ineffective assistance of counsel at trial. *See United States v. George*, 411 F.App'x 31, 33 (9th Cir. 2010). George appealed both the certified and uncertified issues. *George*, 411 F.App'x at 33. Again, the Ninth Circuit affirmed the denial of relief. *Id.* at 33-34.

On January 1, 2016, George filed an application in the Ninth Circuit Court of Appeals requesting leave to file in the district court another petition under 28 U.S.C. § 2255. This application was denied by the Ninth Circuit on April 27, 2016, on the grounds that Section 2255 relief was unavailable because George had finished his sentence on the 2002 conviction, and was no longer in custody.[1] It is the Ninth Circuit's Section 2255 jurisprudence underlying this ruling that George takes issue with in this present petition to the Supreme Court of the United States.

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[1] George had entered custody on May 5, 2008, and had been released and had begun his one-year term of supervised release, on June 10, 2009.

After the April 27, 2016 denial of his section 2255 petition, George filed his petition for writ of error coram nobis, seeking to vacate his 2002 convictions. The district denied the petition and the Ninth Circuit affirmed on appeal.

ARGUMENT

I. WHERE PETITIONER GEORGE FILED HIS PETITION UNDER 28 U.S.C. § 2255 TO VACATE HIS SENTENCE, CLAIMING THAT HIS COUNSEL WAS INEFFECTIVE BOTH AT TRIAL AND AT SENTENCING, AND WHERE HIS PETITION WAS DENIED ON THE GROUNDS THAT SECTION 2255 RELIEF WAS UNAVAILABLE BECAUSE HE HAD FINISHED HIS SENTENCE ON HIS CONVICTION AND WAS NO LONGER IN CUSTODY, IT IS A VIOLATION OF HIS DUE PROCESS RIGHT TO BE HEARD WHEN THE COURT DENIES HIS PETITION FOR WRIT OF ERROR CORAM NOBIS, SEEKING TO VACATE HIS CONVICTIONS

The First, Fifth, Sixth, Seventh, Ninth, and Eleventh Circuits disagree on the question whether in a 28 U.S.C. § 2255 petition a petitioner can challenge a restitution order or order imposing costs of imprisonment based on a meritorious ineffective assistance of counsel claim where such a challenge does not claim a right to be released from custody. 28 U.S.C. § 2255 provides:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground

> that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. § 2255 (emphasis added).

By its clear terms, § 2255 is applicable only to prisoners in custody claiming the right to be released. This reading of the statute is shared by the First, Fifth, Sixth, Seventh, Ninth and Eleventh Circuits. Each has held that § 2255's language clearly and unambiguously limits its applicability to defendants seeking release from custody. It is not available to those, like Mr. George here, who challenge only fines or restitution orders. *See Smullen v. United States*, 94 F.3d 20, 25-26 (1st Cir. 1996) (holding that petitioner cannot challenge restitution order in § 2255 proceeding, stating "we are not aware of any court of appeals that, having addressed this issue, has reached a contrary result"); *United States v. Segler*, 37 F.3d 1131, 1136 (5th Cir. 1994) ("The plain language of § 2255 provides only prisoners who claim a right to be released from custody an avenue to challenge their sentences . . . ."); *United States v. Watroba*, 56 F.3d 28, 29 (6th Cir. 1995) ("Watroba is precluded from challenging the imposition of the cost of his imprisonment and supervised release in a § 2255 petition"); *Barnickel v. United States*, 113 F.3d 704, 706 (7th Cir. 1997) (holding that "§ 2255 is not available

to challenge an order of restitution imposed as part of a criminal sentence"); *United States v. Kramer* (9th Cir. 1999) 195 F.3d 1129 ("by its plain terms, § 2255 is available only to defendants who are in custody and claiming the right to be released" and "[i]t cannot be used solely to challenge a restitution order"); *Blaik v. United States*, 161 F.3d 1341, 1343 (11th Cir. 1998) ("We hold that § 2255 cannot be utilized by a federal prisoner who challenges only the restitution portion of his sentence because § 2255 affords relief only to those prisoners who claim[ ] 'the right to be released' from custody").

In *Kramer, supra*, 195 F.3d 1129, the Ninth Circuit held that a defendant seeking relief under 28 U.S.C. § 2255 not only must be in custody, he also must claim the right to be released from custody. In that case, the defendant's § 2255 motion sought only vacatur of a restitution order, not his release from custody. Consequently, the Ninth Circuit agreed with and affirmed the district court in ruling that § 2255 relief was not available to such a defendant, and affirmed the district court's denial of the § 2255 motion. (*Kramer, supra*, 195 F.3d at 1129-1130.)

When petitioner George here brought a § 2255 motion, the termination of his sentence, including the period of supervised release, was held to have mooted his sentencing challenge on appeal. (*See United States v. George* (9th Cir. 2010) 411 F.App'x 31, 33, *citing Lane v. Williams*, 455 U.S. 624, 631-34, 102 S.Ct. 1322, 71 L.Ed.2d 508 (1982); *cf. United States v. Verdin*, 243 F.3d 1174, 1177-79 (9th Cir. 2001).) Although his sentence also had included restitution and a special assessment, the court held against George,

relying on *Kramer*, ruling that his § 2255 motion could not be used to challenge the restitution and special assessment aspects of his sentence. *See George, supra*, 411 F.App'x 31, 33, fn. 1, *citing United States v. Thiele*, 314 F.3d 399 (9th Cir. 2002); *United States v. Kramer*, 195 F.3d 1129 (9th Cir. 1999).

By way of contrast, in *Weinberger v. United States*, 268 F.3d 346 (6th Cir. 2001), the Sixth Cir-cuit, the court was confronted with the government's reliance upon *Kramer, supra*, 195 F.3d 1129, for the proposition that a petitioner cannot challenge a restitution order in a § 2255 petition because such a challenge does not claim a right to be released from custody. The Sixth Circuit had already previously come to a conclusion different from *Kramer*. In *Watroba, supra*, 56 F.3d 28, 29, the Sixth Circuit had rejected a prisoner's challenge in a § 2255 motion to the imposition of the costs of his imprisonment and supervised release—not a restitution order—on the grounds that such a challenge did not meet the "in custody" requirement of § 2255. Other circuits had relied upon *Watroba* in concluding that petitioners cannot challenge a restitution order in a § 2255 motion, because such an order is not a sufficient restraint on liberty to meet the "in custody" requirement. *See Kramer*, 195 F.3d at 1130; *Blaik, supra*, 161 F.3d 1341, 1343 (11th Cir. 1998); *Smullen, supra*, 94 F.3d 20, 25-26 (1st Cir. 1996). In *Weinberger, supra*, the Sixth Circuit followed its own precedent in *Ratliff v. United States*, 999 F.2d 1023 at 1025-27, which *Watroba* did not purport to overrule, allowing a petitioner to contest a restitution order under § 2255 based on a meritorious ineffective assistance of counsel claim. (*See Weinberger, supra*, 268 F.3d 346, 351, fn. 1; *see Ratliff, supra*, 999

F.2d at 1026 (6th Cir. 1993) ("A refusal to appeal an erroneous restitution award, which award would have been subject to reversal on appeal, would meet the *Strickland* test and would clearly constitute cause for [the] failure to appeal the award.")

George asks this court to adopt in this case and to apply the Sixth Circuit's rule in *Weinberger* and *Ratliff* and make uniform in all circuits (including the Ninth Circuit) the Sixth Circuit's *Weinberger* rule. In *Weinberger, supra*, 268 F.3d 346, the Sixth Circuit quoted 28 U.S.C. § 2255 ("A prisoner in custody under sentence of a [federal] court . . . claiming the right to be released . . . may move the court which imposed the sentence to vacate, set aside, or correct the sentence") and stated that a motion brought under § 2255 must allege one of three bases as a threshold standard: (1) an error of constitutional magnitude; (2) a sentence imposed outside the statutory limits; or (3) an error of fact or law that was so fundamental as to render the entire proceeding invalid. *See Weinberger, supra*, 268 F.3d at 351, *citing United States v. Addonizio*, 442 U.S. 178, 185-86, 60 L.Ed.2d 805, 99 S.Ct. 2235 (1979). George here contends that a fundamental error of fact stands at the root of the denial of his § 2255 motion.

That fundamental error of fact was revealed by the existence of newly discovered evidence that George presented in his May 16, 2016, petition for writ of error coram nobis, brought before the district court praying that the court would find that his attorneys Topel & Goodman denied him effective assistance of counsel and that he was thereby prejudiced. He brought the petition on the grounds that his attorneys had

rendered ineffective assistance of counsel by having failed to disclose newly discovered evidence that unequivocally showed that his tax returns for 1991, 1992, 1993 and 1994 were all prepared in strict accordance with the advice of a qualified tax advisor.

Mr. Oliver, the tax attorney and Certified Public Accountant who gave the advice that George relied on testified that, "Had Mr. George treated or reported receivership fees paid to him in any other way than he treated them on his 1991, 1992, 1993 and 1994 tax returns, he would have been acting contrary to my advice Mr. George acted in full accordance with my advice." Mr. Oliver's testimony had never previously been heard by the jury, by the district court, or by the Ninth Circuit Court of Appeals, and this was solely because of the ineffective assistance of counsel—counsel that had performed zero investigations and zero interviews of potential witnesses before trial. No counsel representing George ever asked any lay witness or expert witness to opine on the question whether George's tax returns conformed to advice given to him. This left a vacuum for the government to present its own "facts" as "proof" of nonconformity to advice.

The George panel relied on the government's "proofs" in formulating its opinion, which "proofs" were actually false, a fact the government did not deny in its brief before the Ninth Circuit. The government did not dispute that it lied about what years various receiverships closed and how those years related to George's good faith defense. The government first told the jury, then reaffirmed in a hearing before the district court, that all the receiverships were closed in 1994. Later, on appeal, in opposition to George's § 2255

petition, the government represented to the Ninth Circuit Court of Appeals that it had presented "overwhelming evidence at trial . . . that two of the receiverships (Reno and Diamond) were closed in 1992."

The government did not dispute this; in fact, the government affirmed that the George panel had relied on those falsehoods as premises for its conclusions. Specifically, the Ninth Circuit found, and the George panel reaffirmed, that "[t]he government's evidence showed that two of the receiverships (Reno and Diamond) were closed in 1992, yet George did not report the receiver fees from these receiverships on his 1992 returns. This is fundamentally inconsistent with George's good faith defense that he was waiting until the receiverships were closed to report the income." *United States v George*, 420 F.3d 991 (9th Cir. 2005).

George relied largely on (1) the Ninth Circuit Court holding in *United States v. Bishop*, 91 F.3d 1100, 1106-07 (9th Cir. 2002) that a defendant "may rebut the Government's proof of willfulness by establishing good faith reliance on a qualified accountant after full disclosure of tax-related information," and (2) the Ninth Circuit Court decision in *United States v. George*, 411 Fed Appx. 31, 33 (9th Cir. 2010) holding that "[i]n order for this defense to succeed, and for prejudice to be established under *Strickland v. Washington*, 466 U.S. 668 (1984), there must be some evidence of George's reliance on any such advice."

On June 24, 2016, the government filed a motion to deny the petition for writ of error coram nobis. The government argued that if George "genuinely relied on someone's advice, there could be nothing preventing him from raising that subjective mental state as a

defense early and often." The government further asserted that the new evidence consisting of Mr. Oliver's testimony could have been, and should have been, obtained much earlier, the government maintaining that because it was not obtained earlier the government was prejudiced and latches applied. The government also argued that in contrast to George's good faith defense, "The government's evidence showed that two of the receiverships (Reno and Diamond) were closed in 1992, yet George did not report the receiver fees from these receiverships on his 1992 returns."

While Mr. George opposed the government's motion. He did agree that Mr. Oliver's testimony could have and should have been obtained much earlier, but he asserted that the failure to obtain Mr. Oliver's testimony earlier was solely because of the ineffective assistance of counsel who failed to perform any investigations of any kind prior to trial, thereby prejudicing George.

George provided evidence of the falsity of the government's so-called "proof" that the Reno and Diamond receiverships were closed in 1992. George produced documents filed in Nevada and California state courts that showed the Reno receivership was judicially closed in 1993, not 1992, and that the Diamond receivership commenced in 1992 and was closed in 1994. George argued that the facts raised in the petition for writ of error had not been used before solely because of the ineffective assistance of counsel who failed to perform any investigations whatsoever. He argued that the Ninth Circuit Court of Appeals held in *United States v. Kwan*, 407 F.3d 1005, 1013 (9th Cir. 2005) that latches applies only if the reason

for delay is unreasonable, and George argued that here the delay was not unreasonable. He argued that the government had made no showing how it would be prejudiced if it had to prosecute anew. George requested an evidentiary hearing too more fully present the evidence. But the request was denied.

On November 9, 2016, the district court found that George failed to show any evidence that he had relied on Mr. Oliver's advice, therefore his trial counsel was not ineffective. The district court held that "[t]he only new evidence offered to support George's theory is a declaration [about] a 'tax return' that 'George prepared for 1993.'" The district court further found that Mr. Oliver's testimony did not support a finding that George had relied on Mr. Oliver's statements because Mr. Oliver "does not claim to have any knowledge that George actually filed with the IRS the return George purportedly 'prepared,' which document is undated and unsigned." For its authority, the district court relied on this Court's decision in *United States v. George*, 411 Fed Appx. 31, 33 (9th Cir. 2010):

> In order for this defense [reliance on advice from an accountant] to succeed, and for prejudice to be established under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), there must be some evidence of George's reliance on any such advice. There is none.

However, (1) contrary to the district court's holding, the 1993 tax return indeed was dated; (2) the only reason the 1993 tax return was not filed with the IRS was because Attorney John Youngquist had advised Mr. George not to file it until the controversy over the

1991 and 1992 tax years was resolved; (3) according to Mr. Oliver's testimony, the tax returns for 1991 and 1992 were indeed prepared and filed in full compliance with his advice, fully satisfying the Ninth Circuit's evidentiary standard for good-faith reliance on the advice of a qualified accountant (as recognized by the Ninth Circuit in *United States v. Bishop*, 291 F.3d 1100, 1106 (9th Cir. 2002) and *United States v. Claiborne*, 765 F.2d 784, 798 (9th Cir. 1985), *abrogated on other grounds*, 487 U.S. 81 (1988)); and (4) the district court was criminalizing the act of relying on the advice of counsel in opposition to Ninth Circuit Court's decision in *United States v. Bishop* 291 F. 3d 1100 (9th Cir. 2002) and the United States Supreme Court's decision in *Cheek v. United States*, 498 U.S. 192 (1991).

A supplemental declaration from Mr. Oliver detailed the exhaustive steps he had taken to verify and authenticate that the 1993 tax return had been prepared on the timeline Mr. Youngquist and Mr. George had testified to. Mr. Oliver reaffirmed his professional opinion that all tax returns for 1991, 1992, 1993 and 1994 had been prepared in strict compliance with his advice.

In his May 16, 2016, petition for writ of error coram nobis and in the subsequent appeal to the Ninth Circuit, George presented publicly available docket reports and documents filed in state receivership courts to prove, beyond all doubt, that the government had lied to the jury, had lied to the district court, and had lied to the Ninth Circuit Court of Appeals. Those lies were relied on by the Ninth Circuit Court of Appeal as premises for its conclusions in its *George* decision.

George argued that a false premise cannot result in a true conclusion. He argued that the year 1992 was a critical year. It was one of two years that Mr. Oliver advised were years when receiver fees were contingent and advised that such fees should not be reported for tax purposes until 1993 when the contingencies were removed. That is precisely how Mr. Oliver himself treated receiver fees on the corporate receivership tax returns, and advised George to do likewise. But George's trial counsel was totally unprepared to back that up. In the government's own words, "The defense . . . deduced absolutely zero evidence from anyone except [Mr. George] to support his argument that he had advice of a CPA or accountant . . . which is usually the crucial evidence in such a defense."

Having made colorable claims and after having shown stark differences between the government's claims and George's evidence, the district court refused to hold the evidentiary hearing this Court has long held is mandatory in a Section 2255 proceeding, the district court having evaded that requirement by forcing Mr. George to file, pro se, a coram nobis proceeding in which there is no requirement for an evidentiary hearing.

It is inconceivable that the prosecution, which spent years preparing for trial, did not possess the publicly available docket reports of the receivership courts proceedings and knew that Diamond commenced in 1992 and finalized in 1994, and that Reno closed in 1993. But it is even more astonishing that George's own counsel had not obtained at least those docket reports to refute the government's lies. That failure was yet another example of ineffective assistance of

counsel in failing to perform any investigation whatsoever in preparation for trial.

During a hearing on George's motion for new trial, the district court chastised trial counsel for failing to use sufficient diligence in subpoenaing documents prior to trial:

> [O]n the question of diligence, there is no question that the defense pulled out all the stops at one point in trying to obtain the evidence which they ultimately obtained. The question the Court has is why they did so at the point that they did as opposed to earlier, . . . and why they didn't . . . subpoena those earlier and/or subpoena records from, if possible, the attorneys from the receivership . . . I am going to find in the first instance that [they] did not use sufficient diligence to obtain the documents. . . .

The district court later said in an *Ameline* remand that it would be willing to reassess the case under a beyond-a-reasonable-doubt standard if it could later be shown that George was not lying on the stand about being advised by qualified accountants. The Ninth Circuit decision found that "the record shows that George was advised," but because it was a coram nobis proceeding, that court ordered that there were to be no further filings accepted in the matter. In other words, because it was a coram nobis proceeding, not a section 2255 matter, George was procedurally locked out of seeking justice, even in light of the Ninth Circuit's findings and its own contradictions.

But the district court nonetheless denied the motion for new trial "for all the reasons set forth by

[the government]." Those reasons, of course, happened to be the falsehoods the government presented and later, before the Court of Appeals did not dispute.

The district court held that the government had established that all receiverships had been judicially closed in 1994 and, in fact, contrary to his alleged good faith belief, that George had not reported the income in 1994, upon which the government argued to the jury that he was lying.

II. PETITIONER GEORGE'S PETITION SHOULD BE GRANTED BECAUSE UNDER 28 U.S.C. § 2255 HE SHOWS THAT AN ERROR OF FACT WAS SO FUNDAMENTAL AS TO RENDER THE ENTIRE PROCEEDING INVALID

Sentencing challenges generally cannot be made for the first time in a post-conviction § 2255 motion. *See Grant v. United States*, 72 F.3d 503, 505-06 (6th Cir. 1996). Normally, sentencing challenges must be made on direct appeal or they are waived. *See United States v. Schlesinger*, 49 F.3d 483, 485 (9th Cir. 1994). But George here argues the rule should be that such challenges are appropriate, especially inasmuch as the continuing onus represented by the sentence is the functional equivalent of custody.

Weinberger argued in his case that the four sentencing rulings forming the basis for his motion were not challenged either at the time of his sentencing or on direct appeal as a result of the ineffective assistance of his trial counsel. The Supreme Court and the Court of Appeals had held that challenges that cannot otherwise be reviewed for the first time on a § 2255 motion can be reviewed as part of a

successful claim that counsel provided ineffective assistance under the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 694, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). *See United States v. Frady*, 456 U.S. 152, 167-68, 71 L.Ed.2d 816, 102 S.Ct. 1584 (1982); *Ratliff v. United States*, 999 F.2d 1023, 1026 (6th Cir. 1993). That is the type of challenge George has sought to pursue here.

Weinberger had presented four claims on appeal, challenging: (1) the calculation of his offense level for sentencing; (2) the restitution order to his fraud victims; (3) the restitution order to the IRS; and (4) and the method for scheduling his restitution payments. Although Weinberger's § 2255 motion to the district court had been based on ineffective assistance of counsel, he had only applied that theory explicitly to his first and fourth claims. Weinberger did not state the theory of ineffective assistance of counsel to support his second and third claims. Since Weinberger had not presented a proper basis for bringing those claims in his § 2255 motion, the district court rejected them.

On appeal, Weinberger applied the theory of ineffective assistance of counsel to all four of his claims. In general, "issues not presented to the district court but raised for the first time on appeal are not properly before the court." *Foster v. Barilow*, 6 F.3d 405, 407 (6th Cir. 1993). The *Weinberger* case, however, was held to be one of those "exceptional cases" when the rule preventing issues from being raised for the first time on appeal would result in a "plain miscarriage of justice." *Ibid.* In light of the circumstances of that case, including the fact that Weinberger was proceeding pro se, the Court of Appeals concluded that Weinberger

could extend the issue of ineffective assistance of counsel, already raised below on two of his claims, to his second and third claims relating to his restitution orders to his fraud victims and the IRS.

To establish ineffective assistance of counsel, Weinberger was required to demonstrate "that counsel's performance was deficient and that the deficient performance was prejudicial." *Ratliff*, 999 F.2d at 1026. That is what George here, too, seeks to demonstrate. In order to establish prejudice, Weinberger was required to show, and George here must show, a reasonable probability that, but for counsel's errors, the sentence imposed would have been different. *See Strickland*, 466 U.S. at 694.

In *Weinberger*, the government did not challenged the argument that Weinberger's trial counsel had been deficient by not challenging the portions of Weinberger's sentence being appealed there, either at the time of Weinberger's sentencing or on direct appeal. The core of the disagreement between Weinberger and the government was whether Weinberger had been prejudiced. The government argued that, with regard to three of the four sentencing rulings, Weinberger could not demonstrate a reasonable probability that his trial counsel's failure to challenge these rulings would have resulted in a different sentence. However, the government did agree with Weinberger's objection to the amount of his restitution order to the IRS.

Weinberger was unable to prove that he was prejudiced with regard to two of his four sentencing objections. Therefore, the Court of Appeals did not need to determine if his trial counsel's performance was deficient with regard to the two claims in which

Weinberger was not prejudiced. But in terms of his claims regarding his restitution orders to his victims and to the IRS, Weinberger was able to demonstrate both that his counsel's performance was deficient and that he was prejudiced. *Weinberger v. United States* (6th Cir. 2001) 268 F.3d 346, 351-352.

III. THE COURT SHOULD ISSUE RELIEF IN THE FORM OF A WRIT OF MANDAMUS UNDER THESE FACTS

The writ of mandamus is among "the most potent weapons in the judicial arsenal." *Will v. United States*, 389 U.S. 90, 107 (1967). Congress consolidated the various federal courts' mandamus powers under the All Writs Act of 1948, 28 U.S.C. § 1651. Federal courts have traditionally issued the writ only "to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 289 (1988) (quoting *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943)). "[O]nly exceptional circumstances amounting to a judicial 'usurpation of power' or a 'clear abuse of discretion'" will justify the writ. *Cheney v. U.S. Dist. Court for Dist. of Columbia*, 542 U.S. 367, 380 (2004) (citations and quotations omitted). For a court to grant the writ, three requirements must be satisfied: (1) the petitioner must have no other adequate means to attain the desired relief; (2) the petitioner must show that the right to the relief is clear and indisputable; and (3) exercising its discretion, the issuing court must decide that the remedy is appropriate under the circumstances. *Id.* at 380-81. Together, these safeguards ensure that the writ does not substitute for the regular appeals process. *Ex parte Fahey*, 332 U.S. 258, 260 (1947).

Such standards are met here. George submits both the District Court and the Ninth Circuit Court of Appeals committed a clear abuse of discretion under these facts. George respectfully requests this Court issue a writ of mandamus to the United States District Court for the Northern District of California allowing the hearing and granting of his petition under 28 U.S.C. § 2255 to vacate his sentence, whereby he claims that his counsel was ineffective at trial and sentencing, reversing the denial of his petition, which denial was rendered on the grounds that Section 2255 relief was unavailable because he had finished his sentence on his conviction and was no longer in custody. George claims that it is a violation of his Due Process right to be heard when the court denies his petition for writ of error coram nobis, seeking to vacate his convictions in these circumstances.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

COREY EVAN PARKER, ESQ.
COUNSEL FOR PETITIONER
LAW OFFICE OF COREY EVAN PARKER
1230 ROSECRANS AVENUE, SUITE 300
MANHATTAN BEACH, CA 90266
(424) 456-3193
COREY@COREYEVANPARKERLAW.COM

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