RECORD NO. _____

IN THE
Supreme Court of the United States

ROBERT DALEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The All Writs Act authorizes federal courts to vacate defective convictions by the writ of error coram nobis. This Court clarified in *United States v. Morgan*, 346 U.S. 502, 512 (1954), that coram nobis relief may be granted to achieve justice when no other remedy is available and when "sound reasons" exist for delay in seeking the relief. The question presented is:

Whether the Fourth Circuit erroneously ruled, thereby deepening a conflict among the circuits, that excessive delay precludes federal coram nobis relief, despite petitioner's showing of "sound reasons" pursuant to this Court's ruling in *United States v. Morgan*, 346 U.S. 502, 512 (1954).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

OPINION BELOW

The opinion of the Court of Appeals for the Fourth Circuit is unpublished but can be found at *Daley v. United States*, 759 F. App'x 192 (4th Cir. 2019).

JURISDICTION

The Fourth Circuit issued the judgment on March 27, 2019. On May 21, 2019, the Chief Justice granted an extension of time to July 25, 2019, within which to file a petition for a writ of certiorari. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The All Writs Act, 28 U.S.C. § 1651(a), states, "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."

STATEMENT OF THE CASE

I. Introduction

The writ of error coram nobis provides a vehicle by which petitioners who are facing significant collateral consequences—such as deportation—from old, defective convictions can challenge the constitutionality of those convictions. The remedy, available under the All Writs Act, endures indefinitely to ensure defendants can achieve justice regardless of time, as long as they provide sound reasons for not bringing the motion earlier.

In 2016, Petitioner Robert Daley filed a Petition for Writ of Error Coram Nobis to challenge the constitutionality of a federal conviction that led to his deportation. The district court denied Daley's petition based solely on the amount of time that had lapsed between his conviction and the filing of his coram nobis petition. This ruling, affirmed by the Fourth Circuit, flies in the face of Supreme Court law and underscores a circuit split in assessing coram nobis claims.

II. Factual overview

Daley lived in the United States as a lawful permanent resident since he was thirteen years old. In 2001, he was charged with federal drug distribution in Maryland and, on advice of counsel, pleaded guilty. Daley did this only because he believed, based on statements made by his attorney and Government agents, that this would allow him to remain in the country with his family.

Despite the assurances of his attorney that his guilty plea would not place him in immigration peril, Daley was removed to Jamaica in 2005 upon completion of his sentence. Two years later, desperate to escape Jamaica and reunite with his family, Daley returned to the United States, where he was eventually arrested for illegal reentry. Daley told his attorney, a federal public defender, about the circumstances of his 2002 guilty plea and his desire to seek legal redress, but his attorney never advised him of the possibility of attacking the underlying drug conviction through a coram nobis petition. Rather, his attorney advised him to plead guilty. Daley received a 36-month sentence for illegal reentry and in 2012 was again deported to Jamaica.

Undeterred by his prior removals, Daley returned to the United States a second time and was charged again in 2016 in the Eastern District of New York with illegal reentry. Only then did he learn about coram nobis. He promptly filed a *pro se* Petition for Writ of Error Coram Nobis one month after his arrest. The District Court in Maryland denied his petition, however, on the grounds that he had waited too long before seeking relief. The court never reached Daley's substantive claim that his Sixth Amendment rights had been violated when his attorney incorrectly advised him that a guilty plea would allow him to remain in the country. The Fourth Circuit affirmed the district court without elaboration in a per curiam opinion.

REASONS FOR GRANTING THE WRIT

This Court should grant Mr. Daley's petition for a writ of certiorari because the Fourth Circuit's decision deepened a conflict between the circuits regarding an increasingly important and recurring issue of federal law: what standard should be used to judge a petitioner's "sound reasons" for delay in seeking coram nobis relief.

In affirming the judgment of the district court, the Fourth Circuit endorsed the district court's erroneous application of the common law rule for evaluating Daley's reasons for delay as seminally articulated in *United States v. Morgan*, 346 U.S. 502 (1954), and encapsulated by the All Writs Act, 28 U.S.C. § 1651(a). The writ of coram nobis exists to correct constitutional errors without time limitation, provided sound reasons exist for not seeking relief earlier. *Morgan*, 346 U.S. at 512. The district court disregarded the sound justifications provided by Daley and

instead weighed only the length of time that elapsed between his initial conviction and the filing of his petition.

In upholding the denial of Daley's coram nobis petition, the Fourth Circuit further clouded a legal issue that raises serious practical and policy considerations regarding coram nobis. The All Writs Act empowers federal courts to rectify longstanding defective convictions through the coram nobis writ, but the district court's decision, affirmed by the Fourth Circuit, obscures the writ's fundamental goal. The ambiguity surrounding what, if any, "sound reason" justifies a delay in seeking coram nobis relief becomes particularly problematic given the increasing number of deportations and coram nobis petitions.

Finally, coram nobis is an underdeveloped area of federal law that sorely needs clarity. *See United States v. George*, 676 F.3d 249, 253 (1st Cir. 2012) (noting coram nobis lacks an "easily readable roadmap for its issuance"); *Blanton v. United States*, 94 F.3d 227, 232 (6th Cir. 1996) (highlighting paucity of instructive cases since *Morgan* in 1954); *United States v. Bush*, 888 F.2d 1145, 1146 (7th Cir. 1987) (describing coram nobis as a "phantom in the Supreme Court's cases"). The circuit inconsistency, moreover, creates arbitrary results across jurisdictions for petitioners seeking relief and thwarts the writ's underlying objective to achieve justice for defendants who continue to suffer from defective convictions. *United States v. Denedo*, 556 U.S. 904, 911 (2009).

This Court should grant certiorari and reverse.

I. Fourth Circuit's Application of *Morgan* Deepens a Circuit Split

The Fourth Circuit's opinion contravenes the hallmark of coram nobis, articulated in *Morgan* more than six decades ago: "The writ of coram nobis was available at common law to correct errors of fact . . . *without limitation of time*." *Morgan*, 346 U.S. at 507 (emphasis added); *cf.* 28 U.S.C. § 2255 (placing a one-year statute of limitations on the analogous habeas corpus writ). The Fourth Circuit has acknowledged that there is no time limitation for seeking coram nobis relief. *United States v. Swaby*, 855 F.3d 233, 239 n.3 (4th Cir. 2017) (observing no requirement to challenge defective convictions immediately). Nevertheless, the Fourth Circuit erroneously affirms an analysis based on *elapsed time* in seeking relief, not based on the petitioner's *reasons* for delay. This subtle shift away from *Morgan* subverts coram nobis' fine balance between finality of judgment and justice for defendants.

The Fourth Circuit's decision further divides the circuits' approach to evaluating coram nobis claims. On one hand, the First, Second, Third, Fifth, Seventh, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits all adhere to the principle that mere passage of time does not bar coram nobis relief, and that courts must consider a petitioner's reasons for delay. On the other hand, the Fourth Circuit seems to join the Sixth Circuit in denying relief based solely on the passage of time. *Compare Kovacs v. United States*, 744 F.3d 44, 54 (2d Cir. 2014) (asserting coram nobis is not bound by statute of limitations), *and United States v. Shoupe*, No. 07-2076, 2008 WL 4899348, at *611 (8th Cir. Nov. 17, 2008) (noting petitioner must provide valid reason for delay), *and United States v. Kwan*, 407 F.3d 1005,

1012 (9th Cir. 2005) (requiring valid reasons for delay), *and United States v. Mills*, 221 F.3d 1201, 1204 (11th Cir. 2000) (needing "sound reasons" to justify delay in seeking relief), *and United States v. Dyer*, 136 F.3d 417, 427 (5th Cir. 1998) (requiring petitioners to show "reasonable diligence" when seeking relief), *and United States v. Hawkins*, 973 F. Supp. 825, 827 (7th Cir. 1997) (barring relief when no "sound reasons [exist] for failure to seek appropriate earlier relief."), *and Hager v. United States*, 993 F.2d 4, 5 (1st Cir. 1993) (requiring explanation for delay in seeking relief), *and Klein v. United States*, 880 F.2d 250 (10th Cir. 1989) (noting petitioner must show valid reasons for not attacking conviction earlier) (citing *Hirabayashi v. United States*, 828 F.2d 591 (9th Cir. 1987)), *and United States v. Stoneman*, 870 F.2d 102, 106 (3d Cir. 1988) (needing only "sound reasons" to explain delay in seeking relief), *and Farnsworth v. United States*, 232 F.2d 59, 63 (D.C. Cir. 1956) ("where the fundamental constitutional right has been denied, an accused should not be precluded from relief because he cannot satisfy a court that he had good cause for delay in seeking it"), *with Blanton v. United States*, 94 F.3d 227, 231 (6th Cir. 1996) ("Timeliness should be a consideration in determining whether to grant Coram Nobis petitions"), *and Bereano v. United States*, 706 F.3d 568, 577 n.10 (4th Cir. 2013) (suggesting habeas corpus procedures, such as its one-year statute of limitations, should be applied to coram nobis proceedings). This inconsistency breeds differential justice across federal courts.

A. Majority of Circuits Subordinate Length of Delay in Favor of "Sound Reasons"

Most circuits correctly abide by *Morgan*'s premise that delay, by itself, does not affect the availability of coram nobis relief. The Second Circuit stated coram nobis contains no statute of limitations. *Doe v. United States*, 915 F.3d 905 (2d Cir. 2019); *Foont v. United States*, 93 F.3d 76, 79 (2d Cir. 1996). Instead, "[t]he critical inquiry . . . is whether the petitioner is able to show justifiable reasons for the delay." *Kovacs v. United States*, 744 F.3d 44, 54 (2nd Cir. 2014) (quoting *Foont*, 93 F.3d at 80).

Both the Fifth and Ninth Circuits similarly subordinate passage of time to petitioner's reason for delay. *See United States v. Dyer*, 136 F.3d 417, 427 (5th Cir. 1998) (requiring petitioners to show "reasonable diligence" when seeking relief); *see also United States v. Kwan*, 407 F.3d, 1005, 1012–13 (9th Cir. 2005) (excusing lengthy delay where petitioner established reasonable cause for delay). The D.C. Circuit, meanwhile, stakes out the strongest position in preserving the core function of coram nobis. It rejects timeliness as grounds for barring coram nobis relief, even when asserted by respondent under the doctrine of laches. *Farnsworth v. United States*, 232 F.2d 59, 63 (D.C. Cir. 1956) ("to permit a defense of laches to the writ would, in effect, denude it one of its essential characteristics—the power to hurdle a time factor").

Finally, the Third Circuit, which noted the "unsettled" nature of coram nobis jurisprudence, *Mendoza v. United States*, 690 F.3d 157, 160 (3rd Cir. 2012),

nonetheless demands sound reasons to justify lengthy delays in seeking relief. *United States v. Stoneman*, 870 F.2d 102, 106 (3rd Cir. 1989).

B. Fourth Circuit Muddies *Morgan*'s Standard by Grounding Analysis in Time

In the 65 years since *Morgan* was decided, this Court has only elaborated on federal coram nobis relief four other times, but these decisions did not alter *Morgan*'s key premise that coram nobis is available without limitation of time, provided petitioners give "sound reasons" for delay. *See Chaidez v. United States*, 568 U.S. 342 (2013) (examining retroactivity of ineffective counsel); *Wall v. Kholi*, 562 U.S. 545 (2011) (discussing applicability of statute of limitations in federal habeas relief); *United States v. Denedo*, 556 U.S. 904 (2009) (holding Article I military courts may hear coram nobis petitions); *James v. United States*, 459 U.S. 1044 (1982) (Brennan, J., concurring in denial of certiorari) (confirming availability of coram nobis when usual remedy is inappropriate).

The circuits have not uniformly applied *Morgan*'s "sound reasons" mandate in the intervening years, and the Fourth Circuit's decision further eclipses *Morgan*'s message. For example, the Sixth Circuit invoked *Morgan* to conclude that "timeliness should be a consideration in determining whether to grant coram nobis petitions." *Blanton v. United States*, 94 F.3d 227, 231 (6th Cir. 1996). The Sixth Circuit's temporal fixation tips an already stringent procedural burden further away from petitioners. *See Kerkman v. United States*, 200 F. App'x 578, 581 (6th Cir. 2006) (*quoting United States v. Nyhuis*, 40 F. App'x 80, 81 (6th Cir. 2002)) ("a ten-year delay does not constitute an exercise of reasonable diligence").

The Fourth Circuit's rejection of Daley's claim replicates the Sixth Circuit's deviation from *Morgan*. Similar to the Sixth Circuit, the Fourth Circuit employs the same "sound reasons" language from *Morgan* to evaluate "failure[s] to seek appropriate earlier relief," *United States v. Rocky Mountain Corp.,* 442 F. App'x 875, 876 (4th Cir. 2011) (quoting *Morgan*, 356 U.S. at 512), but nonetheless relies on the district court's abnegation of "sound reason" analysis without further elaboration to deny coram nobis relief. *Daley v. United States*, 759 F. App'x 192, at * 2 (4th Cir. 2019).

These courts incorrectly focus on length of time in assessing the availability of coram nobis relief. Their reasoning conflates passage of time with "[un]sound reasons" and thwarts the underlying purpose of coram nobis to achieve justice. *See Morgan*, 346 U.S. at 512 ("Otherwise a wrong may stand uncorrected which the available remedy would right"). The preoccupation with time reflects equitable concerns for the respondent who may suffer prejudice from undue delay and finality of conviction. *Hanan v. United States*, 402 F. Supp. 2d 679, 684 (E.D. Va. 2005) (citing *United States v. Keogh*, 391 F.2d 138, 148 (2d Cir. 1968)).

However, if these Circuits use time to evaluate prejudice to the respondent, then equities demand these Circuits provide due consideration to petitioners' reasons for the delay in time. The Southern District of New York recognized the equivalent burden delay presents to both petitioner and respondent shortly after this Court decided *Morgan*:

> Passage of time may indeed present obstacles to renewed prosecution of the old charge, but a defendant who has served his sentence on the challenged

> conviction bears the burden of overcoming the validity of the judgment which carries with it a presumption of regularity and is not lightly to be set aside . . . the passage of time *presents the same obstacles to him in attempting to sustain this burden as it would to the government* in a revived prosecution should he successfully invalidate his prior conviction.

Haywood v. United States, 127 F. Supp. 485, 487–88 (S.D.N.Y. 1954) (emphasis added). An undue delay has the potential to equally burden both the petitioner and respondent. Therefore, delay itself cannot bar relief—no matter how long the delay—without a thorough examination of petitioner's reasons.

Even if the respondent makes a laches or prejudice argument, the petitioner may show either that the government was not prejudiced or that petitioner nonetheless exercised reasonable diligence in filing the claim. *Telink v. United States* 24 F.3d 42, 47 (9th Cir. 1994). The Fourth and Sixth Circuits' approach deviates from *Morgan*'s key precept that delay, of any length, does not bar coram nobis relief in light of petitioner's sound reasons. *See Hirabayashi v. United States*, 828 F.2d 591 (9th Cir. 1987) (finding a 40-year delay did not bar relief).

II. Fourth Circuit Incorrectly Applied *Morgan*'s "Sound Reasons" Analysis.

The Fourth Circuit's decision undermines coram nobis' objective to achieve justice by relying on the district court's cursory analysis of the petitioner's justifications. The courts below barred relief because of a time delay without analyzing whether the supplied reasons justified it. The question becomes what standard should this Court employ to evaluate the petitioner's reasons for delay?

In *Morgan*, the Supreme Court held the writ of coram nobis is available "only under circumstances compelling such action to achieve justice." *Morgan*, 346 U.S. at

511. The petitioner bears the burden of providing valid reasons for delay. Meanwhile, the respondent may subsequently raise the affirmative defense of laches in instances of prejudice. *United States v. Riedl*, 496 F.3d 1003, 1008 (9th Cir. 2007). The petitioner may then show that the government suffers no prejudice or that petitioner nonetheless satisfies *Morgan*'s "sound reasons" requirement. *Telink v. United States* 24 F.3d 42, 47 (9th Cir. 1994). The availability of laches as an affirmative defense means the court must pay equally close attention to the petitioner's reasons. *See Couveau v. American Airlines*, 218 F.3d 1078, 1083 (9th Cir. 2000) (noting "application of laches depends on a close evaluation of all the particular facts in a case"). Otherwise the court tilts the balance of justice versus finality unfairly towards the respondent.

Most circuits, including the Fourth Circuit, do not employ uniform criteria for evaluating a petitioner's sound reasons for delay in seeking coram nobis relief. While the extraordinary nature of coram nobis may have justified ad hoc determinations in the past, *United States v. Akinsade*, 686 F.3d 248, 252 (4th Cir. 2012), the increased prevalence of the writ, particularly in light of increasing deportations, necessitates a cogent standard. *See* David Wolitz, *The Stigma of Conviction: Coram Nobis, Civil Disabilities, and the Right to Clear One's Name*, 2009 BYU L. Rev. 1277, 1281 (2009) (noting number of petitions for coram nobis will rise in response to technological advances and social changes); Daniel E. Martiney et al., *The Rise of Mass Deportation in the United States*, *in* THE

HANDBOOK OF RACE, ETHNICITY, CRIME, AND JUSTICE ch. 8 (Ramiro Martinez, Jr. et al., eds., 2018) (tracing substantial increase in deportations since the mid-1990s).

Conversely, the Ninth Circuit outlined three factors for evaluating delay: (1) whether the petitioner delayed for no reason whatsoever; (2) whether the petitioner abused the writ, *see also United States v. Darnell*, 716 F.2d 479 (7th Cir. 1983) (describing the analogous concept of due diligence); and (3) whether respondent has made a prima facie showing of prejudice. *United States v. Kwan*, 407 F.3d 1005, 1013 (9th Cir. 2005).[1]

The Fourth Circuit, like other circuits, does not rely on such objective benchmarks in its analysis. Consequently, federal criminal defendants who delay filing will receive inequitable treatment merely based on their particular jurisdiction. *Compare Kwan*, 407 F.3d 1005 (granting coram nobis relief despite delay when immigration counsel advised petitioner he faced little chance of deportation), *with Mendoza v. United States*, 690 F.3d 157, 159 (3rd Cir. 2012) (rejecting coram nobis relief because inaccurate attorney advice about deportation consequences does not constitute a sound reason for delay), *and Colon v. United States*, 708 F. App'x 125, 126 (4th Cir. 2018) (rejecting coram nobis relief even though counsel incorrectly advised petitioner that a plea agreement would prevent deportation).

This Court should adopt the *Kwan* factors in the absence of any other consistent benchmark across the circuits. Applying these factors, Daley established

[1] The Ninth Circuit later clarified in *Riedl* that a petitioner may nonetheless prevail over a showing of prejudice or laches through "reasonable diligence in filing the claim." *Riedl*, 496 F.3d at 1008 (quoting *Telink*, 24 F.3d at 47).

valid reasons for his delay. First, Daley presented evidence demonstrating good cause for delay for every period between the time of his defective conviction and the time of filing his coram nobis petition. Second, Daley did not abuse the writ. His petition seeks to correct an injustice that yielded incarceration, deportation, and separation from his family. These collateral consequences arose from the initial deprivation of Daley's Sixth Amendment right to effective counsel. Finally, the respondent neither raised the issue of prejudice nor offered evidence thereof before the district court.

The variance among the circuits shows that Daley was denied justice for a constitutional violation because of an improper and unpredictably applied procedural barrier of timeliness. This Court should reverse the Fourth Circuit and adopt the Ninth Circuit's undue delay factors to provide a uniform standard in evaluating coram nobis claims.

III. Rise of Deportations Necessitates Clarification from This Court

The ramifications of ambiguous undue delay standards among the Circuit Courts extend beyond Daley's case. Advances in forensic techniques and information technology increase the ability to root out wrongful convictions. *See e.g.*, Brandon L. Garrett, *Claiming Innocence*, 92 Minn. L. Rev. 1629, 1659 (2008) ("assuming that genetic science and technology continue to improve, innocence claims will continue to be important, particularly as the cost of testing falls and the speed of testing increases."); Kelly Walsh et al., *Estimating the Prevalence of Wrongful Conviction*, NATIONAL CRIMINAL JUSTICE REFERENCE SERVICE 10 (2017)

(finding 11.6% of studied defendants yielded exculpatory DNA evidence supporting exoneration). The advent of meritorious attacks on defective convictions means the federal courts must institute clearer standards for evaluating postconviction petitions like coram nobis.

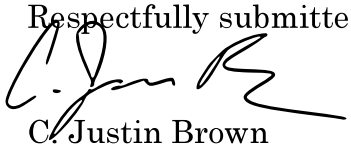
The urgency of clear standards becomes even more apparent in light of the United States' stringent enforcement of immigrant removals. U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, FISCAL YEAR 2018 ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT 10 (2018) (reporting a 14% increase in removals over fiscal year 2017 totals); Marc R. Rosenblum & Kristen McCabe, *Deportation and Discretion: Reviewing the Record and Options for Change*, MIGRATION POLICY INSTITUTE 1 (2014) (noting number of deportations steadily increased since the mid-1990s following stringent legislation and regulatory enforcement). Immigrants with past convictions drove the increase in the past ten years. Kristen Bialik, *Most Immigrants Arrested by ICE Have Prior Criminal Convictions, a Big Change From 2009*, PEW RESEARCH CENTER (2018).

Daley's case epitomizes this growing national trend. Defendants, like Daley, who call the United States their home rely on coram nobis, not as an arcane remedy, *Kovacs v. United States*, 744 F.3d 44, 54 (2d Cir. 2014), but as a vital legal mechanism to redress defective convictions and remain in the country. However, if the standard for evaluating sound reasons remains ambiguous, then petitioners across the country will receive unequal treatment.

CONCLUSION

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

Respectfully submitted,



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APPENDIX

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-1658

ROBERT DALEY,

Petitioner - Appellant,

v.

UNITED STATES OF AMERICA,

Respondent - Appellee.

Appeal from the United States District Court for the District of Maryland, at Greenbelt. Paula Xinis, District Judge. (8:16-cv-02828-PX)

Submitted: March 8, 2019 Decided: March 27, 2019

Before WILKINSON and QUATTLEBAUM, Circuit Judges, and DUNCAN, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

C. Justin Brown, BROWN LAW, Baltimore, Maryland, for Appellant. Robert K. Hur, United States Attorney, Baltimore, Maryland, Patrick G. Nemeroff, Special Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Greenbelt, Maryland, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Robert Daley appeals the district court's order denying his petition for a writ of error coram nobis. We affirm.

Federal courts are authorized to issue "all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a) (2012); *Bereano v. United States*, 706 F.3d 568, 575-76 (4th Cir. 2013). "The writ is narrowly limited to extraordinary cases presenting circumstances compelling its use to achieve justice." *United States v. Akinsade*, 686 F.3d 248, 252 (4th Cir. 2012) (internal quotation marks omitted). On appeal from the district court's denial of a petition for a writ of error coram nobis, we review factual findings for clear error, questions of law de novo, and the court's decision to deny the writ because the petitioner failed to demonstrate sound reasons for the delay for abuse of discretion. *Bereano*, 706 F.3d at 575; *Foont v. United States*, 93 F.3d 76, 79 (2d Cir. 1996).

To obtain coram nobis relief, the petitioner must satisfy the following four prerequisites:

> First, a more usual remedy (such as habeas corpus) must be unavailable; second, there must be a valid basis for the petitioner having not earlier attacked his convictions; third, the consequences flowing to the petitioner from his convictions must be sufficiently adverse to satisfy Article III's case or controversy requirement; and, finally, the error that is shown must be of the most fundamental character.

Bereano, 706 F.3d at 576 (internal quotation marks omitted).

We conclude that the district court did not abuse its discretion in finding that Daley failed to show sound reasons for delay in seeking coram nobis relief. Accordingly,

we affirm. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ROBERT DALEY	*	
Petitioner,	*	
v.	*	Civil Action No. PX 16-2828 (SEALED)
UNITED STATES,	*	
Respondent.	*	

******

MEMORANDUM OPINION

Pending before the Court is a Petition for Writ of Error Coram Nobis pursuant to 28 U.S.C. § 1651(a), filed by Robert Daley. ECF No. 1. Daley seeks to vacate his 2002 conviction for drug conspiracy, arguing that his defense counsel's erroneous advice that pleading guilty and cooperating with the government would save Daley from deportation renders his guilty plea invalid. The Government opposed the Petition, ECF Nos. 16 & 38, and hearings were held on February 12, 20 and 22, 2018. For the reasons set forth below, the Court denies the Petition.[1]

I. Background

a. The 2002 Conviction

In July of 2001, Petitioner Robert Daley ("Daley") was arrested and charged for his role in a drug trafficking conspiracy operating in Baltimore, Maryland. ECF No. 21-1 at 4–5. Although Daley had lived in the United States for more than twenty years, he was not a citizen, and he feared that a federal narcotics conviction would result in his deportation. This was not the first time Daley was faced with this possibility. In 1995, Daley had been convicted of drug

[1] The record considered by the Court in adjudicating Daley's Petition included all exhibits proffered by the parties and, upon the Court's request, Daley's "A-file." Daley's immigration file was provided by the Government to Daley's counsel and the Court on February 13, 2018, and argument and testimony on it was heard at the February 22 hearing. Daley's file is referenced herein by its original Bates numbering system (i.e., "RMDALEY-111").

trafficking in North Carolina state court, but with the assistance of counsel, received a 212(c) waiver of deportation, and was allowed to remain in the United States. RMDALEY-121–30. The 212(c) waiver was premised on Daley's strong ties to the United States, minimal involvement in the underlying drug conspiracy, and substantial cooperation with the government's criminal investigation in the underlying drug case. *Id.*

Six years later, when Daley was arrested on the Maryland federal drug charges, the Court appointed Lawrence B. Rosenberg ("Rosenberg") to represent Daley. Rosenberg met with Daley several times to discuss his criminal case, and Daley began to cooperate with government agents in short order. *See* ECF No. 1 at 2. Daley asserts that during these sessions, he repeatedly expressed concerns about deportation to Rosenberg and the agents, including his fears that deportation was a "death sentence" at the hands of Jamaican drug traffickers with whom Daley previously associated. ECF No. 18 at 1–3; *see also* ECF Nos. 1 at 1 & 30 at 1–2. Daley contends that Rosenberg assured Daley that he would not be deported if he pled guilty, citing Daley's substantial ties to the United States, long time permanent resident status, pending application for naturalization, and, most significantly, Daley's cooperation with the government, including Daley turning over $300,000 in conspiracy related proceeds. ECF No. 1 at 1. Rosenberg also advised Daley that trial would likely result in a guilty verdict and certain deportation after serving a lengthy sentence. *Id.*; *see also* ECF No. 30 at 2.

Daley further asserts that at the time, government agents promised to help secure a "S-visa" for Daley by virtue of his cooperation, and so Daley could remain in the United States.[2] ECF No. 18 at 1, 3; *see also* ECF Nos 24 at 2 & 30 at 1–2. Daley states that he discussed the possibility of the "S-visa" with Rosenberg, who again broadly assured him that deportation was

[2] An S-visa is a non-immigrant visa available to a limited class of individuals who are witnesses, informants, or are otherwise assisting a federal investigation. 8 U.S.C. § 1184(k)(1); *see also* 22 U.S.C. § 2708(a).

not at issue. *See* ECF No. 43. Relying on Rosenberg's advice, Daley signed a written plea agreement in November 2001. *See* ECF Nos. 21-1 & 24 at 2–3. The plea agreement was silent as to the possible immigration consequences of his guilty plea. *Id.*

On March 10, 2002, the Honorable Catherine C. Blake accepted Daley's plea of guilty to conspiracy to distribute controlled substances in violation of 21 U.S.C. § 846, after conducting a hearing pursuant to Rule 11 of the Federal Rules of Criminal Procedure. *See* ECF No. 21-2. Notably, Judge Blake asked Daley during this hearing whether any other promises *not* included in the plea agreement were made to him to induce him to plead guilty. *Id.* at 23:5–10. Daley responded in the negative, contradicting his current assertions that he was induced to plead guilty and cooperate based on oral promises of relief from deportation. *Id.* In fact, at no point during the plea colloquy or later sentencing proceedings did any discussion occur about promised relief from deportation in exchange for his cooperation. *See* ECF Nos. 21-2 & 21-4. At sentencing, Daley received a four-level downward departure under the then-mandatory United States Sentencing Guidelines for his substantial assistance, and was sentenced to 57 months imprisonment followed by 3-years supervised release. *See* ECF No. 21-4.

Shortly after beginning his term of incarceration, Daley filed a petition for habeas corpus relief pursuant to 28 U.S.C. § 2255 based on substandard conditions at the facility. *See* ECF No. 14, No. 02-cr-160 (D. Md.). The Court determined that his claim was more properly considered a petition brought under 28 U.S.C. § 2241. The Court subsequently dismissed the petition on its merits. *See* ECF No. 17, No. 02-cr-160 (D. Md.).

b. Deportation Proceedings

On August 13, 2003, while serving his federal prison sentence, Daley first learned that he was possibly subject to removal when Immigration and Naturalization Service ("INS") of the

United States Department of Justice interviewed Daley regarding his immigration status. RMDALEY-114. A month later, Daley was formally notified that deportation proceedings would commence in light of his 2002 federal drug trafficking conviction. RMDALEY-118. The notice more particularly advised Daley of his rights to challenge deportation at a hearing, as well as his right to hire counsel who would "have an opportunity to present evidence" and examine evidence presented by the government. RMDALEY-119.

In November 2003, Daley appeared before an immigration judge for the first of several removal hearings. RMDALEY-90. On Daley's request, the immigration judge continued the hearing until February 4, 2004, to give Daley an opportunity to obtain counsel. RMDALEY-94. When February 4 arrived, however, Daley informed the judge that he was unable to obtain a lawyer and would represent himself. The immigration court then advised Daley that under the circumstances of his case, Daley was "not eligible for any form of relief except potentially to apply for . . . deferral of removal under the Convention Against Torture." RMDALEY-92–99. This meant that if Daley could "even on a temporary basis, prove that [he was] likely to be tortured by the government of Jamaica, [or] someone working with an agreement or encouragement [of the government]," he would not be deported. *Id.* Daley noted for the immigration court that Jamaican law enforcement treated deported aliens "very badly," and was given an additional continuance to prepare an asylum application. RMDALEY-100. At no point during any of the deportation proceedings did Daley mention that his defense counsel had advised that cooperation in the 2002 drug case would save Daley from deportation.

On March 4, the immigration proceedings reconvened, and Daley informed the immigration court that he had not filed for asylum. RMDALEY-103. Daley was ordered deported. RMDALEY-34–39.

Daley appealed this deportation order, arguing that the immigration court violated his due process rights by conducting the hearing without his counsel present. RMDALEY-105–06. Daley further affirmed that he would file an additional, separate written brief with his appeal. *Id.* Daley did not raise in his direct appeal any argument that his prior cooperation should relieve him from deportation. Ultimately, the appeal was dismissed when he failed to submit a written brief. On December 22, 2005, Daley was deported to Jamaica. ECF Nos. 1 at 1 & 38 at 1.

c. Re-Entry Charges

Shortly after arriving in Jamaica, Daley's house and car were firebombed. ECF No. 30 at 2; *see also* ECF No. 1 at 1–2. Fearing for his life in Jamaica, Daley returned to the United States, and was arrested in November 2007 by the Illinois State Police while attempting to obtain an ID card. *Id.*; *see also* ECF No. 1 at 1–2. After failing to appear on the Illinois charge, Daley was found and arrested in Howard County, Maryland. He was subsequently charged in Maryland federal court with illegal re-entry into the United States after having previously been deported for his 2002 felony conviction. *See* 8 U.S.C. § 1326; No. 09-cr-586 (D. Md.).

Daley was represented in the 2009 illegal reentry case by Assistant Federal Public Defender Gary W. Christopher ("Christopher"). Christopher advised Daley "there was no defense to the reentry charge," *Id.*; *see also* ECF Nos. 1 at 5 & 18 at 3–4, and they did not discuss avenues to challenge the underlying 2002 felony conviction, Pet. Ex. 5. Daley pleaded guilty to the illegal reentry offense and received 40 months imprisonment, followed by 3 years of supervised release. *See* ECF No. 16 at 1–2; *see also* ECF Nos. 7 & 13, No. 09-cr-586 (D. Md.); ECF No. 33, No. 02-cr-160 (D. Md.).

After sentencing but before his deportation, Daley asked Christopher whether he could challenge the validity of his initial deportation without jeopardizing his plea agreement. *See* Pet.

Ex. 1. Christopher advised Daley that while contesting his removal may violate the terms of his plea agreement, additional penalties were unlikely, and urged Daley to consult with an immigration attorney. *Id.* After completing his prison term, Daley was again deported to Jamaica in November 2012. ECF No. 1 at 3, No. 16-cr-387 (E.D. N.Y.). No record evidence demonstrates that Daley in fact made any formal challenges prior to being deported.

Daley then again reentered the United States. *See* ECF No. 30 at 2; *see also* ECF No. 15 at 1, No. 16-cr-387 (E.D.N.Y.). In 2014 and 2015, Daley sought legal advice as to obtaining lawful status, and was urged to seek vacatur of his 2002 federal narcotics conviction. *See* Pet. Ex. 2 & 3. Daley failed to pursue this advice prior to August 2016, when he filed the Petition currently before the Court.

In June 2016, Daley was charged once again with illegal reentry in the United States District Court for the Eastern District of New York.[3] While detained, Daley filed a *pro se* Petition for a Writ of Error Coram Nobis ("Petition"). ECF No. 1. In it, and for the first time, Daley alleged that Rosenberg "affirmatively misrepresented" the immigration consequences of his 2002 guilty plea. After initial briefing on the Petition, Daley moved for appointment of counsel, which this Court granted. *See* ECF Nos. 10, 12, 13, 16, 18, 20, 23, 27. After further briefing, the parties presented testimony and argument at hearings on February 12, 20, and 22, 2018 ("February 2018 hearings"). ECF Nos. 43, 47, 48.

II. Analysis

The writ of error coram nobis is a remedy of last resort, granted only where "extraordinary cases present[] circumstances compelling its use to 'achieve justice.' " *United States v. Akinsade*, 686 F.3d 248, 252 (4th Cir. 2012) (quoting *United States v. Mandel*, 862 F.2d

[3] Daley's case in the Eastern District of New York is in abeyance pending the disposition of the Petition. *See* ECF No. 30 at 7.

1067, 1075 (4th Cir. 1988) *and United States v. Denedo*, 556 U.S. 904 (2009)); *see also Bereano v. United States*, 706 F.3d 568, 576–77 (4th Cir. 2013) (noting the "circumscribed use of coram nobis" and quoting the Supreme Court's observation that " 'courts must be cautious so that the extraordinary remedy of coram nobis issues only in extreme cases.' ") (quoting *Denedo*, 556 U.S. at 916)). Importantly, "a court reviewing a petition for a writ of coram nobis to vacate a conviction must presume that the underlying proceedings were correct, and the burden of showing otherwise rests on the petitioner. And, that burden is substantial, exceeding that of a habeas petitioner." *Hanan v. United States*, 402 F. Supp. 2d 679, 684 (E.D. Va. 2005), *aff'd* 213 F. App'x 197 (4th Cir. 2007). Specifically, petitioners must demonstrate:

> "(1) a more usual remedy is not available; (2) valid reasons exist for not attacking the conviction earlier; (3) adverse consequences exist from the conviction sufficient to satisfy the case or controversy requirement of Article III [of the United States Constitution]; and (4) the error [in the underlying proceeding] is of the most fundamental character."

Akinsade, 686 F.3d at 252 (quoting *Hirabayashi v. United States*, 828 F.2d 591, 604 (9th Cir. 1987)). A petitioner must sustain his burden as to each factor to be eligible for relief.

Here, the Government concedes that Daley's case satisfies the first and third factors — a more usual remedy is not available, and Daley's pending charges on illegal reentry and possible re-deportation satisfy the case or controversy requirement of Article III. *See* ECF Nos. 16 & 37 at 6. Accordingly, Daley must demonstrate that he has valid reasons for not attacking his conviction earlier, and that Rosenberg's alleged failure to advise Daley of the deportation consequences of his 2002 guilty plea is an "error of the most fundamental character."

As to Daley's reasons for not attacking his conviction earlier, although there are no hard time limits, petitioners must demonstrate that " 'sound reasons exist [ ] for failure to seek appropriate earlier relief.' " *United States v. Rocky Mountain Corp., Inc.*, 442 F. App'x 875, 876 (4th Cir. 2011) (quoting *United States v. Morgan*, 346 U.S. 502, 512–13 (1954)). The Court notes that in this Circuit, an extended delay may be forgiven where the petitioner filed for coram nobis relief close in time to first learning of the underlying error. *See Akinsade*, 686 F.3d at 252 (noting that the petitioner "had no reason to challenge the conviction" until he was detained by immigration authorities, and filed his petition shortly thereafter); *Colon v. United States*, 708 F. App'x 125, 125–26 (4th Cir. 2018) (affirming denial of coram nobis where the petitioner alleged affirmative misadvice by counsel regarding the consequences of her guilty plea, but waited over three years after deportation to challenge the conviction) (citing *Mendoza v. United States*, 690 F.3d 157, 159–160 (3d Cir. 2012)); *Fernandez-Garcia v. United States*, Case Nos. 12-cv-1137, 2:86-cr-228-3, 2013 WL 5372745, at *3 (M.D. N. C. Sept. 24, 2013); *Kokoski v. United States*, Case Nos. 5:12-2150, 5:96-64, 2013 WL 1337408, at *7 (S.D. W. Va. Mar. 29, 2013); *see also United States v. Abou-Khodr*, Case No. 99-cv-81073, 2013 WL 4670856, at *4 (E.D. Mi. Aug. 30, 2013) (vacating conviction where the petitioner alleged affirmative misadvice and filed his initial petition "within months of the government's initiation of removal proceedings."); *accord United States v. Swaby*, 855 F.3d 233, 238 (4th Cir. 2017).

Daley cannot make this showing. It is uncontroverted that Daley received notice of his possible removability in August 2003, shortly after he began serving his prison term on the underlying 2002 narcotics conviction. *See* RMDALEY 114-106. At that point, Daley was acutely aware of his counsel's purported "affirmative misrepresentations" as to cooperation forestalling deportation. Daley, however, took no action consistent with the claim he raises now,

and he certainly did not seek to vacate his plea and sentence based on Rosenberg's misadvice.[4] Over the next ten years, as Daley was arrested and charged with illegal reentry, at no point does he challenge Rosenberg's alleged misadvice. *See* ECF No. 1; *compare Akinsade*, 686 F.3d at 252. Further, although Daley now contends that he relied on federal agents' promise of an "S-visa" as corroborating Rosenberg's misadvice, the record is bereft of *any* reference to negotiations with law enforcement for an S-visa. And even if the Court credits that Daley had informal conversations about obtaining an S-visa, this does not advance Daley's burden to demonstrate why Daley failed to challenge Rosenberg's misadvice for a decade, despite ample opportunity to do so.

More to the point, Daley cannot credibly explain why he failed to challenge the validity of his 2002 conviction in any way after he learned of his likely deportation. *See Akinsade,* 686 F.3d at 252; *United States v. Kwan*, 407 F.3d 1005, 1013–14 (9th Cir. 2005), *abrogated on other grounds by Padilla v. Kentucky*, 559 U.S. 356 (2010). Daley has provided several explanations but none are availing. Daley, for example, contends that because his 2003 immigration proceedings were conducted via television broadcast in a public room at the prison, he did not want to discuss the details of his plea — and more specifically, his cooperation — in that setting. While understandable, this does not explain why Daley failed to raise the impact of Rosenberg's misadvice in any other forum. Nor does it explain why Daley did not share with the immigration judge in more general, less risky, terms that he had been provided inaccurate legal advice about deportation consequences. This is particularly troubling considering that Daley had once before obtained relief from deportation, in part because he had cooperated in his 1995 North Carolina drug case. *See* RMDALEY-121–30.

[4] The Court is hard pressed to ascribe a lack of sophistication to Mr. Daley, as his counsel urged during the February 2018 hearings. During this initial period of incarceration, Daley challenged the constitutionality of his confinement conditions and the validity of his deportation proceedings. *See* ECF No. 14, No. 02-cr-160 (D. Md.).

Next Daley argues that the Ninth Circuit decision in *Kwan* compels granting his petition here. The Court disagrees. Unlike Daley, Kwan challenged his conviction shortly after an immigration judge determined that Kwan would be deported. *See Kwan*, 407 F.3d at 1009. In that regard, Kwan raised the issue of his counsel's affirmative misadvice in a reasonably short time after learning of its adverse impact. *Id.*; *see also Akinsade*, 686 F.3d at 252. By contrast, Daley knew as early as August 2003 that his cooperation did not remove the possibility of deportation, and he took no action. Daley then became certain of the now-challenged error when the final order of deportation was issued in March 2004. Yet not until August 2015, ten years later, did Daley challenge the validity of his underlying 2002 conviction. *Kwan* cannot provide legal justification for Daley's delay.

In finding that Daley failed to marshal "sound reasons exist for [his] failure to seek appropriate relief," the Court is mindful that the law does not require a petitioner to challenge such infirmities at the first opportunity. *Morgan*, 346 U.S. at 512; *Swaby*, 855 F.3d at 239 n.3 (citing *Castro v. United States*, 540 U.S. 375, 381 (2003)). That said, Petitioner must nonetheless provide "sound reasons for not doing so." *Kwan*, 407 F.3d at 1014. To forgive delay on less proof would set up disfavored incentives for petitioners to put off challenges to their convictions so as to bypass the stringent procedural requirements of seeking habeas corpus relief under 21 U.S.C. § 2255. A consequential corollary would be that courts are left to adjudicate later-filed challenges with witnesses hampered by fading memories and missing records from the passage of time. *Accord Hanan*, 402 F. Supp. 2d at 684 (noting that "[c]ourts have properly recognized that, were coram nobis relief granted with any regularity, courts would be overrun with endless relitigation of criminal convictions.") (citing *United States v. Keogh*, 391 F.2d 138, 148 (2d Cir. 1968)).

In sum, after close review of Daley's immigration file, criminal records, and his testimony over two separate proceedings, the Court finds that Daley has not sustained his burden to give "sound reason" for the delay in bringing this challenge.[5] Accordingly, the Petition for Writ for Coram Nobis is denied. A separate Order follows.

5/4/2018
Date

/s/
Paula Xinis
United States District Judge

[5] Because the Court finds that Daley has not met his burden on the second factor, it declines to reach the fourth factor. *See, e.g. Fernandez-Garcia*, 2013 WL 5372745, at *3.