

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

FILED

AUG 29 2019

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ABRAHAM HERNANDEZ-ZAVALA,

Defendant-Appellant.

No. 18-55267

D.C. Nos. 3:12-cv-00228-DMS  
3:11-cr-05082-DMS-3

Southern District of California,  
San Diego

ORDER

Before: THOMAS, Chief Judge, FRIEDLAND and BENNETT, Circuit Judges.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

Hernandez-Zavala's petition for panel rehearing and petition for rehearing en banc (Docket Entry No. 28) are denied.

No further filings will be entertained in this closed case.

NOT FOR PUBLICATION

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FOR THE NINTH CIRCUIT

MAY 23 2019

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U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

No. 18-55267

Plaintiff-Appellee,

D.C. Nos. 3:12-cv-00228-DMS  
3:11-cr-05082-DMS-3

v.

ABRAHAM HERNANDEZ-ZAVALA,

MEMORANDUM\*

Defendant-Appellant.

Appeal from the United States District Court  
for the Southern District of California  
Dana M. Sabraw, District Judge, Presiding

Submitted May 21, 2019\*\*

Before: THOMAS, Chief Judge, FRIEDLAND and BENNETT, Circuit Judges.

Abraham Hernandez-Zavala appeals pro se from the district court's judgment denying his petition for a writ of error coram nobis. We have jurisdiction under 28 U.S.C. § 1291 and, reviewing de novo, *see Matus-Leva v. United States*, 287 F.3d 758, 760 (9th Cir. 2002), we affirm.

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\* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

\*\* The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

“The writ of error coram nobis is a highly unusual remedy, available only to correct grave injustices in a narrow range of cases where no more conventional remedy is applicable.” *United States v. Chan*, 792 F.3d 1151, 1153 (9th Cir. 2015). Hernandez-Zavala’s petition argued that his 2012 conviction for attempted entry after deportation, in violation of 8 U.S.C. § 1326, should be vacated due to an alleged error in the presentence report. However, the district court properly denied the petition because Hernandez-Zavala is currently “in custody” in connection with his 2012 conviction. *See United States v. Montreal*, 301 F.3d 1127, 1132 (9th Cir. 2002). “A person in custody may seek relief pursuant to 28 U.S.C. § 2255.” *Matus-Leva*, 287 F.3d at 761. Therefore, Hernandez-Zavala cannot avail himself of coram nobis relief because he cannot show that a more usual remedy is unavailable to attack his conviction. *See id.*

In light of this disposition, we do not reach the parties’ remaining arguments.

**AFFIRMED.**

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

10 UNITED STATES OF AMERICA,  
11 Plaintiff,  
12 vs.  
13 ABRAHAM HERNANDEZ-  
14 ZAVALA,  
Defendant.

CASE NO. 11cr5082 DMS

**ORDER DENYING PETITION FOR  
WRIT OF ERROR *CORAM NOBIS***

15 On November 23, 2011, Defendant Abraham Hernandez-Zavala pleaded guilty  
16 to one count of violation of 8 U.S.C. § 1326(a) and (b), attempted entry into the United  
17 States after deportation. On February 23, 2012, this Court sentenced Defendant to 48  
18 months in prison followed by 2 years of supervised release.

19 On January 10, 2013, Defendant filed a motion to correct his sentence pursuant  
20 to 28 U.S.C. § 2255. In that motion, Defendant argued he received ineffective  
21 assistance of counsel in two respects. First, he claimed his counsel promised him he  
22 would receive a 27-month sentence as part of his plea agreement. Defendant asserted  
23 he accepted the agreement on that condition, but his sentence exceeded that time,  
24 thereby rendering his plea involuntary. Second, Defendant contended his counsel was  
25 ineffective for allowing him to be present at his sentencing hearing in a prison jumpsuit  
26 and shackles. The Court denied that motion on July 19, 2013.

27 On May 28, 2015, Defendant was again deported to Mexico. While on  
28 supervised release in this case, Defendant again entered the United States illegally, this

1 time across the border with Texas. Defendant was apprehended by federal authorities  
 2 and charged with illegal reentry in the United States District Court for the Southern  
 3 District of Texas. While that case was pending, this Court issued an arrest warrant for  
 4 Defendant for violating the terms of his supervised release. The Court thereafter  
 5 transferred jurisdiction over Defendant's supervised release to the Southern District of  
 6 Texas. Defendant eventually pleaded guilty to the illegal entry charge in that court, and  
 7 was sentenced to 83 months on that count and 18 months on the supervised release  
 8 violation to run consecutively to the other sentence. Defendant appealed that sentence  
 9 to the United States Court of Appeals for the Fifth Circuit, which affirmed the district  
 10 court.

11 On January 26, 2017, Defendant filed the present petition for a writ of error  
 12 *coram nobis* seeking expungement of his conviction in this case. As in the Texas court,  
 13 Defendant here contends the knife allegation was improperly included in his PSR.<sup>1</sup> As  
 14 a result of this alleged error, Defendant contends the Bureau of Prisons has classified  
 15 him as a violent sex offender, which is affecting his current placement and custody.  
 16 The Government opposes this request on several grounds, First, it argues *coram nobis*  
 17 relief is unavailable because Defendant is still "in custody." Second, the Government  
 18 asserts Defendant waived his right to collaterally attack his conviction in this case when  
 19 he pleaded guilty. Third, the Government contends that to the extent the Court  
 20 construes the present petition as a motion under 28 U.S.C. § 2255, it is untimely, subject  
 21 to a procedural bar and an unauthorized second or successive motion. Finally, the  
 22 Government argues Defendant's substantive arguments are without merit.

23 " "[T]he writ of error *coram nobis* is a highly unusual remedy, available only to  
 24 correct grave injustices in a narrow range of cases where no more conventional remedy  
 25 is applicable." " *United States v. Chan*, 792 F.3d 1151, 1153 (9<sup>th</sup> Cir. 2015) (quoting

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27 <sup>1</sup> The PSR describes a prior allegation of rape against Defendant involving the  
 28 use of a knife. It appears Defendant was not charged with rape in that case, but was  
 instead charged with kidnapping, coercion and assault, and thereafter pleaded guilty to  
 the latter two charges.

1 *United States v. Riedl*, 496 F.3d 1003, 1005 (9<sup>th</sup> Cir. 2007)). A petitioner is not entitled  
 2 to *coram nobis* relief unless the following four factors are met: “(1) a more usual  
 3 remedy is not available; (2) valid reasons exist for not attacking the conviction earlier;  
 4 (3) adverse consequences exist from the conviction sufficient to satisfy the case or  
 5 controversy requirement of Article III; and (4) the error is of the most fundamental  
 6 character.” *Id.* (quoting *Riedl*, 496 F.3d at 1006)).

7 Here, Defendant cannot meet the first requirement because he is currently in  
 8 custody, and thus has the option of filing a motion under § 2255.<sup>2</sup> *See Matus-Leva v.*  
 9 *United States*, 287 F.3d 758, 761 (9<sup>th</sup> Cir. 2002) (stating writ of error *coram nobis* is not  
 10 available when petitioner is in custody and may file a habeas petition). That Defendant  
 11 would have to seek permission to file a second motion under § 2255 in this Court does  
 12 not make that remedy unavailable. *See Rafus v. United States*, No. CV 13-5082-JVS  
 13 (JEM), 2014 U.S. Dist. LEXIS 112596, at \*6 (C.D. Cal. June 3, 2014) (citing *Matus-*  
 14 *Leva*, 287 F.3d at 761) (“A Section 2255 remedy is not unavailable for purposes of  
 15 *coram nobis* relief merely because the petitioner may not be able to meet the  
 16 requirements for filing a second or successive petition.”); *United States v. Grant*, Nos.  
 17 H-09-424-3, H-17-1498, 2017 U.S. Dist. LEXIS 214373, at \*9 (S.D. Tex. Sep. 11,  
 18 2017) (“inability to satisfy the stringent standards for filing a successive § 2255 Motion  
 19 ... is not a ‘sound reason’ for purposes of obtaining a writ of *coram nobis*.”) Nor is that  
 20 remedy unavailable because Defendant is currently in custody on a separate conviction.  
 21 *See Brim v. United States*, No. 2:15-CV-7496-SVW, 2:88-CR-886-JDG, 2016 U.S.  
 22 Dist. LEXIS 155701, at \*3-4 (C.D. Cal. Nov. 9, 2016) (rejecting argument that *coram*  
 23 *nobis* was appropriate remedy because defendant was in custody on separate,  
 24 subsequent conviction).

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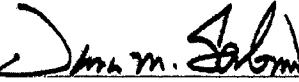
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28       <sup>2</sup> Indeed, Defendant filed a § 2255 motion in the Texas court on February 7,  
 2018.

1 Because Defendant has a more usual remedy available, he is not entitled to *coram  
2 nobis* relief in this case. *Matus-Leva*, 287 F.3d at 760 (stating failure to meet any one  
3 of the requirements is fatal). Accordingly, the petition is denied.

4 **IT IS SO ORDERED.**

5 DATED: February 15, 2018

6   
7 HON. DANA M. SABRAW  
8 United States District Judge

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