No. 19-7269

In The

SUPREME COURT OF THE UNITED STATES

James Robertson

*Petitioner*

V.

ORIGINAL

United States of America

*Respondent*



On a Petition for a Writ of Certiorari to
The United States Court of Appeals
For the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

James Robertson
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Coleman, FL 33521

# THE QUESTIONS PRESENTED

1. A petition for the ancient writ of *Coram nobis* calls for an adjudication of the facts as well as the law. The District court dismissed the action as untimely without considering the factual questions. The Court of Appeals likewise denied the appeal without any of the exploration of the facts as would have been seen in a normal plenary action when the government moved for summary disposition. In this case, the pivotal issue is a letter the plaintiff sent to the trial judge which he says contains information that will prove he was promised transactional immunity. In the normal course of events, that letter would have had to have been produced. It was avoided because the court granted a motion summary disposition. Is summary disposition appropriate when considering this or any other *Coram nobis* petition?

2. The Court of Appeals said the petitioners *Coram nobis* petition came too late. But this court has never established a bright line "statute of limitations" for such a petition, and in the leading case, the petitioner waited seven years before filing his case. Under the circumstances presented, was seven years after completing his sentence too long?

3. The general description of frivolous in Federal law is a position which cannot be supported by fact, existing law or extension of existing law. But the Court of Appeals said that because of the five-year delay the case was frivolous. Did the petitioner's reliance on the five years which passed in the controlling law make his claim "frivolous"?

## PERSONS AFFECTED BY THIS PETITION

1. Deyer, Dionja L., Federal Public defender

2. Flanagan, Dyril L., Esq

3. Merryday, Hon. Steven D., U.S. District Judge

4. Porcellim Hon. Anthony E, U.S. Magistrate Judge ((solely in his capacity as a former Assistant U.S. Attorney)

5. Bjon Brunvand, petitioner's trial attorney

## JURISDICTION

The District court had jurisdiction because this was a criminal prosecution under 18 USC § 1959. The Court of Appeal had jurisdiction under 28 USC § 1291 (a) because it was an appeal of a final order from the District court. This court has jurisdiction under 28 USC § 2101 (b).

Review is sought from the Order of the U.S. Court of Appeals in Case 19-1026 denying a motion for reconsideration dated September 18, 2019

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## APPENDIX

## STATEMENT OF THE CASE

The *pro se* petitioner, James P. Robertson Jr. in 2002 brings this petition for a writ of certiorari asserting that the actions described below violated both his substantive and procedural right to due process as guaranteed by the Fifth Amendment of the U.S. Constitution.

Mr. Robertson was under indictment on a charge of armed bank robbery. Seeking a plea bargain, he said he had information about a "cold case," the murders of two vagrants. In exchange for helping Federal prosecutors solve them, he was promised transactional immunity from prosecution in the murders and that he would be released into the Witness Protection Program when he pled guilty to the bank robbery charge.

When a few weeks after his bank robbery conviction he had not been released from confinement, as promised, he realized he'd been tricked and wrote to the judge in that case providing fulsome detail --- Names, dates, places --- that would detail that he was promised such immunity.

The judge did not respond to the letter in 2003. It was sealed "at the request of the prosecutor." Still in jail, he received a telephone call from the FBI agent who had been involved with the plea bargain negotiations telling him that his letter had been sealed because it was compromising to the prosecutor, who was

then being considered for a post as a U.S. Magistrate judge (which he eventually became).

He began the action for which he seeks review here attempting to have the letter to the judge unsealed, because he believes that the details in it, written contemporaneously with the event and containing details, corroborate his story of promised immunity. Acting *pro se* he brought it in 2018 pursuant to FRCP 60 (b). The District court dismissed his action because it was brought under a civil statute. The Eleventh Circuit accepted his argument that it should have been considered as a petition under the ancient writ of *coram nobis* because it was brought under the index number for the bank robbery and having finished his sentence for the crime he was no longer in custody for that crime. The 11th Circuit said it was too late and frivolous.

No court has ever looked at his letter to the judge.

He asserts that pursuant to controlling law, he was not too late, his claim is not frivolous, and the actions more fully described below violation his rights to both procedural and substantive due process, and the decisions were contrary to precedents establish by this court.

He denies that he an active participant in the migrant killings, and asserts he would never have pled guilty in the bank robbery case unless he'd been promised immunity, pointing to the obvious: What man throws himself under the bus in a

murder case where the prosecution has no inkling he was involved without some sort of plea deal?

***The facts of this case***

Mr. Robertson's 2002 bank robbery case was captioned *U.S v. Schroder et al*, (U.S. District Court for the Middle District of Florida, 8:02-cr-30). This is the case and index number under which Mr. Robertson brought this action.

Mr. Robertson had on July 25, 2002 (Docket 63) reached a plea bargain but withdrew it and fired the public defender who had arranged it when he learned it would require him to testify against a white supremacist gang member in open court, which he feared would be perilous to his safety. (Docket120) .[1] His family retained a new lawyer, Dyril Flanagan. Mr. Robertson told Mr. Flanagan that he could provide evidence that would lead to the solution of the high profile, cold case --- the murder of two vagrants --- in exchange for a reduced sentence and protection from "white supremacy" gang members involved in the murders.

Mr. Flanagan contacted Anthony Porcelli, then an assistant U.S. Attorney. In March of 2003 Mr. Robertson and consequently he was visited by FBI agents Jose Olivera and Carl Cuneo at the Morgan Street county jail in Tampa, FL where he was held awaiting trial. At this meeting, the FBI agents said that Mr. Robertson would have to reveal some details about the murders to prove he had useful

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[1] These docket numbers here refer to the bank robbery case

information to offer. Mr. Flanagan did this by disclosing where the murders took place. A second meeting was attended by Mr. Robertson's lawyer. Mr. Flanagan, FBI agents Olivera and Cuneo, and the Assistant U.S. Attorney, Porcelli. [2]

At that meeting, the government promised that if Mr. Robertson did not contest the bank robbery charges and provide investigators with sufficient evidence to convict gang members who had committed the murders, in return, the prosecutor would recommend a lower sentence on the pending bank robbery, he would not be charged him in the murders, and he would be given a new identity and during his bank robbery interment placed in the Witness Protection Program ("WITSEC"- 18 USC § 3521) to protect him from retribution by "white supremacy" gang members.

At this point, Robertson asked that the offer be put in writing, but Mr. Porcelli told him in front of Mr. Flanagan that "agreements like this are not put in writing – trust me." Olivera told him that the offer given was "the same one as given 'Sammy the Bull.'" (This was a reference to Sam Graviano, a New York mob hit man, who in 1994, in exchange for his cooperation in solving Mafia crimes, was sentenced to only five years in prison, and on his release, was provided a new identity in Arizona.)

When he arrived in court for sentencing on July 9, 2003, his new lawyer, Mr. Flanagan told Mr. Robertson the Porcelli had directed that he was not to

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[2] Magistrate Porcelli has testified he "can't be 100% certain" whether or not he was there. His assistant says she thinks he was there but cannot be "100% certain."

mention the plea agreement: "Just go ahead, everything is fine." Accordingly, he pleaded guilty without a plea bargain and was sentenced to 10 years in prison. When he wasn't released into the WITSEC program within a few days, Mr. Robertson realized that he had been tricked into pleading guilty without any plea bargain and wrote to Judge Merryday who has presided at the bank robbery trial describing the offer in detail and asking for his help.

At this point, he was transferred to a jail in Charlotte County. There he was asked to pick up a phone near the guard's station for an incoming call. The caller proved to be Cuneo, the FBI agent, who said he'd learned about the letter to Judge Merryday. Cuneo said it had come at a crucial time --- Porcelli was being considered for a post as a Federal magistrate, and Robertson's letter had thrown a monkey wrench into the process. Cuneo told Robertson that Porcelli had gone to great lengths to convince Judge Merryday that the letter should be sealed (September 7, 2003, Docket 148). Cuneo told Robertson "never try to contact the judge again" and there would be "serious consequences" if he did. Cuneo then visited Robertson in jail and repeated the same threats.(Mr. Porcelli was eventually appointed a U.S. magistrate.).

Despite the promises from the FBI and prosecutor that in exchange for his cooperation when led to the solving the vagrant murders, his sentence on the bank robbery would be reduced, he would not be prosecuted on murder charges and he'd

be given a new identity and placed into the witness protection program, on May 22, 2008 Mr. Robertson was indicted on two counts of murder under 18 USC 1959 (a) (1) and two counts of maiming under 18 USC 1959 (a) (2). (*U.S. v. Robertson*, 8:02-cr-00030-SDM-AAS).

He was convicted after a jury trial on December 22, 2011 and sentenced to life imprisonment without parole.

On April 12, 2012, Mr. Robertson tried to raise the question of the promise of immunity in a post-conviction. [3] He had retained a new attorney for the murder trial, Bjorn Brunvand who stated at that hearing that Mr. Flanagan, the lawyer who was present during the bank robbery trial when Porcelli offered full immunity to Mr. Robertson in exchange for evidence that solved the vagrant murders and resulted in the convictions of three other persons had signed an affidavit corroborating Mr. Robertson's story... but flipped 180 percent and said he'd signed the affidavit by error. Mr. Brunvand's description of the Flanagan affidavit can be found at Case 8:308-cr-00240-EAK-TBM, Document 206, starting on Page 842, but is briefly summarized below:

> "The specific facts that are set forth in the original affidavit he (Mr. Flanagan) understood that he was coming forth with very serious information....and because of the serious nature of --- of --- the information that they proceeded to have meeting with the authorities and that he

[3] (*U.S. V. Robertson,* 8:08-cv-EAK-TBM, Document 206)

understood there are a proffer agreement and the government....And that the basic understanding that Mr. Flanagan had was that his client would be a cooperating witness.

"That any statements provided by his client would not be used against him in a later criminal prosecution. That any evidence located by his client on behalf of law enforcement would not be used against him. That his client was provided immunity. That he, Derald Flanagan was present when in a meeting with state and federal authorities and AUSA Anthony Porcelli..explained the ground rules of the cooperation set forth above. Now he basically says he would say that he doesn't even know what Porcelli looks like. He can't say whether or not Porcelli was there. And there was ---as far as he's concerned, there was no understanding."

Mr. Flanagan was never called to testify though he was present in the courthouse that day. His affidavit appears to have disappeared. He continues to appear as a criminal defense lawyer before Magistrate Porcelli.

Mr. Robertson believes that the sealed letter, together with the missing sworn-but-recanted Flanagan letter, and others he believe would be outed by the sealed letter, will prove he was promised immunity for helping Porcelli solve the vagrant murders.

He has completed his 10-year sentence for the bank robbery conviction but he is still in prison serving his murder convictions. He believes that there is other collateral evidence to back up his story, but that release of his contemporary letter to Judge Merryday from seal will be powerful evidence.

***Arguments of Law***

In *Colorado Springs v. Rizzo (* 428 U.S.914 (1976)) this court recognized the shortcomings of summary disposition, noting that these "rarely contain more than brief discussions of the issues presented - certainly not the full argument we expect in briefs where plenary hearing is granted."

This court went on to state in another case concerning summary disposition that such decisions are "somewhat opaque," (*Colorado Springs v. Rizzo,* cited above,) and we cannot deny that they have sown confusion."

In contrast, the function of *coram nobis* is for the correction of error of fact not apparent on the record and which, if known to the court, would have prevented the entry of judgment. (*Lipscomb v. United States*, 273 F.2d 860, 865 (8th Cir.1960)). [Emphasis added] . "The writ allows a court to vacate a judgment for errors of fact as well as for egregious legal errors." *Martinez v. U.S.*, 90 S Supp. 2d 1072 (D.C. Hawaii, 2000)

In *U.S. v. Adley*, (2019 US app lexis 2433) the Eleventh Circuit, from is taken ruled that coram nobis is appropriate "where (1) time is of the essence, such as situations where important public policy issues are involved or those where rights delayed are rights denied, or (2) the position of one of the parties is clearly right as a matter of law so that there can be no substantial question as to the

outcome of the case, or where, as is more frequently the case, the appeal is frivolous. An appeal is frivolous if it is without arguable merit either in law or fact."

In Robertson's appeal before that panel, recognized tit held that while his reliance on *coram nobis* was correct, his case was frivolous because "there is no substantial question as to the outcome of this case."

That conclusion appears to be based on the calculation that Mr. Robertson waited "15 years" to file the instant motion. In measuring that time period, the Eleventh Circuit relied on *U.S. v. Morgan*, 346 U.S. 502 (1954), which is considered the controlling law on whether the writ of *coram nobis* was still available in current practice,

The All Writs Act, (28 U.S.C.S. § 1651) gives federal courts authority to issue writs of error coram nobis A writ of error coram nobis is a remedy available to vacate a conviction when the petitioner has served his sentence and is no longer in custody, as is required for post-conviction relief under *habeas corpus*. (*U.S. v. Audley* 2019 U.SA. App. Lexis, 2433 (Eleventh Circuit, 2019)).

The statute of limitations for appealing a criminal conviction is 14 days, (CR 2-4.112. ) Mr. Robertson had pled guilty to the bankruptcy charge and did not even know he'd been tricked into such a plea until two weeks had passed. The Statute of Limitations on *habeas corpus* is one year. Both require the need to "correct an

error." But in Mr. Robertson's case, there was no "error to correct" because the promise to not prosecute him in the vagrant killings and release him into the WITSEC program was not in the record.

And in any event, the provision of 28 U.S.C. § 2255 that a prisoner "in custody" may move the court which imposed the sentence to vacate it, if "in violation of the Constitution or laws of the United States," does not supersede all other remedies in the nature of *coram nobis*. (see *Morgan*, cited above).

As recognized in *U.S. v. Audlet,* cited above, he could not object through the writ of *coram nobis* as long as he was in custody on the bank robbery conviction. That 10-year sentence ran out in 2013. So the window between the end of his bank robbery sentence and bringing this action was five years.

In the *Morgan* case, the petitioner was convicted to four years in prison on an undisclosed Federal crime, and was released in 1943. He apparently did not bring the *coram nobis* claim until 1953, a decade later, and only then, to correct a 1950 New York state sentence which was enhanced because he was a second offender.

Thus this court did not find a 10-year lapse (from finishing his time in Federal prison) or a three year one (from the imposing of the enhanced state conviction) to be a bar to bringing a writ of *coram nobis.*

In coming to the conclusion that Mr. Robertson had waited too long to seek relief via *coram nobis*, the Eleventh Circuit relied on language from

*U.S. v. Meyer*, 235 U.S, 55 (1914). However, *Mayer* was written when a court only had power to review a decision during its term, and that procedure became obsolete with the passing of the Federal Rules of Civil Procedure.

Thus:

a. The government's motion consisted of a sparse 10 pages, most of which were devoted to arguing (incorrectly) that Mr. Robertson's pleading should not have been considered under the writ of *coram nobis.* Nowhere does it discuss the factual errors raised by Mr. Robertson, most particularly the "sealed" letters, Since the point of a *coram nobis* petition is to deal with facts which "do not appear on the record," his (or any other plaintiff's) *coram notice* cannot be deal with by summary disposition.

b. The Court of Appeals set a deadline based on an outdated 1914 precedent in hold that Mr. Robertson's *coram nobis* petition was too late. This court has not

in fact ever set a bright line for a *coram nobis* petition becomes untimely did not bar the writ. In Morgan cited earlier, this court found no barrier in brining that petition even though more than a decade had passed between the end of the prison sentence and the filing of the writ. In that light, the five years that passed in Mr. Robertson's can cannot before untimely.

c. Similarly, the Eleventh Circuit found Mr. Robertson's petition was frivolous because it was "late." As above,, since his petition was not "late" it was not frivolous. It should be note that at no time did the Attorney General send Mr. Robertson a "safe harbor" letter alleging his petition was frivolous and he faced sanctions. Reading his petition alongside the *Morgan* case clearly demonstrates that his arguments are supported by existing precedents or good faith extension of these, and as such could not be dismissed as "frivolous."

***Why this petition should be granted***

"Summary disposition" is a fast-growing weapon in the arsenal of the Department of Justice. It seems that there is no case which is pleaded that cannot be attacked as "frivolous" and deal with by a few cut-and-paste precedents.

But "summary disposition" should *never* be appropriate when applied to a *coram nobis* petition seeking to correct a manifest injustice, as these *per se*

generally do not appear on the record, and a *coram nobis* petition demands the inspection than can only come from a review as provided by a plenary review.

There is a second reason. Mr. Flanagan advertises on his web page that his stock in trade is criminal defense. Normally, every case has a magistrate as well as a judge assigned to it. There are six magistrate's including Judge Porcelli in the Tampa division. The odds of Mr. Flanagan coming into Judge Porcelli's courtroom on behalf of a client numerous times a year are likely.

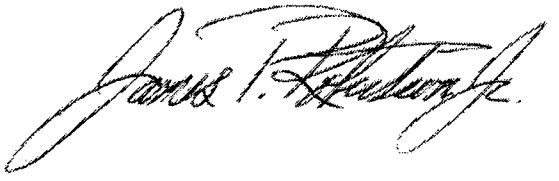
Obviously, with a busy criminal defense practice, Mr. Flanagan is in good odor with Judge Porcelli. Yet, Mr. Flanagan signed a sworn affidavit (never formally withdrawn), the Porcelli has a prosecutor committed perjury when he denied he has promised immunity to Mr. Robertson.

There is no doubt that a spirit of collegiality binds the judges of the Florida Middle District and those of the Eleventh Circuit. Mr. Robertson does not propose that this bond extends to covering for a colleague's actions in a prior role. But he suggests that when faith in the judiciary is paramount that Mr. Robertson's petition should not have been cast off by a summary disposition, with not a word to appear in a public record that Porcelli's veracity had been challenged.

These facts create an aura of suspicions amongst the general public, which must be swept away, not buried on summary disposition without examining the facts.

WHEREFORE, Mr. Robertson asks that his petition for a writ of certiorari be granted.

Respectfully,



James P. Robertson Jr. January 1, 2020

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