APPENDIX
A-1

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-10686
Non-Argument Calendar

D.C. Docket No. 4:00-cr-00007-HLM-WEJ-3

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

KENNETH DARNELL WILLIAMS,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Georgia

(February 5, 2021)

Before LUCK, LAGOA, and BLACK, Circuit Judges.

PER CURIAM:

Kenneth Darnell Williams, a former federal prisoner proceeding *pro se*,[1] appeals the district court's denial of his petition for a writ of error *coram nobis* or, alternatively, for a writ of *audita querela* challenging a 2000 federal conviction for which he has completed his sentence. Williams first reiterates the merits of his ineffective assistance of counsel claim and contends he did not learn that his trial counsel failed to file an appeal until November 2017 when he hired a new attorney to litigate a motion to vacate his state convictions. He also reiterates his claim of newly discovered evidence and argues he could not have discovered the facts underlying his codefendants' affidavits earlier or received the affidavits sooner. Finally, Williams argues that the district court erred by not holding an evidentiary hearing on his petition. After review,[2] we affirm the district court.

I. DISCUSSION

A. Ineffective Assistance of Counsel Claim

First, neither writ of error *coram nobis* nor writ of *audita querela* was available as to Williams's ineffective assistance claim because that claim was

[1] "*Pro se* pleadings are held to a less stringent standard than pleadings drafted by attorneys and will, therefore, be liberally construed." *Tannenbaum v. United States*, 148 F.3d 1262, 1263 (11th Cir. 1998).

[2] We review a district court's denial of a petition for writ of error *coram nobis* for abuse of discretion. *Alikhani v. United States*, 200 F.3d 732, 734 (11th Cir. 2000). We review "*de novo* the question of whether a prisoner may challenge his sentence by filing a motion for a writ of *audita querela*." *United States v. Holt*, 417 F.3d 1172, 1174 (11th Cir. 2005).

cognizable only in a timely 28 U.S.C. § 2255 motion. *See, e.g., United States v. Patterson*, 595 F.3d 1324, 1328-29 (11th Cir. 2010); *see also United States v. Holt*, 417 F.3d 1172, 1175 (11th Cir. 2005) ("[W]e hold that a writ of *audita querela* may not be granted when relief is cognizable under § 2255."); *Alikhani v. United States*, 200 F.3d 732, 734 (11th Cir. 2000) ("[T]he writ [of error *coram nobis*] is appropriate only when there is and was no other available avenue of relief."). This rule applies even though Williams's only remaining remedy may be to seek leave from this Court to file a successive § 2255 motion. *See Holt*, 417 F.3d at 1175. Moreover, Williams's argument that he was unaware that his trial counsel did not file an appeal until over a decade after his judgment became final does not constitute a sound reason for failing to seek relief earlier; he has not explained why he could not have inquired as to the status of an appeal and has not asserted that he followed up with trial counsel after his sentencing proceedings. *See United States v. Mills*, 221 F.3d 1201, 1204 (11th Cir. 2000) (stating courts may consider a *coram nobis* petition only when there are sound reasons for the petitioner's failure to seek relief earlier).

B. Newly Discovered Evidence Claim

Second, Williams's newly discovered evidence claim was not cognizable in a *coram nobis* proceeding because it did not constitute an error of fundamental character. *See id.* Likewise, Williams was not entitled to *audita querela* relief as

to that claim because Federal Rule of Criminal Procedure 33 controlled the claim rather than the All Writs Act,[3] which is available only where there was or is no other remedy. *See Holt*, 417 F.3d at 1174-75 (stating the writ of *audita querela* continues to exist only to the extent necessary to fill in the gaps not covered by federal post-conviction remedial law); *see also Pa. Bureau of Corr. v. U.S. Marshals Serv.*, 474 U.S. 34, 43, 106 S. Ct. 355, 361 (1985) (explaining that, where another law specifically addresses a particular issue, the All Writs Act is not controlling). To the extent Williams has framed his newly discovered evidence challenge as an extension of his ineffective assistance claim—a claim which arises under the Sixth Amendment—such a claim was cognizable only in a § 2255 motion. *See Holt*, 417 F.3d at 1175. To the extent such a claim can be construed as a due process challenge, *audita querela* relief was not available for the same reason. *See id.*

C. Evidentiary Hearing

Finally, the district court did not err by declining to hold an evidentiary hearing because even if Williams's allegations are true, he would not be entitled to *coram nobis* or *audita querela* relief.[4] *See Aron v. United States*, 291 F.3d 708,

[3] 28 U.S.C. § 1651(a).

[4] This Court has not yet specified a standard of review for the denial of an evidentiary hearing for a petition for a writ of error *coram nobis* or a writ of *audita querela*; however, in

715 (11th Cir. 2002) ("[A] district court is not required to hold an evidentiary hearing where the petitioner's allegations are affirmatively contradicted by the record, or the claims are patently frivolous . . . .").

II. CONCLUSION

Accordingly, we affirm the district court's denial of Williams's petition for a writ of error *coram nobis* or a writ of *audita querela*.

AFFIRMED.

---

other contexts, a district court's denial of an evidentiary hearing is reviewed for an abuse of discretion. *See Aron v. United States*, 291 F.3d 708, 714 n.5 (11th Cir. 2002).

APPENDIX
A-2

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

UNITED STATES OF AMERICA, v. KENNETH DARNELL WILLIAMS, Defendant.	CRIMINAL FILE NO. 4:00-CR-007-03-HLM-WEJ

ORDER

This case is before the Court on Defendant's Motion for a Writ of Error Coram Nobis, or, Alternatively, for a Writ of Audita Querela [181].

I. Background

On February 8, 2000, a federal grand jury sitting in the Northern District of Georgia returned an indictment against Defendant and two co-defendants. (Indictment (Docket Entry No. 1).) The indictment charged Defendant with two counts of

conspiring to distribute narcotics, in violation of 21 U.S.C. § 846. (Id.) Defendant proceeded to a jury trial, and, on June 27, 2000, a jury found Defendant guilty on count one and not guilty on count two. (Jury Verdict (Docket Entry No. 67).) On August 25, 2000, the Court sentenced Defendant to seventy-two months of imprisonment, to be followed by six years of supervised release. (Docket Entry No. 76.) On August 28, 2000, the Court entered its Judgment and Commitment Order. (Judgment & Commitment Order (Docket Entry No. 77).) Defendant did not file a direct appeal. On August 10, 2010, the Court signed an Order terminating Defendant's supervised release. (Petition & Order Terminate Supervised Release (Docket Entry No. 115).)

On April 13, 2018, Defendant signed and mailed a Motion to Vacate, Set Aside, or Correct Sentence under 28 U.S.C. § 2255 ("§ 2255 Motion"). (§ 2255 Motion (Docket Entry No. 148).) Defendant argued that: (1) his counsel provided ineffective assistance, including by failing to file a notice of appeal; and (2)

no evidence supported his conviction because the primary prosecution witness committed perjury. (Id. at 1-4.)

United States Magistrate Judge Walter E. Johnson recommended that the Court dismiss the § 2255 Motion as untimely. (Final Report & Recommendation (Docket Entry No. 149).) On May 14, 2018, the Court adopted Judge Johnson's Final Report and Recommendation and dismissed the § 2255 Motion as untimely. (Order of May 14, 2018 (Docket Entry No. 154).) The Court denied Defendant's Motion to Reinstate his § 2255 Motion. (Order of May 24, 2018 (Docket Entry No. 158).) Defendant appealed, and the United States Court of Appeals for the Eleventh Circuit ultimately affirmed the denial of the § 2255 Motion, concluding that the Court lacked jurisdiction to consider that Motion because Defendant was no longer in custody under that conviction. Williams v. United States, 785 F. App'x 710 (11th Cir. 2019) (per curiam). The Eleventh Circuit issued its

mandate on October 3, 2019. (USCA Mandate (Docket Entry No. 174).)

On December 18, 2019, the Clerk received Defendant's Motion for a Writ of Error Coram Nobis, or, Alternatively, for a Writ of Audita Querela. (Mot. Writ Error (Docket Entry No. 181).) The Court ordered the Government to respond to that Motion. (Order of Dec. 19, 2019 (Docket Entry No. 183).) The Government responded as directed. (Resp. Mot. Writ Error (Docket Entry No. 187).) Defendant filed a reply in support of his Motion. (Reply Mot. Writ Error (Docket Entry No. 188).) The Court finds that the briefing process for the Motion is complete, and it concludes that the matter is ripe for resolution.

II. Discussion

Defendant has moved for a writ of audita querela, or, alternatively, for a writ of error coram nobis, arguing that he is entitled to this relief based on ineffective assistance of counsel and based on newly discovered evidence. (See generally Mot.

Writ Error.) In a recent case, the Eleventh Circuit discussed both writs, explaining:

> The All Writs Act grants federal courts the power to issue 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). However, "[t]he All Writs Act is a residual source of authority to issue writs that are not otherwise covered by statute. Where a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling." Pa. Bureau of Corr. v. U.S. Marshals Serv., 474 U.S. 34, 43, 106 S. Ct. 355, 88 L.Ed.2d 189 (1985). Accordingly, common law writs, such as coram nobis and audita querela, survive only to the extent that they "fill the interstices of the federal post-conviction remedial framework through remedies available at common law." United States v. Holt, 417 F.3d 1172, 1175 (11th Cir. 2005).
>
> Audita querela, like coram nobis, is an "extraordinary remedy" that is available "only under circumstances compelling such action to achieve justice." United States v. Morgan, 346 U.S. 502, 511, 74 S. Ct. 247, 98 L.Ed.2d 248 (1954). These writs may be used to correct "errors of the most fundamental character." Id. at 512, 74 S. Ct 247 (quotation marks, citation, and footnote omitted). See also United States v. Denedo, 556 U.S. 904, 911, 129 S. Ct. 2213, 173 L.Ed. 2d 1235 (2009) (noting that the Supreme Court . . . limits the use of extraordinary writs "to redress a fundamental error . . . as opposed to mere technical errors").

"'[C]ircumstances compelling such action to achieve justice' . . . exist only when the error involves a matter of fact of the most fundamental character which has not been put in issue or passed upon and which renders the proceeding itself irregular or invalid." Moody v. United States, 874 F.2d 1575, 1576-77 (11th Cir. 1989) (quoting Morgan, 346 U.S. at 511, 74 S. Ct. 247).

Although similar in nature, "[e]ach of the ancient writs permitted relief in different scenarios." Gonzalez v. Sec'y for Dep't of Corr., 366 F.3d 1253, 1289 (11th Cir. 2004). "Audita querela, Latin for 'the complaint having been heard', was an ancient writ used to attach the enforcement of a judgment after it was rendered." Holt, 417 F.3d at 1174 (citing Black's Law Dictionary 126 (7th ed. 1999)). The common law writ "typically 'afford[ed] relief to a judgment debtor against a judgment or execution because of some defense or discharge arising subsequent to the rendition of the judgment or the issue of the execution.'" Gonzalez, 366 F.3d at 1289 (quoting 11 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2687, at 398 (Civil 2d ed. 1995) (alteration in original). See also United States v. Miller, 599 F.3d 484, 488 (5th Cir. 2020) ("[Audita querela] can only be available where there is a legal objection to a judgment which has arisen subsequent to that judgment."). So long as there is another avenue for relief, a writ of audita querela is not appropriate. See Holt, 417 F.3d at 1174-75 (concluding that audita querela relief was improper

> because relief was cognizable under 28 U.S.C. § 2255).
>
> Coram nobis is a similarly extraordinary writ that may be used to remedy "mistakes of fact, not appearing on the face of the record, and but for which the judgment would not have been entered." Gonzalez, 366 F.3d at 1289 (quotation marks omitted). See also Miller, 599 F.3d at 487. Audita querela differs from coram nobis in that coram nobis attacks the judgment itself, which was unsound when rendered, whereas audita querela is directed against the enforcement of a judgment which, when rendered, was just and unimpeachable. See Miller, 599 F.3d at 487 (citing 7A C.J.S. Audita Querela § 4 (2004)). Stated another way, a writ of coram nobis is properly used to challenge a judgment that was infirm at the time it was rendered for reasons later coming to light, whereas a writ of audita querela is used to challenge a judgment that was correct at the time it was rendered but is made infirm by matters that arose after it was rendered. See United States v. Reyes, 945 F.2d 862, 863 n.1 (5th Cir. 1991) (comparing the Black's Law definitions of audita querela and coram nobis).

Ramdeo v. United States, 760 F. App'x 900, 902-03 (11th Cir. 2019) (per curiam) (some alterations in original). For the reasons discussed below, the Court declines to issue a writ of coram nobis or a writ of audita querela.

A. Writ of Error Coram Nobis

With respect to Defendant's request for a writ of error coram nobis, Defendant argues that his trial counsel provided ineffective assistance by disregarding Defendant's specific instructions to file a notice of appeal. Certainly, "[t]he writ of error coram nobis has been issued to remedy certain violations of the sixth amendment." Moody, 874 F.2d at 1577. For example, in United States v. Morgan, 346 U.S. 502 (1954), an uneducated and unrepresented nineteen-year-old defendant alleged that he was not advised of his constitutional rights and did not competently or intelligently waive his right to counsel before entering his guilty plea. 346 U.S. at 511-12. The Supreme Court noted: "Where it cannot be deduced from the record whether counsel was properly waived, we think, no other remedy being then available and sound reasons existing for failure to seek appropriate earlier relief, this motion in the nature

of the extraordinary writ of coram nobis must be heard by the federal trial court." Id. at 512 (footnote omitted).

This case, however, differs from Morgan. Here, Defendant was aware, or should have been aware, of the basis for his ineffective assistance of counsel claim at the conclusion of his case, after his counsel failed to file a notice of appeal within the applicable time period. Defendant should have raised this claim in a timely Motion filed under § 2255. With all due respect to Defendant, he has not established that there were sound reasons for failing to seek relief earlier. Because Defendant had "another remedy available for the sixth amendment violation alleged," he "cannot now have his conviction vacated via the extraordinary writ of error coram nobis." Moody, 874 F.2d at 1578 (footnote omitted).[1]

---

[1] The Eleventh Circuit noted that Defendant "would not be entitled to coram nobis relief because he could have challenged his federal conviction while still in custody pursuant to that conviction." Williams, 785 F. App'x at 713 n.1.

Defendant also cannot obtain coram nobis relief for his newly discovered evidence claim. According to Defendant, new affidavits from his co-defendants establish that he is not guilty of the offense charged in the indictment. A claim of newly discovered evidence relevant only to the guilt or innocence of a defendant, however, is not cognizable in a coram nobis proceeding. Mayer, 235 U.S. 55, 69 (1914). This rule is consistent with Federal Rule of Criminal Procedure 33, which requires that a motion for new trial based on newly discovered evidence be filed within three years after a verdict. Fed. R. Crim. P. 33(b)(1). Far more than three years have passed since the jury's verdict in Defendant's case, and a motion for new trial based on newly discovered evidence would clearly be time-barred. Id. Under those circumstances, Defendant cannot obtain a writ of coram nobis based on his newly discovered evidence claim. See Moody, 874 F.2d at 1577 ("The writ of error coram nobis . . . cannot be available for new evidence only

potentially relevant to an issue decided long ago by a jury for, if it were, the limitations of Rule 33 would be meaningless and the writ would no longer be extraordinary."); see also United States v. Mills, 221 F.3d 1201, 1203-04 (11th Cir. 2000) ("A court's jurisdiction over coram nobis petitions is limited to the review of errors of the most fundamental character. Such errors do not include . . . newly discovered evidence." (internal quotation marks and citations omitted)).

In sum, Defendant cannot obtain a writ of error coram nobis. The Court therefore denies the portion of Defendant's Motion that seeks a writ of error coram nobis.

B. Writ of Audita Querela

Defendant cannot obtain a writ of audita querela for his ineffective assistance of counsel claim, because that claim was cognizable under § 2255 and should have been asserted in a timely § 2255 Motion. Further, Defendant's newly discovered evidence claim would have been cognizable under Rule 33 but is

now time-barred. Fed. R. Crim. P. 33(b)(1). Allowing Defendant to invoke the writ of audita querela for that claim would render Rule 33's restrictions null and void, and "would prolong litigation once concluded, thwarting society's compelling interest in the finality of criminal convictions." Moody, 874 F.2d at 1577. The Court therefore denies Defendant's request for a writ of audita querela.

III. Conclusion

ACCORDINGLY, the Court **DENIES** Defendant's Motion for a Writ of Error Coram Nobis, or, Alternatively, for a Writ of Audita Querela [181].

IT IS SO ORDERED, this the 30th day of January, 2020.

SENIOR UNITED STATES DISTRICT JUDGE