21-5806
No.

ORIGINAL

IN THE
Supreme Court of the United States

ANTONIO MEDINA
Petitioner

vs.

UNITED STATES OF AMERICA
Respondent

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

PETITION FOR A WRIT OF CERTIORARI

Antonio Medina
P.O. Box 361361
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Petitioner

QUESTIONS PRESENTED

1. Whether the split in the Circuits regarding tests to grant coram nobis relief should remain unresolved.
2. Whether the test used by the 1st circuit violates due process of law and contravenes the Supreme Court doctrine about the issuance of writ coram nobis.
3. Whether the 1st circuit case *George* is bad law permitting biased rulings in coram nobis cases based on general rule and should be overruled by this court.
4. Whether the 1st circuit application of their own law, which contravenes that of the Supreme Court, permitting convictions of innocent people to remain is repugnant and/or should be sanctioned by this court.
5. Whether the 1st circuit court violates the fundamental principle *Nullum crimen sine lege* refusing to exonerate a person who has committed no crime but was wrongfully convicted by that court.
6. Whether due process is violated when circuit judges, and 1st circuit judges, in particular, can ignore challenges to their impartiality and proceed to decide a case and judgment while the challenge is raised is unresolved.
7. Whether judge Selya is biased and incompetent to rule in a corm Nobis case by reason of his stated opinion in *George*.
8. Whether the 1st circuit and lower courts in Massachusetts can continue their witch hunt[1] in the 21st century as they did in the 17th Century.

[1] "Witch hunt" is used here to refer to persecution of any person who is charged

LIST OF PARTIES AND RELATED CASES

All parties appear in the caption of the case on the cover page.

Lower court related cases:

Medina v. United States, No. 15-cv-14257, U. S. District Court for the District of Massachusetts. Judgment entered September 10, 2019.

Medina v. United States, No. 19-2179, U. S. Court of Appeals for the First Circuit. Judgment entered December 9, 2020. Rehearing denied on April 28, 2021.

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with an inexistent crime, not limited to witchcraft, consistent with the definition in Collins dictionary.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI.

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States court of appeals appears at **Appendix 1** to the petition and it is unpublished.

The opinion of the United States district court appears at **Appendix 2** and it is unpublished.

JURISDICTION

The judgment of the Court of Appeals for the First Circuit was entered on December 9, 2020.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: April 28, 2021, and a copy of the order denying rehearing appears at **Appendix 3**.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions involved are the Fifth Amendment right to due process of law, Sixth Amendment right to a fair trial; as well as right to seek redress or a legal remedy; right of freedom and of participation in civil society, and the right to petition.

The statutory provision involved is 18 U.S.C. § 1344 which provided, at relevant times (1986)[2]:

(a) Whoever knowingly executes, or attempts to execute, a scheme or artifice

(1) to defraud a federally chartered or insured financial institution; or

(2) to obtain any of the monies, funds, credits, assets, securities, or other property owned by or under the custody and control of a federally chartered or insured financial institution by means of false and fraudulent pretenses, representations or promises shall be fined ...

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[2] This vague statute has been interpreted many times by the Supreme Court which narrowed the scope given by circuit courts. The statute was enacted in 1984, 2 years before Petitioner's alleged violation in 1986. Because Petitioner was charged with a new law he did not have the benefit of the Supreme Court rulings in or before his direct appeal. For this reason, collateral attack like the present one is proper and expected.

I. STATEMENT OF THE CASE

1. Summary of current proceedings

The 1st Circuit panel let a conviction stand despite being convicted for something that is not a crime. Petitioner's "crime" was to deposit a check in his bank account. A check that was mailed to him from a third party. He had no part in the preparation of the check and he did not alter it in any way. What he did was perfectly ordinary conduct which can at best be considered a "but for" cause of a loss sustained by the bank due to other reasons including bank mistakes. *Loughrin* established that "but for" causation is not enough to convict of bank fraud.

This Appeals Court found that the tripartite test for granting coram nobis relief was not satisfied, but did not say why. The judgment goes against the compelling authority of the Supreme Court, this circuit and other circuits.

Petitioner's only request was and still is, that the error is corrected. Not only the panel of Lynch, Selya and Kayatta did not correct the error, but it appears that they ignored it. As explained in this brief, it is apparent that they did not bother to read the appeal brief. Judge Selya evidences in the judgment citing *George*, a case he wrote, that he thinks a coram nobis petition is like a game, with minuscule probability of success. It seems that

he is saying that since the general probability of granting the writ is low why to bother reading the brief and finding differently than usual. The judgment based on these premises is error and a biased judgment.

2. Summary of prior proceedings

The Petitioner, Antonio Medina (hereinafter "Medina" or "Petitioner"), was indicted by the United States on September 5, 1991, for an alleged offense committed in November 1986. The Indictment charged violation of 18 U.S.C. § 1344, in Count One,

A trial by jury was held in January 1993, resulting in a verdict of guilty.

On October 21, 1994, the First Circuit Court of Appeals affirmed the original judgment.

Petitioner-Appellant filed his petition for a writ of coram nobis pursuant to 28 U.S.C. §§1651 and 2241.[3] The district court dismissed the

[3] The petition for writ of coram nobis and the appeal brief included a request for judicial notice of the file in the underlying criminal case as it contains the facts related in the petition, facts that are repeated herein and were never contested. The district court denied the request for judicial notice and so did implicitly the First Circuit panel. See Appendix 1, 2 and brief on appeal. Such denial is error and consistent with the apparent sham review of the petition, where fact or law is irrelevant. Although unnecessary, because the facts are undisputed, this court can of course take judicial notice of the underlying case on its own motion or based on the request made by Petitioner in the courts below, and now, expanded to the files as they exist now in the coram nobis case and its appeal, the subject of

petition on the ground that petitioner had not met the requirements of its test.

The panel of the 1st circuit entered judgment on December 9, 2020, without opinion. The judgment only succinctly stated that "After plenary review, we conclude that the denial of coram nobis relief was appropriate for substantially the same reasons set forth by the district court. See *United States v. George*, 676 F.3d 249, 256 (1st Cir. 2012) (standard of review and tripartite test for coram nobis relief)".)". A judgment that says nothing other than by reference to other judgment is a bad judgment. The panel purportedly agreed with the district court and affirmed on that basis alone. But the basis for the denial of the lower court is undisputedly flawed as new case law by the Supreme Court, published after the petition for coram nobis, showed that the exact basis for denial: that the error was not of a fundamental nature, was wrong, reversing a case on point with the exact error. This is evidence of a summary affirmance without knowledge of the new law that Petitioner tried to bring to the attention of the judges. The lower court did not discuss any of the arguments made by the parties or the district court judge. There is a strong appearance that the panel made its judgment without reading or considering petitioner's brief or anything else as discussed below.

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this petition for writ of certiorari.

If we try to discern on what the 1st circuit opinion based its judgment we are compelled to analyze the only sentence with some legal meaning: "denial of coram nobis relief was appropriate for substantially the same reasons set forth by the district court. See *United States v. George*, 676 F.3d 249, 256 (1st Cir. 2012) (standard of review and tripartite test for coram nobis relief)". Which leads us to *George* that says: "we have discretion to withhold the remedy where the interests of justice so dictate." We discuss below how this undefined, vague statement is applied by the 1st Circuit in contravention of Supreme Court case law.

3. Statement of facts and procedural background

In September 1991, 5 years after a civil trial involving the same facts, a grand jury indicted Petitioner of defrauding Bank of Boston in violation of 18 U.S.C. § 1344 and 18 U.S.C. § 2314 (bank fraud and transportation of those funds obtained by that fraud). The government alleged that Petitioner made an implicit misrepresentation by presenting a deposit slip prepared by a bank officer for an amount that differed from the amount intended by the issuer of the check, a third-party bank. Neither the government alleged nor the jury was charged with Petitioner making any misrepresentation that caused any loss to the bank.

On October 4, 1991, several pretrial motions were filed, notably a motion to dismiss the indictment because it did not state an offense. The motion was denied by order of March 25, 1992. The court however annotated in the margin of the order that it was inclined to grant it. Petitioner filed a motion for judgment of acquittal at the conclusion of the government case on January 25, 1993. The court denied the motion although it stated on the record that this was "a close case." The relevant argument that was made in these motions was essentially that what Petitioner did, presenting a third-party check for deposit was unrelated to any loss and it was not a crime. In essence, it was argued that the misrepresentation, concealment, or falsehood (if in fact there was any) were immaterial since it was undisputed that the true facts were known to the Bank of Boston.

On January 28, 1993, a jury convicted Petitioner of both counts. The jury was not instructed that the bank fraud statute 18 U.S.C. §§ 1344 (a)(1) required that the loss resulted from Petitioner's alleged misrepresentation.

Appeal was filed on August 2, 1994 (case number 93-2167). On July 18, 1995, the First Circuit affirmed Petitioner's conviction on direct appeal. The opinion of the court of appeals was published in October of 1994 as *United States v. Puerta,* 38 F.3d 34. The issue of materiality was argued again on appeal. The issue was whether Petitioner's misstatement or

omission to the bank could be material since the bank knew the true facts. The court of appeals found the argument "substantial" but it wrote: "Absent compelling authority, we reject the argument." On September 5, 1995, the mandate issued. On October 12, 1995, Petitioner petitioned for a writ for certiorari to the Supreme Court. In the petition, Petitioner asked the Supreme Court to provide that "compelling authority." Upon denial of the petition (115 S. Ct. 1797, 1995), the judgment became final.

The "compelling authority" needed came from the Supreme Court later in *Neder v. United States*, 527 U.S. 1, *Loughrin, Gaudin, and Shaw*.

In essence, the Supreme Court made evident in those cases that Petitioner was convicted of a non-crime. He is therefore innocent as he has always claimed.

There is no question about the "availability of collateral relief from a federal criminal conviction based upon an intervening change in substantive law" *Davis v. United States*, 417 U.S. 333, 334 (1974).

4. First circuit's statement of the law and evidence

The coram nobis petition was filed on December 25, 2015 and dismissed on September 12, 1919. The order of dismissal of the district court was appealed. The First Circuit affirmed making no explicit findings of law or evidence.

Judges in the first circuit, whose impartiality had been challenged, affirmed by general rule writing in the judgment that granting relief was not "in the interests of justice." The panel of the 1st circuit entered that judgment on December 9, 2020, without opinion.

5. Disposition by the panel in the court of appeals

The First Circuit panel found that the district court's "denial of coram nobis relief was appropriate for substantially the same reasons set forth by the district court. See *United States v. George*, 676 F.3d 249, 256 (1st Cir. 2012)", but affirmed without explanation of why the Supreme Court cases that were published contradicting such conclusion should be disregarded. Despite some of the district court findings being specifically rejected and found to be grounds for reversal by the Supreme Court, the panel disregarded the Supreme Court precedent in *Shaw* and affirmed without an opinion. The controlling cases *Shaw* and *Berroa* were published after Petitioner filed his coram nobis petition. It is apparent that the district court, who mentions neither in its opinion, and the panel judges, who followed the district court opinion, were unaware of them. Petitioner had objected in his opening brief to have his appeal reviewed by judges Lynch and Selya. Brief section III 3, p 16. The bias objection was ignored and not ruled upon.

6. Grounds for the first circuit ruling

The First Circuit stated no grounds for affirming the lower court other than saying that they agreed with the district court. The judgment only succinctly stated that "After plenary review, we conclude that the denial of coram nobis relief was appropriate for substantially the same reasons set forth by the district court. See *United States v. George*, 676 F.3d 249, 256 (1st Cir. 2012) (standard of review and tripartite test for coram nobis relief)". A judgment that says nothing other than by reference to other judgment is a bad judgment.

7. The relief sought in this Supreme Court proceedings

The First Circuit judgment is presently challenged in this petition for a writ of Certiorari. This court has ruled in several cases since the original underlying judgment in this case, that the conduct with which Petitioner was charged is not a crime sanctioned by the bank fraud statute and therefore Petitioner is factually and legally innocent.

II. REASONS FOR GRANTING THE WRIT

1. The main reason for granting the writ

The 1st Circuit panel opinion conflicts with decisions of the United States Supreme Court (*United States v. Morgan,* 346 U.S. 502 (1954); *Loughrin v. United States,* 134 S. Ct. 2384 (2014; *Shaw v. United States*,

137 S. Ct. 462 (2016); *Neder v. United States*, 527 U.S. 1 (1999); *Williams v. United States,* 458 U.S. 279 (1982); *United States v. Gaudin*, 515 U.S. 506 (1995), all controlling in this case). Consideration by this court is, therefore, necessary to secure and maintain uniformity of the court's decisions, and the integrity of the courts. This case involves more than one question of exceptional importance because it involves issues on which the lower court decision conflicts with the authoritative decisions of the Supreme Court and other United States Courts of Appeals that have addressed the issue, namely the directives or "test" used to grant or deny petitions for writ of coram nobis.

The First Circuit writes in *George*, as the law, that any coram nobis petition is like a move in a football game where the chances of success are essentially nil. See *United States v. George*, 676 F.3d 249, 249 (1st Cir. 2012). Because of that opinion and its continued application to coram nobis cases, included the one at hand, it is patent that the 1st circuit believe that coram nobis petitions should be summarily denied. In fact it is apparent that the judges do not even read them, but simply issue boilerplate judgments stating that the petition is denied based on *George*. This case uses "in the interests of justice" as an escape valve, cover-all "test" invented by the First Circuit itself which contravenes the precedent of this court. An analysis of

this test shows or appears to show that "in the interests of justice" includes the interests of the 1st circuit judges "saving face" or the interests of the judges in not having their mistakes exposed by reversal. The particular reasons, in detail, follow with law and argument supporting the reasons for granting the writ.

The flawed rationale for systematic denial of writs of coram nobis in the First circuit court of appeals is that since it is an extraordinary remedy it should be extraordinarily (rarely) granted. It is an extraordinary remedy because very rarely the conditions for the writ are met, such as a change in law that will make a conviction invalid after it was found otherwise. In the event that such a thing happens the writ is not extraordinary and should be granted forthwith.

2. Certiorari should be granted to bring the First Circuit in line with the other circuits

Certiorari should be granted to unify the application of coram nobis relief, to provide needed guidance to the lower courts and to stop the shameful practice of the first circuit to disallow coram nobis relief as a matter of general policy and bring the law into the 21st century. Certiorari should be granted to resolve a conflict between the First Circuit's handling of Petitions for coram nobis and its treatment by the other Circuits. *Marks* v. *United*

States, 430 U.S. 188, 189 (1977) (certiorari granted to resolve a conflict in the Circuits). The First Circuit should be brought into constitutional line. Certiorari should be granted both because of the central and constitutional importance of the requirement of uniform treatment of petitions for coram nobis in all Circuits, and the fact that the resolution of this issue will have constitutional wide impact on the treatment of innocent people who have been erroneously convicted. *Aldinger* v. *Howard,* 427 U.S. 1, 3 (1976) (certiorari granted "to resolve the conflict on this important question"); *Fuller* v. *Oregon,* 417 U.S. 40, 42 (1974) (certiorari granted "because of the importance of the question presented and the conflict of opinion on the constitutional issue involved").

Each circuit has its own test, or no test, to decide whether to grant the writ. For example, to qualify for coram nobis relief in the 9th circuit, the petitioner must demonstrate each of the following four factors:

> "(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; and (4) the error is of the most fundamental character." *U.S. v. Walgren,* 885 F.2d 1417, 1420 (9th Cir. 1989)

In *United States v. Loschiavo,* similar to this case, a writ of coram Nobis was affirmed without consideration of any test: "The petitioner, Loschiavo, was placed in the same hopeless situation of invalid penal custody with no clear way out and with the Government striving to block any remedy, in spite of the clear knowledge that he had been convicted on a charge which was no federal crime at all". *United States v. Loschiavo*, 531 F.2d 659, 667 (2d Cir. 1976) (emphasis added)

Many circuits use the standard that a fundamental error requires relief. Even after a guilty plea, ineffective assistance of counsel "demonstrated that he has suffered a fundamental error necessitating coram nobis relief" *United States v. Akinsade*, 686 F.3d 248, 256 (4th Cir. 2012); *Correa-Negron v. United States*, 473 F.2d 684, 685 (5th Cir. 1973) ("to correct errors of the most fundamental character where the circumstances are compelling to achieve justice.")

Some circuits, including the 2nd, follow *Morgan's* standard: "the standards applied in federal coram nobis are similar. See *United States v. Morgan*, supra, 346 U.S. at 511, 74 S.Ct. at 252 ("under circumstances compelling such action to achieve justice")" *United States v. Travers*, 514 F.2d 1171, 1173 n.1 (2d Cir. 1974).

Most circuits also weigh, in very variable degree, the failure to seek

appropriate earlier relief, and the petitioner's legal consequences from his conviction.

Whether "the interests of justice" are served, a test fabricated by the 1st circuit, plays no role in any of the other circuits.

3. The test used in the 1st circuit violates the precedent in the main Supreme Court case about coram nobis

The district court's opinion is incorrect beyond dispute despite the panel's unsupported conclusion.

The only support to the judgment offered by the 1st Circuit panel is *United States v. George,* 676 F.3d 249 (1st Cir. 2012). In the first place, *George* is an inapposite case where the defendant pleaded guilty. This is a case where Petitioner, who has always and repeatedly defended his innocence, was charged with a non-crime. Someone convicted of a non-crime is not guilty of any crime and a writ for coram nobis should issue.

The next, and more important problem is using George as authority for the test used to grant, or rather systematically deny, the writ. The case *US v George* was cited for the proposition that there is a test in the 1st Circuit circuit for coram nobis relief as enunciated by judge Selya, author of the *George* opinion. A reading of that case and the opinion of jurists discloses

that the case is a disgrace. The test or requirements for granting coram nobis were enunciated by the Supreme Court in *United States v. Morgan,* 346 U.S. 502, 512 (1954). The remedy of coram nobis is to issue when "Otherwise a wrong may stand uncorrected which the available remedy would right." *United States v. Morgan,* at 512. Any other test that imposes other requirements is the wrong test. The writ of error coram nobis is appropriate "where a man was convicted for actions that were not illegal," *United States v. Mandel*, 862 F.2d 1067, 1079 n. 6 (4th Cir. 1988) citing *Morgan.*

The first circuit is not at liberty to come with its own test if it contradicts the Supreme Court's. Petitioner submits that it does, as well as other circuits' tests. The *George* case starts with judge Selya comparing a coram nobis petition to a game: "A Hail Mary pass in American football is a long forward pass made in desperation at the end of a game, with only a small chance of success. The writ of error coram nobis is its criminal-law equivalent." There are no criminal law equivalents to a football game. A coram nobis petition is not a game, but a very serious matter because if it is not granted "a wrong may stand uncorrected which the available remedy would right." *United States v. Morgan,* at 512. It is the chance to fix a constitutional error. An error that convicted an innocent, an error of

conviction for a nonexistent crime. The game analogy used by judge Selya in George is not just unfortunate; it is legally incorrect, repugnant, and insulting. The appearance is that judge Selya looks at the probability of success of coram nobis in general to rule on a specific case. That is legal error, as cases cannot be decided by general rule. A decision on a coram nobis petition that considers anything but its merits is biased. It is an abuse of discretion the court's failure to actually exercise discretion, deciding by general rule. *James v. Jacobson*, 6 F.3d 233, 239 (4th Cir. 1993). Judge Selya's opening statement in *George*: "...with only a small chance of success. The writ of error coram nobis is its criminal-law equivalent." Selya's statement evinces that he is biased. By his own words he sees a coram nobis case before him as having a "small chance of success." Even before he reads, evaluates or hears the case. A case is evaluated on its merits, not on the merits or outcomes in other cases. Because judge Selya was so clearly predisposed to deny the instant (and any other) coram nobis cases he was not qualified to rule and he will continue his biased adverse rulings against other innocent people unless this Court pronounces error. It is apparent that this case was decided by a biased judge by general rule. Only someone who wrote the *George* opinion can cite only that opinion in his review, ignoring five Supreme Court authorities: *Morgan, Williams,*

Nader, Laughrin, Gaudin, and Shaw controlling in this case. The latest case in the First circuit that is right on point was ignored also. *Berroa*, 856 F.3d 141 (1st Cir. 2017)[4] citing *Loughrin v. United States*134 S.Ct. 2384, 189 L.Ed.2d 411 (2014), further corroborates that judge Selya was not qualified to review this coram nobis case.

4. The tripartite test used by the first circuit and other circuits was met

Circuits are split on the test used to grant a coram nobis petition. For example, the 1st circuit requires a very high degree of prejudice to grant the writ, while the 9th circuit, 4th circuit and others find criminal status presumptively sufficient prejudice per se. *U.S. v. Walgren*, 885 F.2d 1417, 1420 (9th Cir. 1989). ""Conviction of a felony imposes a status upon a person which not only makes him vulnerable to future sanctions through new civil disability statutes, but which also seriously affects his reputation and economic opportunities." *Parker v. Ellis*, 362 U.S. 574, 593-94, 80 S.Ct. 909, 919-20, 4 L.Ed.2d 963 (1960)" *U.S. v. Mandel*, 862 F.2d 1067, 1075 n.12 (4th Cir. 1988). Most criminal convictions do in fact entail adverse

[4] *Berroa* held that bank and mail fraud require that the actions of the defendant must cause the loss of the victim, which is the fundamental problem with Petitioner's conviction. (... fraud statute imposed not only a but-for causation requirement, but also a "natural[ ] induc[ement]" requirement, akin to proximate causation. *Berroa.* at 149 & n.4.)

collateral legal consequences," *Sibron v. New York*, 392 U.S. 40, 55, 88 S.Ct. 1889, 1898, 20 L.Ed.2d 917 (1968). In the Ninth Circuit, there is no need for petitioner to show specific adverse consequences that he presently is suffering or that he is likely to suffer in the future. See e.g., *Byrnes v. United States*, 408 F.2d 599, 601 (9th Cir. 1969).

Some circuits do not use the tripartite test, but merely follow the Supreme Court directive that the error committed is of the most fundamental nature, which is part of the tripartite test of other circuits.

We list the three parts of the test used by the 1st circuit and show how each part was more than sufficiently met, assuming that it is a legally sound test.

Part 1. A fundamental error was sufficiently showed when several cases have been decided after Petitioner's underlying judgment became final, and reversed by the Supreme Court for substantially the same reason articulated by him in this case. One of the Supreme Court cases (*Shaw*) quotes the identical jury instruction given in this case as a fundamental error sufficient to reverse and remand. The identical error was made by the district court in its opinion and order in this coram nobis case. The court specifically quotes the same constitutionally infirm instruction with approval and to support its order, in contravention of *Shaw*. The court then dismissed the petition for a writ of coram nobis on September 12, 2019, on the only significant ground

that the error committed is not fundamental because the key jury instruction was correct. Appendix 2: p.12. However, the Supreme Court case *Shaw v. United States,* 137 S. Ct. 462, decided after Petitioner filed his petition for writ of *coram nobis* found the opposite, that the same instruction was a fundamental error and grounds for reversal.

Part 2. The Delay in seeking relief based on *Shaw v. United States* is nonexistent as this opinion was published after Petitioner filed his brief. Petitioner relied on *Shaw* to defeat the district court argument in its denial of the coram nobis petition, because the exact argument of the district court had been assigned error by the Supreme Court in *Shaw,* decided after he filed his petition, so there cannot be any delay as he filed his petition in anticipation. As for the delay after the other main Supreme Court precedent, *Loughrin,* Petitioner shows in his brief that the delay was barely one year. There is no statute of limitations for coram nobis. Finding that a delay of about one year to file a coram nobis petition is excessive is ridiculous.

Part 3. Prejudice is presumed by reason of the conviction in some circuits and "the government carries the burden of disproving this presumption." *U.S. v. Walgren*, 885 F.2d 1417, 1421 (9th Cir. 1989). Even using the more demanding and vague "test" of the 1st circuit it was exceedingly shown by Petitioner that he was prejudiced well in excess of what a conviction itself

naturally and normally conveys.

The 1st circuit ignored all precedential cases of the Supreme Court claimed to be controlling without comment. There is no perversion more repugnant than charging and convicting a man of a non-crime. It abounds in history, and the courts of Massachusetts are infamous for their share of this disgrace, such as charging, convicting, and executing "witches" in 1692.[5] A disgrace that seems to continue to the present.

5. The 1st circuit case *George* is bad law permitting biased rulings in coram nobis resulting in denial of a remedy to wrongfully convicted innocent people

"The Supreme Court has not yet addressed the precise standards that lower courts should use in deciding whether to issue writs of error coram nobis" *Murray v. United States*, 704 F.3d 23, 29 (1st Cir. 2013)

This is the standard that the 1st circuit applies in coram nobis cases:

> Even if we assume for argument's sake that the petitioner has satisfied the tripartite test, we know of no binding authority that

[5] The Commonwealth of Massachusetts. Chapter 145 of the resolves of 1957. "Resolve relative to the indictment, trial, conviction and execution of Ann Pudeator and certain other persons for "witchcraft" in the year sixteen hundred and ninety-two." https://www.mass.gov/doc/resolves-of-1957-chapter-145/download

> would compel us … to grant coram nobis. When all is said and done, issuing or denying a writ of error coram nobis must hinge on what is most compatible with the interests of justice

The first circuit then refers to Morgan, 346 U.S. at 511, 74 S.Ct. 247 but Morgan does not support such conclusion. Petitioner is requesting with this petition that this Supreme Court provides the binding authority that the 1st circuit claims is missing, not just for his benefit but the benefit of other innocent people wrongly convicted now or in the future.

The error of the 1st circuit is that its test to grant a coram nobis writ is never passed except: when it "is most compatible with the interests of justice" or "where the interests of justice so dictate." In contrast this Supreme Court will grant the writ: "under circumstances compelling such action to achieve justice." Other circuits apply strictly that test: See e.g. *U.S. v. Mandel*, 862 F.2d 1067, 1074 (4th Cir. 1988) "it is clear to us that if this case were before us on direct appeal we would be required to overturn all the convictions. The issue here, however, is whether *Coram Nobis* relief is appropriate in this case. We think that it is required in order to achieve justice." "the standards applied in federal coram nobis are similar" (citing Morgan, emphasis added). See *United States v. Morgan*, supra, 346 U.S. at 511, 74 S.Ct. at 252 ("under circumstances compelling such action to

achieve justice")"; *United States v. Travers*, 514 F.2d 1171, 1173 n.1 (2d Cir. 1974).

An analysis of the *George* case evinces that *interests of justice* is distinct from *to achieve justice.* It is quite evident in *George* that The First circuit is talking about the interests of the judicial system, including the judges in that circuit, not the interests of a wrongfully convicted petitioner or anybody else, including the public at large.

This is further enhanced by the quotation to *United States v. George* in this case as the only case cited in the judgment, for the authority on the test for coram nobis relief, a test made up with no connection to the relevant Supreme Court rulings.

The *George* case, authored by judge Selya, contravenes the Supreme Court test for granting coram nobis relief. Furthermore, judge Selya states that coram nobis is equivalent to a football game pass ("Hail Mary") and states: "we have discretion to withhold the remedy where the interests of justice so dictate" contradicting the Supreme Court and giving a strong appearance of judgment by general rule. An appearance that is evidenced in this case also. In short, there is a failure to follow precedent and an appearance of lack of impartiality and due process of law. Petitioner contends that the 1st circuit does not have discretion to withhold the remedy

based on a naked finding as vague and meaningless as "the interests of justice so dictate."

The 1st circuit will not grant a writ of coram nobis, even if an innocent person was convicted unless "the ends of justice will be served" or "the interests of justice so dictate."[6] But that is a blatant distortion of the Supreme Court's instruction that at a writ of error coram nobis should issue "only under circumstances compelling such action to achieve justice." *Morgan,* 346 U.S. at 511, 74 S.Ct. 247. To "achieve justice is" clearly defined and understood, "the interests of justice" is not. The First circuit understands it as unrelated to the interest of achieving justice but to the interest and good appearance of the judicial system. The Supreme Court in *Morgan* and others clearly focuses on achieving justice for the wrongfully convicted if a substantial legal error is discovered. The 1st Circuit focuses on itself and its reputation. Without explaining the meaning of "the ends of justice will be

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[6] Although those phrases sound good and somewhat similar to the Supreme Court phrase *to achieve justice*, they are ambiguous and meaningless because they are not defined by the 1st circuit or any other, especially in the context of coram nobis. Furthermore, the discussion in *George* seems to indicate that the 1st circuit uses them as meaning finality or "save face", not what the Supreme Court intended with the words *to achieve justice,* and are no excuse either to let stand the conviction of an innocent person. Black's law dictionary defines justice as "Protecting rights and punishing wrongs using fairness" and denial of justice as "A deficiency in the administration of justice." From these definitions it is easy to find the meaning of "to achieve justice" as it is the opposite of denial of justice. The dictionary does not define "the interests of justice."

served" or "the interests of justice so dictate," it appears nevertheless in *George,* and this case, that a further understanding is finality. They explain, with disguised words, that reversing a prior opinion is against "the ends of justice" or "the interests of justice" because it does not promote how wise and infallible the judges in the 1st circuit are. But the interest of finality, no matter how important it is, does not override the interest of vindicating an innocent person. Furthermore, conviction of the innocent may sooner or later come to haunt not only the convicting court, but the whole judicial system so the interest of finality is questionable. See footnote 5 and related text.

The 1st Circuit does not say, even by way of example what cases (if any) will satisfy the circuit's ambiguous test. Not surprisingly, consistently with the impossible test it uses the1st Circuit has never ruled in favor of granting a petition for the writ, making the review of such petition futility and a sham, of which this case is an example.

6. A circuit judge should not decide a case while a challenge to his impartiality has been raised and the issue remains unresolved

The 1st Circuit panel issued judgment over objection of bias and without ruling on the objection.

Petitioner objected in his opening brief to have his appeal reviewed by

judges Lynch and Selya because they were biased. Brief section III 3, p 16. The objection and grounds were detailed in Petitioner's brief. He stated: "It is human nature and bias to be averse to change one's opinion and admit mistake". The two judges ignored the objection, and without any ruling on the objection proceed to review, and not surprisingly, affirm.

There is an appearance of bias and there is no ruling regarding the objection to bias. Each is sufficient for this case to be reheard by judges different from the ones charged with bias.

It is unknown why the judges proceeded to review a case where they had been objected on bias without considering and ruling on the objection. In lower courts these kinds of objections are ruled by other judges, as it is quite evident that bias is not something that the biased person can competently, and without bias, determine. Some courts, despite the appearance of sham, have a rule that permits the judges charged with bias to rule on it. Neither happened in this case.

Maybe the judges missed the objection, which was made in the brief instead of in a separately filed document. Petitioner is unaware of any rule about the procedure to disqualify a judge in the 1st Circuit court but he contends that an objection perfectly made and supported with facts in his brief should suffice. After all, the judges had to read the brief. Didn't they?

Of course, it is possible that they missed it simply because they did not read it. More than possible, it is probable. The judgment itself looks like a biased judgment on its face. The following facts evidence lack of due process and bias:

a. The judgment is not supported by any opinion at all.

b. The judgment makes no reference to anything in the record.

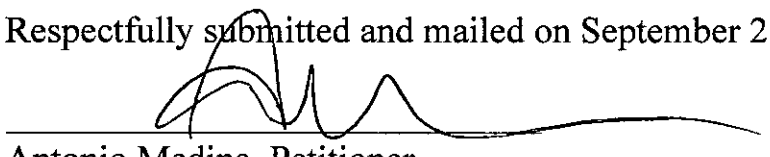
c. The only citation in the judgment supports and confirms the suspicion that the panel decided this case by general rule as explained here.

d. The judgment states that the review was plenary, but does not list a single issue that was reviewed de novo, or otherwise. The judgment lists only the judgment of the district court as the item that they reviewed. But the opinion of the district court is irrelevant in this plenary review.[7] So the appearance is that the panel judges of this court reviewed nothing.

III. CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted and mailed on September 21, 2021



Antonio Medina, Petitioner

[7] Furthermore, the opinion of the district court is facially in error in light of *Shaw* and as discussed here.