No. 22-124

IN THE

Supreme Court of the United States

BRETT KIMBERLIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF RIGHTS BEHIND BARS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST

Rights Behind Bars (RBB)[1] legally advocates for people in prison to live in humane conditions. RBB also contributes to a legal ecosystem in which such advocacy is more effective and seeks to create a world in which people in prison do not face large structural obstacles to advocating for themselves in the courts. RBB helps incarcerated people advocate for their own interests more effectively and through such advocacy pushes towards a world in which people in prison are treated humanely.

SUMMARY OF THE ARGUMENT

The Seventh Circuit denied the coram nobis writ to a petitioner because he failed to meet the civil disability requirement, one that finds no basis in this Court's precedent.

Problems with both causation and timeliness render the civil disability requirement dysfunctional. First, many civil disabilities are the result of amorphous processes in which past convictions are potentially or even likely determinative but petitioners are unable to conclusively demonstrate a causal relationship. Second, problems of timeliness will often render the writ moot, as petitioners cannot bring the writ until they suffer a civil disability but

[1] Pursuant to Supreme Court Rule 37.6, *Amicus Curiae* affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus Curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

cannot practically obtain the writ in time to redress those injuries.

The civil disability requirement is not the only procedural obstacle that some lower courts have thrown up concerning access to the writ, resulting in both inconsistent law across circuits and barriers to use of the writ that this Court's precedent does not support. This Court's silence on the coram nobis writ has allowed as much. A particularly troubling trend is lower courts applying recent statutory limits on habeas corpus to coram nobis, which is out of step with this Court's well-established approach to statutory interpretation.

I. ISSUES OF CAUSATION AND TIMELINESS RENDER THE CIVIL DISABILITY REQUIREMENT FUNDAMENTALLY UNWORKABLE.

Coram nobis petitioners often have the writ stymied for one of two reasons, even when their claims are meritorious. First, petitioners are unable to demonstrate causation, as most civil disabilities flow from amorphous decision-making processes. Second, petitioners cannot seek the writ until they suffer from a "civil disability," but cannot practically obtain the writ in time to redress their injury, making their claim moot. A non-exhaustive tour through some of the many "civil disabilities" that those like Kimberlin experience demonstrates how the requirement blocks access to the writ.

Bail

On any given day, approximately 500,000 people are incarcerated in United States jails despite being legally innocent because they cannot pay, or were not

granted the opportunity to pay, cash bail. U.S. Comm'n on Civil Rights, *The Civil Rights Implications of Cash Bail* 23 (2022). Although the use of bail was permitted only to ensure presence at trial for most of American history, *see Stack v. Boyle*, 342 U.S. 1, 5 (1951), the 1984 Bail Reform Act allowed pretrial incarceration solely on the basis of future dangerousness, and in 1987 this Court upheld this provision as constitutional, *see United States v. Salerno*, 481 U.S. 739, 746 (1987). In the following decade, most states and the District of Columbia responded to this Court's ruling by altering their bail statutes to regulate future dangerousness in addition to flight risk. Timothy Schnacke, Michael Jones, and Claire Brooker, "The History of Bail and Pretrial Release," Pretrial Justice Institute 18 (Sept. 24, 2010).

Social science confirms that people with prior convictions for violent felonies are more likely to be denied bail. Katherine Hood and Daniel Schneider, "Bail and Pretrial Detention: Contours and Causes of Temporal and County Variation," RSF: Russell Sage Foundation Journal of the Social Sciences, vol. 5, no. 1 (Feb. 2019). The decision, however, to deny bail typically relies on numerous variables, such as the nature and circumstances of the current charges, the strength of the prosecution's evidence against the defendant, any history with substance abuse, employment, and family ties. *See, e.g.*, 18 U.S.C. § 3142. As a result, even though past convictions are a quintessential reason to deny bail, a judge who does so with a petitioner like Kimberlin has no reason to engage in the counterfactual of whether, absent the convictions, he would have received bail. So despite likely being incarcerated because of his convictions,

Kimberlin would be unable to demonstrate as much to meet the civil disability requirement.

Finally, even were the judge to take the unusual step of noting that Kimberlin's bail was denied because of the validity of his convictions, he would still likely be unable to access the writ because of timing issues. Upon being denied bail, Kimberlin would for the first time have standing to bring a coram nobis petition from his jail cell, but the petition would be unlikely to reach resolution before his criminal case went to trial or he reached a plea deal, either of which would moot the relief he sought.

Prison and jail classification systems

The validity of convictions influences not only who remains in jail but also the conditions that they experience, both pre-trial and post-conviction. Prisons and jails have moved to objective classification systems that determine a security level through objective metrics such as severity of offense, prior convictions, prior incarcerations, and age. *See, e.g.*, James Austin, *Objective Jail Classifications: A Guide for Jail Administrators*, Nat'l Inst. of Corrections 1 (1998). The classification level then helps determine whether a detainee or prisoner is eligible for jobs, educational programming, visitation with family, time outdoors, the amount of violence and sexual violence in their housing unit, the opportunity to exercise, and other variables that dictate how rehabilitative or traumatic their experience of incarceration is.

Despite classification largely dictating a detainee or prisoner's experience, detainees and prisoners have no substantive right to being housed at a particular classification level or even a procedural due process

right in determining their classification. *See Meachum v. Fano*, 427 U.S. 215, 228 (1976). The result is that detainees and prisoners typically have no information explaining or justifying their classification status. Consequently, they would likely have no knowledge that past, invalid convictions resulted in higher security classifications, preventing them from demonstrating causation on a coram nobis writ.

Testifying at trial

As Kimberlin explained in his petition for certiorari, this Court has long presumed that convictions carry collateral consequences, writing in *Evitts v. Lucey* that "some collateral consequences of petitioner's conviction remain, including the possibility that the conviction would be used to impeach testimony … in a future proceeding." 469 U.S. 387, 391 n.4 (1985). Federal Rule of Evidence 609 renders certain criminal convictions admissible to impeach the trustworthiness of a witness, although, critically, not if a judicial proceeding has invalidated the conviction. Petitioners like Kimberlin could be impeached not just in future criminal cases but also in any civil cases that arise—for instance, if they were injured by a faulty product or were defrauded by a payday lender.

Demonstrating causation would again be difficult or impossible. Prejudice is not an on-off switch: different convictions are prejudicial to different extents, and violent convictions like Kimberlin's are particularly powerful. Critically, most criminal defendants with felony convictions do not suffer the prejudice of impeachment because they choose to not

testify at all rather than endure the introduction of evidence about their past convictions. Gordon Van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 Notre Dame L. Rev. 403, 482 (1992) (noting that "[t]he threat of felony conviction impeachment can be a powerful deterrent to taking the witness stand" and citing empirical evidence that "a defendant [i]s almost three times more likely to refuse to testify if he ha[s] a criminal record than if not"); *Ohler v. United States*, 529 U.S. 753, 759 (2000) (recognizing that potential use of prior convictions as impeachment "may deter a defendant from taking the stand").

Once again, timing issues would also arise. By the time a petitioner was certain that she would be testifying and that her conviction would be used to impeach her, the writ would no longer be of use—the length of time between obtaining standing under the civil disability requirement and when the issue would become moot is too short.

Enhanced sentencing

This Court has also presumed that convictions carry collateral consequences in the context of sentencing enhancements. *See Evitts*, 469 U.S. at 391 n.4. Along with the severity of offense, criminal history is the decisive variable in criminal sentencing. *See, e.g.*, *United States v. Lambert*, 984 F.2d 658, 660 (5th Cir. 1993) ("Sentencing under the guidelines is based primarily on the evaluation of two variables: the offense level and the defendant's criminal history score."). Outside the context of past convictions triggering mandatory minimums, however, petitioners will struggle to demonstrate causation because it will be unclear when a past conviction was decisive in influencing a sentence. The Sixth Circuit

for example, recently wrote that even when a past conviction appears in a presentence investigation report and forms the basis for a recommendation of a sentencing enhancement, the petitioner *still* may not be able to demonstrate causation to meet the civil disability requirement because of the "vast discretion" of the sentencing judge. *United States v. Castano*, 906 F.3d 458, 463 (6th Cir. 2018). There are also yet again timing issues, with petitioners obtaining standing to bring a coram nobis petition upon being convicted but needing to obtain relief before their sentencing.

Serving on a jury

Past and invalid convictions can also prevent people like Kimberlin from serving on a jury. Kimberlin raised this argument in the district court, which agreed with him but still held that he faced no civil disability because his other convictions for marijuana possession and perjury also prevented him from serving on a jury. The court's reasoning, however, depends on Kimberlin's current state of residence, Maryland, and its current jury exclusion statute. Either could change. Just this year, legislation passed the Maryland House of Representatives and Senate that eliminated the exclusion from juries of those convicted felonies, and the debate around the bill centered on whether particularly troublesome felonies would still merit exclusion. Ovetta Wiggins, "Maryland bill would allow people convicted of felonies to serve on juries," Wash. Post (Feb. 20, 2022). Similarly, were Kimberlin to move to Alabama, which excludes only those convicted of "crimes of moral turpitude" instead of all felonies, his challenged convictions alone might make him ineligible to serve on a jury. Ginger Jackson-Gleich, "Rigging the jury: How each state reduces jury

diversity by excluding people with criminal records," Prison Policy Institute (Feb. 19, 2021). Although changes in either Maryland law or his residence could grant Kimberlin the opportunity to seek relief under a coram nobis petition, he would be excluded from jury service for the length of time it would take for him for the petition to reach a resolution.

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The list above is far from exhaustive and demonstrates two significant points about the civil disability requirement, one that the federal courts of appeals on the correct side of the civil disability split have articulated well. First, a presumption of civil disability will almost always be correct given the countless and ever-changing ways that the law formally disadvantages those with convictions. *United States v. Peter*, 310 F.3d 709, 715–16 (11th Cir. 2002) (quoting *Spencer v. Kemna*, 523 U.S. 1, 12 (1998)) ("[I]t is an obvious fact of life that most criminal convictions do in fact entail adverse collateral legal consequences.") (internal quotations omitted). Second, even when the law imposes severe civil disabilities, complications involving causation and timeliness will often render the coram nobis writ practically useless. *United States v. Mandel*, 862 F.2d 1067, 1075 (4th Cir. 1988) ("Conviction of a felony imposes a *status* upon a person which … makes him vulnerable to future sanctions through new civil disability statutes."). The civil disability requirement is a solution in search of a problem, and its introduction prevents many of those suffering from grave civil disabilities from practical use of the writ.

II. THIS COURT'S ABDICATION OF CORAM NOBIS HAS ALLOWED LOWER COURTS TO INVENT OTHER OBSTACLES TO THE RIGHT.

"The metes and bounds of the writ of coram nobis are poorly defined and the Supreme Court has not developed an easily readable roadmap for its issuance." *United States v. George*, 676 F.3d 249, 253 (1st Cir. 2012). As a result, "the courts of appeals have not yet developed anything resembling a uniform approach to such relief." *Id.* at 254. As described above, the case law on the civil disability requirement is "uneven," and this split "over the collateral consequences requirement is emblematic of a more general lack of jurisprudential uniformity." *Id.*

Much of this lack of uniformity is the result of lower courts taking this Court's silence on corum nobis as an invitation to invent procedural obstacles to the writ which are not based in statutory text or this Court's precedent. Although courts typically justify these creations by invoking the extraordinary nature of the writ, *see Baranski v. United States*, 880 F.3d 951, 956 (8th Cir. 2018), the *substantive* standard for coram nobis already reflects the unusual nature of the writ. The appropriate deference to finality is therefore already baked into the substantive standard and need not be duplicated through the creation of additional procedural hurdles.

One particularly troublesome example involves the application of the Anti-Terrorism and Effective Death Penalty Act (AEDPA) to the coram nobis writ. "Congress enacted AEDPA to reduce delays in the execution of state and federal criminal sentences,

particularly in capital cases." *Woodford v. Garceau*, 538 U.S. 202, 206 (2003). Some courts have responded to AEDPA by reading the same limitations it imposes on habeas corpus onto coram nobis, despite the fact that AEDPA is silent on the latter.

For example, in *Baranski*, the Eighth Circuit noted that AEDPA changed the standard for a miscarriage of justice exception for successive habeas petitions from "more likely than not" to "clear and convincing evidence." 880 F.3d 951, 955 (8th Cir. 2018). The court applied the same substantive change to a coram nobis petition, noting that "custody is the only substantive difference between coram nobis and habeas petitions" and concluding that "it would make no sense to rule that a petitioner no longer in custody may obtain coram nobis relief with a less rigorous substantive showing than that required by AEDPA's limitations for successive habeas corpus … relief." *Id.* at 956.

Other courts have adopted rules governing procedural default from the habeas context, meaning that if petitioners have failed to make earlier attempts at voiding their convictions, they may no longer bring a claim for coram nobis. *See United States v. Osser*, 864 F.2d 1056, 1060–62 (3d Cir. 1988); *Rebrook v. United States*, No. 2:10-cv-01009, 2012 WL 10270158, at *26 (S.D.W. Va. Jan. 5, 2012), *report and recommendation adopted*, No. 2:10-cv-1009, 2014 WL 555283 (S.D.W. Va. Feb. 11, 2014), *aff'd*, 589 F. App'x 130 (4th Cir. 2014).

This application of AEDPA—or the pre-AEDPA habeas statute—to coram nobis arises from an outdated method of statutory interpretation. This Court now interprets statutes according to their plain

text, without speculation as to what else Congress may have intended to accomplish. *Wisconsin Central Ltd. v. United States*, 138 S. Ct. 2067, 2073 (2018) ("It is not our function to rewrite a constitutionally valid statutory text under the banner of speculation about what Congress might have intended.") (internal quotation marks omitted); *Magwood v. Patterson*, 561 U.S. 320, 334 (2010) ("We cannot replace the actual text with speculation as to Congress' intent.").

AEDPA amended the habeas statute and did not amend the All Writs Act, the latter being the statutory basis for the ancient common law writ of coram nobis. AEDPA is therefore not a basis to restrict coram nobis but instead the opposite—a reason not to. This Court presumes that Congress would have amended the coram nobis writ in AEDPA had it intended to do so without speculating about whether "it would make no sense" for Congress to do what, per the plain language of AEDPA, it did.

CONCLUSION

For the foregoing reasons and those in the petition, the Court should grant the petition for certiorari.

Respectfully submitted,

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