No. 22-124

In the Supreme Court of the United States

BRETT C. KIMBERLIN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner, who has completed his term of imprisonment and supervised release, established the grounds needed to obtain relief pursuant to a petition for a writ of coram nobis.

RELATED PROCEEDINGS

United States District Court (S.D. Ind.):

United States v. *Kimberlin*, No. 79-cr-7 (Nov. 5, 1979)

United States v. *Kimberlin*, No. 79-cr-7 (Nov. 5, 1980)

United States v. *Kimberlin*, No. 79-cr-7 (June 3, 1981)

United States v. *Kimberlin*, No. 81-cv-702 (July 2, 1981)

United States v. *Kimberlin*, No. 79-cr-7 (July 17, 1981)

United States v. *Kimberlin*, No. 79-cr-7 (Aug. 13, 1981)

United States v. *Kimberlin*, No. 79-cr-7 (Dec. 10, 1981)

United States v. *Kimberlin*, No. 79-cr-7 (Dec. 30, 1981)

United States v. *Kimberlin*, No. 79-cr-7 (Jan. 8, 1982)

United States v. *Kimberlin*, No. 79-cr-7 (Apr. 6, 1982)

Kimberlin v. *Lippman*, No. 81-cv-117 (Apr. 12, 1982)

Kimberlin v. *Attorney General*, No. 82-cv-72 (July 21, 1982)

United States v. *Kimberlin*, No. 79-cr-7 (June 15, 1983)

United States v. *Kimberlin*, No. 79-cr-7 (July 6, 1983)

Kimberlin v. *United States*, No. 18-cv-1141 (Mar. 17, 2021)

United States v. *Kimberlin*, No. 79-cr-7 (Sept. 3, 2021)

Kimberlin v. *United States Department of Justice*, No. 21-cv-2506 (Mar. 2, 2022)

United States District Court (D. Md.):

Kimberlin v. *United States Parole Comm'n*, No. 97-cv-1687 (June 5, 1997)

Kimberlin v. *United States Parole Comm'n*, No. 97-cv-1687 (June 25, 1997)

Kimberlin v. *Dewalt*, No. 97-cv-3829 (May 20, 1998)

Kimberlin v. *Dewalt*, No. 97-cv-3829 (Nov. 15, 1999)

United States District Court (E.D. Va.):

Kimberlin v. *Dewalt*, No. 99-cv-979 (Apr. 3, 2000)

Kimberlin v. *Dewalt*, No. 99-cv-979 (Oct. 20, 2000)

United States District Court (W.D. Tenn.):

Kimberlin v. *White*, No. 90-cv-2647 (June 8, 1992)

United States Court of Appeals (7th Cir.):

United States v. *Kimberlin* (Feb. 12, 1980)

United States v. *Kimberlin*, No. 80-2634 (Dec. 21, 1981)

United States v. *Kimberlin*, Nos. 88-1181, 88-1650 (Mar. 28, 1990)

Kimberlin v. *United States*, No. 91-2986 (Oct. 23, 1992)

Kimberlin v. *United States*, No. 00-2669 (July 20, 2000)

United States v. *Kimberlin*, No. 00-3966 (Feb. 7, 2001)

United States v. *Kimberlin*, No. 05-3411 (Nov. 28, 2005)

United States v. *Kimberlin*, No. 21-1691 (Jan. 6, 2022)

United States v. *Kimberlin*, No. 21-2714 (May 17, 2022)

United States Court of Appeals (6th Cir.):

Kimberlin v. *White*, No. 92-6084 (Oct. 19, 1993)

United States Court of Appeals (4th Cir.):

Kimberlin v. *United States Parole Comm'n*, Nos. 97-7108, 97-7452 (July 31, 1998)

In re Kimberlin, No. 98-558 (Aug. 12, 1998)

Kimberlin v. *Bidwell*, No. 98-6831 (Dec. 2, 1998)

Kimberlin v. *Dewalt*, No. 00-6489 (May 25, 2000)

Kimberlin v. *Dewalt*, No. 00-6001 (May 26, 2000)

Kimberlin v. *Dewalt*, No. 00-7555 (Jan. 18, 2001)

Supreme Court of the United States:

Kimberlin v. *United States*, No. 81-6476 (May 3, 1982)

Kimberlin v. *United States*, No. 82-6385 (Apr. 18, 1983)

Kimberlin v. *Lippman*, No. 83-6596 (Oct. 1, 1984)

Kimberlin v. *United States*, No. 85-6465 (May 27, 1986)

Kimberlin v. *United States*, No. 86-5577 (Nov. 3, 1986)

Kimberlin v. *United States*, No. 86-6445 (June 26, 1987)

Kimberlin v. *United States*, No. 87-7110 (Oct. 3, 1988)

Kimberlin v. *United States*, No. 90-5308 (Nov. 13, 1990)

Kimberlin v. *United States*, No. 92-7505 (Mar. 8, 1993)

Kimberlin v. *U.S. Parole Comm'n*, No. 98-7616 (Feb. 22, 1999)

Kimberlin v. *Bidwell*, No. 98-9120 (June 24, 1999)

Kimberlin v. *Dewalt*, No. 00-6296 (Nov. 13, 2000)

Kimberlin v. *Dewalt*, No. 00-8722 (Apr. 30, 2001)

Kimberlin v. *United States*, No. 00-8877 (Oct. 1, 2001)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-8a) is unreported but is available at 2022 WL 59399. The order of the district court (Pet. App. 16a-26a) is unreported but is available at 2020 WL 979850. Additional orders of the district court (18-cv-1141 D. Ct. Doc. 95; Pet. App. 9a-15a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 6, 2022. A petition for rehearing was denied on March 9, 2022 (Pet. App. 1a-2a). On May 31, 2022, Justice Barrett extended the time within which to file a petition for a writ of certiorari to and including August 6, 2022, and the petition was filed on August 5, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In the early 1980s, following three jury trials in the United States District Court for the Southern District of Indiana, petitioner was convicted on eight counts of unlawfully possessing an unregistered destructive device, in violation of 26 U.S.C. 5861(d); eight counts of unlawfully manufacturing a firearm, in violation of 26 U.S.C. 5861(f); six counts of maliciously damaging property by explosives, in violation of 18 U.S.C. 844(f) and (i); two counts of receiving explosives as a convicted felon, in violation of 18 U.S.C. 842(i)(1); four counts of unlawfully possessing and illegally using an official insignia of the Department of Defense (DOD), in violation of 18 U.S.C. 701; one count of unlawfully using the presidential seal, in violation of 18 U.S.C. 713(a); and four counts of falsely impersonating a DOD official in violation of 18 U.S.C. 912. Crim. R. 1, 10, 19, 30, 33[1]; see 805 F.2d 210, 215-216. The court sentenced petitioner 50 years of imprisonment. Crim. R. 10; see *Kimberlin* v. *White*, 7 F.3d 527, 529 (6th Cir. 1993). The court of appeals affirmed. 805 F.2d 210; 692 F.2d 760 (Tbl.); 673 F.2d 1335 (Tbl.). This Court denied petitions for writs of certiorari. 483 U.S. 1023; 460 U.S. 1092; 456 U.S. 964.

Petitioner filed a motion under Federal Rule of Criminal Procedure 35, which the district court denied. See 781 F.2d 1247, 1248-1249. The court of appeals reversed in part, vacating three of petitioner's convictions for unlawfully possessing and illegally using an official insignia of the DOD. *Id.* at 1259. Those vacaturs did not result in any change to petitioner's sentence. See Crim. R. 53. This Court denied a petition for a writ of

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[1] Crim. R. is the record in the criminal case that resulted in the convictions that petitioner currently challenges, No. 79-cr-7 (S.D. Ind.).

certiorari. 479 U.S. 938. Petitioner filed additional post-conviction challenges to his convictions and sentence, which were denied. See, *e.g.*, *White*, 7 F.3d at 529 n.1 (collecting cases).

In 2001, petitioner completed his imprisonment. Pet. App. 5a. In 2018, petitioner filed motions seeking to set aside his convictions; the district court treated those motions as a petition for a writ of coram nobis. *Id.* at 18a. The court denied the petition, *id.* at 16a-26a, and also denied petitioner's subsequent motions to amend the order, 18-cv-1141 D. Ct. Doc. 95, and to reconsider, Pet. App. 9a-15a. The court of appeals affirmed. *Id.* at 3a-8a.

1. Before, and separate and apart from, the convictions that petitioner currently challenges, he was convicted of two other felony offenses. In 1974, he was convicted in the Southern District of Indiana of perjury. Pet. App. 17a. And in 1979, he was convicted in the Southern District of Texas of conspiracy to possess with intent to distribute 4000 pounds of marijuana. *Id.* at 17a-18a; *White*, 7 F.3d at 529.

The events underlying the convictions that petitioner currently challenges stem from his arrest in 1979 after he tried to procure counterfeit government documents, including a presidential seal, military driver's license forms, and military license plates. Pet. App. 4a. In part based on evidence obtained during a subsequent search of petitioner's car, federal officers connected petitioner to eight bombings in Speedway, Indiana, that had been carried out from September 1 to September 6, 1978. *Ibid.*; *White*, 7 F.3d at 528; 805 F.2d at 215, 228.

In the worst bombing incident, petitioner placed a bomb in a gym bag, which he left in a parking lot outside Speedway High School. *White*, 7 F.3d at 528. Carl

DeLong, who was leaving a high school football game with his wife, attempted to pick up the gym bag, and it exploded. *Ibid.* The blast tore off DeLong's lower right leg and two fingers and embedded bomb fragments in his wife's leg. *Ibid.* DeLong was hospitalized for six weeks, during which he underwent nine operations to complete the amputation of his leg, reattach the two fingers, repair damage to his inner ear, and remove bomb fragments from his stomach, chest, and arm. *Id.* at 529-530. In February 1983, DeLong committed suicide. *Id.* at 529.

2. A federal grand jury in the Southern District of Indiana returned an indictment charging petitioner with eight counts of unlawfully possessing an unregistered destructive device, in violation of 26 U.S.C. 5861(d); eight counts of unlawfully manufacturing a firearm, in violation of 26 U.S.C. 5861(f); six counts of maliciously damaging property by explosives, in violation of 18 U.S.C. 844(f) and (i); two counts of receiving explosives as a convicted felon, in violation of 18 U.S.C. 842(i)(1); one count of transporting ammunition in interstate commerce as a convicted felon, in violation of 18 U.S.C. 922(g)(1); four counts of unlawfully possessing and illegally using an official insignia of the DOD, in violation of 18 U.S.C. 701; one count of unlawfully using the presidential seal, in violation of 18 U.S.C. 713(a); and four counts of falsely impersonating a DOD official in violation of 18 U.S.C. 912. Crim. R. 1; see 805 F.2d at 215-216.

After trial, the jury found petitioner guilty on the nine counts of unlawfully using DOD insignia and the presidential seal and impersonating a DOD official; acquitted him of transporting ammunition in interstate commerce as a convicted felon; and was unable to reach

a verdict on the remaining charges. Crim. R. 1, 10; 805 F.2d at 215-216.[2] Before retrial, the district court granted petitioner's motion to sever the two counts of receiving explosives as a convicted felon; those counts were tried first, and the jury found petitioner guilty on both. Crim. R. 1, 18-19; 805 F.2d at 215-216. Following a third trial on the remaining 22 counts related to the bombings, the jury found petitioner guilty on all of them as well. Crim. R. 1, 30, 33; 805 F.2d at 215-216.

The district court sentenced petitioner to a total of 50 years of imprisonment. Crim. R. 10; see *White*, 7 F.3d at 529. The court of appeals affirmed, and this Court denied petitions for writs of certiorari. 805 F.2d 210, cert. denied, 483 U.S. 1023; 692 F.2d 760 (Tbl.), cert. denied, 460 U.S. 1092; 673 F.2d 1335 (Tbl.), cert. denied, 456 U.S. 964.

3. While serving his sentence, petitioner filed a motion to correct or reduce his sentence under Federal Rule of Criminal Procedure 35. The district court denied that motion, see 781 F.2d at 1248-1249, but the court of appeals reversed in part and vacated three of petitioner's convictions for unlawfully using DOD insignia, *id.* at 1259. Petitioner's sentence, however, remained the same. See Crim. R. 53. This Court denied a petition for a writ of certiorari. 479 U.S. 938. Petitioner's remaining post-conviction challenges to his convictions and sentence were denied. See, *e.g.*, *White*, 7 F.3d 527; 898 F.2d 1262, cert. denied, 498 U.S. 969; 776 F.2d 1344, cert. denied, 476 U.S. 1142; 675 F.2d 866.

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[2] One of the court of appeals decisions in petitioner's case erroneously stated that the first jury found him guilty of transporting ammunition in interstate commerce as a convicted felon and acquitted him of one count of unlawfully using DOD insignia. 781 F.2d at 1248.

Petitioner was paroled in 1994, but his parole was revoked in 1997 for submitting a fraudulent mortgage loan application and failing to pay a civil judgment to the DeLong family. *Kimberlin* v. *Dewalt*, 12 F. Supp. 2d 487, 490-494 (D. Md. 1998), aff'd, 166 F.3d 333 (4th Cir. 1998) (per curiam), cert. denied, 527 U.S. 1041 (1999). Petitioner completed his prison sentence in 2001, Pet. App. 5a, and is no longer on parole or subject to supervised release.

4. In 2018, petitioner filed motions seeking to set aside his convictions in the three trials that occurred in 1980 and 1981. Pet. App. 18a. Petitioner contended that he continues to suffer consequences from those convictions, such as his inability to obtain government grants, sit on a jury, and renew his pilot's license. *Id.* at 19a. The district court construed petitioner's claims as a petition for a writ of coram nobis. See *id.* at 16a.

The district court denied the petition. Pet. App. 16a-26a. The court "assume[d], without deciding, that [petitioner's] alleged" civil disabilities caused him "more than merely incidental harm." *Id.* at 19a-20a. The court explained, however, that petitioner could obtain coram nobis relief only if all the felony convictions producing such civil disabilities were vacated and found that petitioner was not entitled to vacatur of all his convictions. *Id.* at 20a (citing *United States* v. *Keane*, 852 F.2d 199 (7th Cir. 1988), cert. denied, 490 U.S. 1084 (1989)).

The district court observed that petitioner's First Amendment challenge to his convictions under Section 912 for falsely impersonating a DOD official were foreclosed by circuit precedent. Pet. App. 20a-21a (citing *United States* v. *Bonin*, 932 F.3d 523 (7th Cir. 2019), cert. denied, 140 S. Ct. 960 (2020)). And it noted that petitioner had not challenged two of his felony

convictions—namely, his convictions for perjury and possessing with intent to distribute marijuana—which would themselves be independently sufficient to maintain the civil disabilities that he had alleged. *Id.* at 20a.

The district court denied petitioner's motions to amend the order and for reconsideration. 18-cv-1141 D. Ct. Doc. 95; Pet. App. 9a-15a.

5. The court of appeals affirmed. Pet. App. 3a-8a.

The court of appeals explained that "[b]ecause it upends finality, a writ of coram nobis requires not just a fundamental error affecting a conviction, and civil disabilities from it, but also good reason that the defendant failed to seek relief while in custody." Pet. App. 6a. The court found that, "[f]or three reasons, the district court rightly denied" petitioner's coram nobis petition. *Ibid.*

First, the court of appeals noted that it is "'inappropriate for the judiciary'" to issue a writ of coram nobis that "'override[s the] limitations enacted by Congress'" and found that "nothing prevented [petitioner] from raising on direct appeal or in his prior petition under [28 U.S.C.] 2255" the relevant challenges to his Section 912 convictions. Pet. App. 6a-7a (citation omitted).

Second, the court of appeals determined that petitioner's challenges to his Section 912 convictions were "meritless" "in any event." Pet. App. 7a. The court observed that it had already rejected the contention that this Court's decision in *United States* v. *Alvarez*, 567 U.S. 709, 715 (2012)—which upheld a First Amendment challenge to a portion of the Stolen Valor Act of 2005, 18 U.S.C. 704(b), that criminalized false claims about the receipt of military decorations or medals—undermined convictions under Section 912, like petitioner's. Pet. App. 7a. Citing its precedent, the court of appeals reiterated that "the plurality opinion in *Alvarez*

distinguished § 912 from the Stolen Valor Act" and its own substantive determination "that § 912[] * * * is a constitutional, narrowly drawn ban on false speech (impersonation) that protects compelling interests in government processes, reputation, and service." *Ibid.* (citing *Bonin*, 932 F.3d at 534-536).

Third, the court of appeals observed that petitioner "is not challenging his felony convictions for marijuana possession and perjury" and "does not contest the district court's conclusion that his ongoing civil disabilities will remain intact by virtue of these unchallenged convictions." Pet. App. 7a. And the court of appeals noted that "for this reason as well, he cannot obtain [the] relief he seeks in his *coram nobis* petition." *Ibid.*

ARGUMENT

Petitioner seeks (Pet. 13-19) this Court's review of the circuits' approaches to the requirement that a party seeking issuance of the extraordinary writ of coram nobis demonstrate ongoing collateral consequences flowing from his conviction. But the prevailing rule in the circuits runs contrary to petitioner's preferred rule, and the collateral-consequences issue—which this Court has frequently declined to review—is seldom dispositive in coram nobis cases. In any event, the question presented challenges only one of the three independent grounds on which the decision below relied to affirm the denial of coram nobis relief. Because petitioner has not demonstrated the existence of any fundamental error in this case or offered any reason for the delay in bringing his claims, he would not be eligible for coram nobis relief even under the approach that he favors. Accordingly, this Court's review is not warranted.

1. "Federal courts are authorized to issue extraordinary writs such as c*oram nobis* only as 'necessary or

appropriate in aid of their respective jurisdictions.'" *United States* v. *Denedo*, 556 U.S. 904, 920 (2009) (Roberts, C.J., concurring in part and dissenting in part) (quoting 28 U.S.C. 1651(a)). Thus, a court may grant post-conviction relief pursuant to a writ of coram nobis only for errors "'of the most fundamental character,'" and only when "sound reasons exist[] for failure to seek appropriate earlier relief." *United States* v. *Morgan*, 346 U.S. 502, 512 (1954) (quoting *United States* v. *Mayer*, 235 U.S. 55, 69 (1914)); see *id.* at 510-511; see also *Denedo*, 556 U.S. at 911. This Court has made clear that "[c]ontinuation of litigation after final judgment and exhaustion or waiver of any statutory right of review should be allowed through this extraordinary remedy only under circumstances compelling such action to achieve justice." *Morgan*, 346 U.S. at 511.

The Seventh Circuit, like other courts of appeals, has distilled those principles into a three-part test. See *United States* v. *Wilkozek*, 822 F.3d 364, 368 (2016). Under that test, coram nobis relief is available only when "(1) the error alleged is 'of the most fundamental character' as to render the criminal conviction 'invalid'; (2) there are 'sound reasons' for the defendant's 'failure to seek earlier relief'; and (3) 'the defendant continues to suffer from his conviction even though he is out of custody.'" *Ibid.* (citation omitted); see Pet. App. 6a; see also *Denedo*, 556 U.S. at 910-911, 917; *Morgan*, 346 U.S. at 509 n.15, 511-512. And even if a coram nobis applicant can make all three of those showings, the district court nevertheless "retains discretion over the ultimate decision to grant or deny the writ." *United States* v. *George*, 676 F.3d 249, 255 (1st Cir. 2012).

The court of appeals applied those principles here to affirm the denial of coram nobis relief on three

independent grounds. First, the court found that petitioner's challenges to his Section 912 convictions were "meritless," Pet. App. 7a—and thus his convictions were not the result of fundamental error. Second, the court determined that petitioner lacked sound reasons for failing to previously seek relief, because "nothing prevented [petitioner] from raising on direct appeal or in his prior petition under § 2255" the relevant challenges to his Section 912 convictions. *Id.* at 6a. And third, the court noted that petitioner did not continue to suffer from the challenged convictions because his unchallenged felony convictions would maintain his civil disabilities. *Id.* at 7a.

The petition challenges only the third ground, see Pet. i, asserting that this Court has previously articulated a presumption of collateral consequences in all criminal convictions sufficient to justify coram nobis relief. Pet. 19-24 (citing *United States* v. *Juvenile Male*, 564 U.S. 932 (2011) (per curiam); *Evitts* v. *Lucey*, 469 U.S. 387 (1985); *Sibron* v. *New York*, 392 U.S. 40 (1968); *Carafas* v. *LaVallee*, 391 U.S. 234 (1968); and *United States* v. *Morgan*, *supra*). That assertion is incorrect. The coram nobis applicant in *Morgan* had been "sentenced to a longer term as a second offender" because of the conviction he sought to challenge, and thus plainly continued to be disadvantaged by it. 346 U.S. at 504. The remaining cases relied on by petitioner involved consideration of whether a case was moot because (1) the litigant was no longer in custody at the time of certiorari review of his habeas corpus petition, *Evitts*, 469 U.S. at 391 n.4; *Carafas*, 391 U.S. at 236-240; (2) the litigant was no longer in custody at the time of a direct appeal, *Sibron*, 392 U.S. at 50-52; or (3) the litigant was no longer subject to a sex-offender registration

condition at the time of a direct appeal, *Juvenile Male*, 564 U.S. at 936-939 (finding that the case was moot). None of those cases mentions coram nobis, let alone says anything about the prerequisites that a litigant must satisfy in order to obtain coram nobis relief. And the mootness inquiry is distinct from the inquiry into "what conditions justify the expenditure of judicial resources to grant the extraordinary writ of error coram nobis," a context in which interests in finality are at their zenith. *United States* v. *Craig*, 907 F.2d 653, 659 n.3 (7th Cir.), amended, 919 F.2d 57 (1990), cert. denied, 500 U.S. 917 (1991); see *Denedo*, 556 U.S. at 916 ("No doubt, judgment finality is not to be lightly cast aside; and courts must be cautious so that the extraordinary remedy of *coram nobis* issues only in extreme cases.").

2. As petitioner notes (Pet. 13-19), the courts of appeals are not in full agreement regarding the requirement that a coram nobis applicant demonstrate continuing adverse collateral consequences from a criminal conviction in order to qualify for coram nobis relief. "Most of the courts of appeals that have decided the issue have held that coram nobis [applicants] are required to show that their allegedly wrongful conviction actually results in an ongoing civil disability." *Blanton* v. *United States*, 94 F.3d 227, 233 (6th Cir. 1996) (citing, *inter alia*, *Nicks* v. *United States*, 955 F.2d 161, 167 (2d Cir. 1992); *United States* v. *Stoneman*, 870 F.2d 102, 106 (3d Cir.), cert. denied, 493 U.S. 891 (1989); *United States* v. *Osser*, 864 F.2d 1056, 1059-1060 (3d Cir. 1988); *United States* v. *Drobny*, 955 F.2d 990, 996 (5th Cir. 1992); *United States* v. *Marcello*, 876 F.2d 1147, 1154 (5th Cir. 1989); *Craig*, 907 F.2d at 657 (7th Cir.); *Keane*, 852 F.2d at 203 (7th Cir.); and *Stewart* v. *United States*, 446 F.2d 42, 43-44 (8th Cir. 1971) (per curiam)); see *United States*

v. *Castano*, 906 F.3d 458, 463 (6th Cir. 2018); *George*, 676 F.3d at 255-256. Such disabilities include "loss of the rights to vote, hold occupational licenses, or bear arms, and the imposition of enhanced penalties for future sentences." *Blanton*, 94 F.3d at 232.

Other courts apply a presumption that "continuing collateral consequences invariably flow from a felony conviction alone." *George*, 676 F.3d at 254 (citing *United States* v. *Peter*, 310 F.3d 709, 715-716 (11th Cir. 2002) (per curiam); *United States* v. *Walgren*, 885 F.2d 1417, 1421 (9th Cir. 1989); and *United States* v. *Mandel*, 862 F.2d 1067, 1075 & n.12 (4th Cir. 1988), cert. denied, 491 U.S. 906 (1989)); see *United States* v. *Lesane*, 40 F.4th 191, 203-204 (4th Cir. 2022). The Ninth Circuit, for example, presumes that "*coram nobis* relief is available to prevent manifest injustice 'even where removal of a prior conviction will have little present effect on the petitioner.'" *Hirabayashi* v. *United States*, 828 F.2d 591, 606 (1987) (quoting *Holloway* v. *United States*, 393 F.2d 731, 732 (9th Cir. 1968)). And the Fourth Circuit has declined to endorse the proposition that a coram nobis applicant cannot obtain relief unless the relief would eliminate all of his convictions. See *Lesane*, 40 F.4th at 203-204; see also *Walgren*, 885 F.2d at 1422-1423.

This Court has previously declined, on numerous occasions, to address the collateral-consequences issue. See, *e.g.*, *Cruzado-Laureano* v. *United States*, 569 U.S. 921 (2013) (No. 12-6828); *Atkin* v. *United States*, 561 U.S. 1028 (2010) (No. 09-1441); *Braswell* v. *United States*, 528 U.S. 1160 (2000) (No. 99-1116); *Medley* v. *United States*, 520 U.S. 1276 (1997) (No. 96-1796); *Craig* v. *United States*, 500 U.S. 917 (1991) (No. 90-1320); *Keane* v. *United States*, 490 U.S. 1084 (1989) (No. 88-1178); *United States* v. *Mandel*, 491 U.S. 906 (1989) (No.

88-1759). The same result is warranted here. The cases holding that collateral consequences should be assumed as a result of any conviction are outliers, and most courts require the same showing required by the Seventh Circuit—which is consistent with this Court's general observation that the "extraordinary remedy of *coram nobis*" should "issue[] only in extreme cases." *Denedo*, 556 U.S. at 916; see *Carlisle* v. *United States*, 517 U.S. 416, 429 (1996); *Morgan*, 346 U.S. at 511-512.[3]

3. This case would be an especially unsuitable vehicle for considering the standard for establishing collateral consequences in the coram nobis context because petitioner cannot establish either of the other prerequisites for coram nobis relief. As the court of appeals expressly recognized, petitioner lacks a right to coram nobis relief for at least "three reasons," each independent of the other. Pet. App. 6a; see *id.* at 6a-7a. Irrespective of whether the convictions that petitioner challenges give rise to sufficient independent practical consequences to potentially warrant coram nobis relief, he does not qualify for such relief because his claims of error in those convictions lack merit and cannot be considered "fundamental" in nature, *Morgan*, 346 U.S. at 512, and he has offered no justification for his delay in bringing those claims, see *Denedo*, 556 U.S. at 917.

a. The "fundamental errors" that petitioner asserts are that the evidence against him was circumstantial and included testimony from witnesses that had been hypnotized; the government did not disclose that one of

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[3] To the extent that petitioner takes issue (Pet. 16-17) with other court of appeals decisions determining what constitutes a civil disability, such decisions are not implicated here because the courts below "assume[d]" that petitioner suffered from civil disabilities. Pet. App. 19a; see *id.* at 4a, 6a-7a.

the detectives who testified at trial had been investigating petitioner before the bombings; and the trial included "procedural irregularities," such as "the use of microscopic hair evidence" and "an undisclosed familial relationship between a juror and a member of the prosecution." Pet. 28-29; see Pet. 2, 8-11. Neither alone nor in combination do those asserted errors come close to showing that this case presents extraordinary circumstances warranting coram nobis relief.[4]

The hypnotism issue has been known from the beginning of the case, was the subject of evidentiary motions at trial and a cautionary jury instruction, and was thoroughly addressed on direct appeal. 805 F.2d at 216-223. After extensively analyzing the six witnesses'

[4] Petitioner does not appear to challenge in this Court his convictions for unlawfully using DOD insignia and the presidential seal and impersonating a DOD official. See Pet. 7-11, 28-29; see also pp. 7-8, *supra* (describing the court of appeals' rejection of those challenges on the merits). As the court of appeals recognized (Pet. App. 7a), the plurality opinion in *Alvarez* expressly distinguished Section 912's prohibition on "impersonating an officer or employee of the United States"—the prohibition underlying petitioner's impersonation convictions—from the prohibition invalidated in that case. 567 U.S. at 721. Petitioner's convictions for unlawfully using governmental designations, a form of "falsely representing that one is speaking on behalf of the Government," likewise arise from statutes that validly "protect the integrity of Government processes." *Ibid.* Petitioner also appears to no longer press the claim that his convictions for receiving explosives as a felon are invalid under *Rehaif* v. *United States*, 139 S. Ct. 2191 (2019), because he did not know that he was a felon when he received explosives. See Pet. 11. That claim is meritless as well, because the trial evidence did not support petitioner's assertion that lacked knowledge of his felon status. See Gov't C.A. Br. 29 (explaining that at trial petitioner's brother testified that petitioner avoided handling explosives because he understood that he was a prohibited person).

testimony, *id.* at 221-223, the court of appeals determined that given "the strength of the proof other than the testimony of" the six witnesses, "the lack of any effect of hypnosis on [one witness] and the importance of his testimony," and the "consisten[cy]" of another witness's pre- and post-hypnosis statements, it was "satisfied that the admission of the testimony of these six witnesses affected no substantial right of" petitioner. *Id.* at 223. Petitioner's references to hypnosis (Pet. 2, 8, 10, 28) appear to merely resurface arguments considered and rejected by the court of appeals decades ago.

Petitioner also suggests that the government should have disclosed that a detective had been investigating petitioner "for years" before the bombings. Pet. 29; see Pet. 28. But the district court found that allegation immaterial in an order denying one of petitioner's motions to amend its order denying coram nobis relief. See 18-cv-1141 D. Ct. Doc. 95 (Mar. 17, 2021). The court recognized that Detective Brooke Appleby had investigated petitioner in the mid-1970s for various crimes and had written many notes on petitioner that he turned over to the officers who were investigating the bombings. *Id.* at 7. But, as the court explained, petitioner provided no reason to suggest that anything in the notes was exculpatory or that any notes had been wrongly denied to him in discovery. *Id.* at 7-8. And with nothing more "than speculation to support the existence of a fraud on the court by the Government," *id.* at 8, the suggestion that petitioner could have impeached Detective Appleby by claiming that his work in the mid-1970s showed that he was biased against petitioner is far from a showing of "fundamental error" that would warrant coram nobis relief.

Petitioner's challenge (Pet. 2, 9, 29) to the use of microscopic hair analysis in his trial is likewise misplaced. In 2015, the Federal Bureau of Investigation and the Department of Justice "began reviewing cases in which the government had introduced testimony regarding microscopic hair comparison analysis to assess whether the government's forensic expert gave false or misleading testimony that exceeded the limits of science." *United States* v. *Ausby*, 916 F.3d 1089, 1091-1092 (D.C. Cir. 2019) (per curiam); see Federal Bureau of Investigation, U.S. Dep't of Justice, *FBI/DOJ Microscopic Hair Comparison Analysis Review*, https://perma.cc/2FW7-LVVT. When such false or misleading testimony had been introduced by the government, the Department notified any affected defendants and agreed to waive procedural objections. See *Ausby*, 916 F.3d at 1092; see also 18-cv-1141 D. Ct. Doc. 37, at 14-16 (July 2, 2019). But in petitioner's case, he—not the government—introduced the hair comparison evidence.

At trial, petitioner called an Indiana State Police examiner to testify. Gov't C.A. Br. 23. With petitioner's assent, the examiner compared petitioner's hair to hair found near the bombing scene. *Ibid.* The examiner acknowledged the fallibility of hair comparison, and testified that he could not say for sure whether hairs found at the scene belonged to petitioner, but stated that the hairs were sufficiently similar that, in his professional opinion, the hairs were from the same origin. *Id.* at 23-24. Petitioner's counsel relied on the hair evidence in closing argument, stating that petitioner's willingness to have the hair tested tended to show his innocence. *Id.* at 23. To the extent that introduction of the hair comparison evidence was erroneous, any error was invited

by petitioner and does not amount to a fundamental defect in his trial warranting extraordinary relief.

Finally, petitioner's suggestion (Pet. 11, 29) that a juror's familial relationship with Detective Appleby created a trial irregularity is meritless. As the district court explained in an order denying one of petitioner's motions to amend its order denying coram nobis relief, a juror in one of petitioner's trials was the wife of Detective Appleby's ex-wife's cousin. 18-cv-1141 D. Ct. Doc. 95, at 6. In rejecting petitioner's claim, the court observed that, due to the divorce, the two were not related at the time of trial; that it was unknown whether the two were close friends; and that Detective Appleby provided a sworn statement that he did not communicate with the juror during the trial. *Id.* at 6-8.

That assertion of error—like the others, whether considered alone or in combination—falls far short of a fundamental error that "sap[s] the proceeding of any validity." *Keane*, 852 F.2d at 203. That is particularly true given that the court of appeals found in petitioner's direct appeal that the evidence tying him to the bombing was "strong, albeit circumstantial." 805 F.2d at 221, 243.

b. Moreover, petitioner has offered no justification for the delay in raising the arguments contained in his coram nobis petition (to the extent that they are new). As the court of appeals explained with respect to petitioner's challenges to his Section 912 convictions, "nothing prevented [petitioner] from raising on direct appeal or in his prior petition under § 2255" any First Amendment challenge to those convictions. Pet. App. 6a. The same holds true for petitioner's remaining claims. His claims about hypnosis, Detective Appleby's purported bias, and a juror's relationship with Appleby relate to

his trial, which occurred 40 years ago. See 18-cv-1141 D. Ct. Doc. 95, at 7. Petitioner's complaint about the use of microscopic hair evidence at his trial is based on a 2015 Department of Justice initiative, and thus likewise is several years tardy.

Given the weakness of petitioner's substantive claims and his lack of any justification for the delay in raising them, this case would be a poor vehicle to review the bounds of coram nobis relief. Even if petitioner could establish that a vacatur of only some of his convictions could satisfy the collateral consequences requirement, he still would not be entitled to the relief he seeks.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 2022