No. 22-124

IN THE
Supreme Court of the United States

BRETT C. 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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION[1]

The Government concedes that the courts of appeals are split on the question presented by this petition, and does not dispute that the split is entrenched and intractable. *See* Brief of the United States in Opposition (Opp.) 11-13. Instead, the Government devotes its response to developing an argument that this petition is a poor vehicle for considering the question presented. *Id.* at 8-11, 13-18. The Government is wrong. None of their vehicle problems would prevent the Court from deciding the question presented.

[1] Petitioner inadvertently omitted a list of related proceedings in the petition. The Government has provided a list in its Brief in Opposition. The Government's list is accurate.

First, the Government argues that the Seventh Circuit's analysis of the merits of Mr. Kimberlin's § 912 claim will prevent this Court from considering the Seventh Circuit's application of the civil disability requirement. But the Seventh Circuit did not make any alternative holdings that would bar this Court's review. Kimberlin challenged all of his convictions arising from the Speedway Bombing trials. The Seventh Circuit reached the merits of only one of those convictions, believing that it could "focus on the § 912 conviction because * * * a coram nobis challenge that might eliminate some felony convictions but leaves intact others that yield the same civil disabilities does not warrant relief." Pet. App. 6a.

Second, the Government argues that—even though the Seventh Circuit didn't reach these questions—Kimberlin's challenge to his other convictions would have failed because they do not meet certain other coram nobis requirements. But the courts of appeals are split on the contours and application of those requirements. "The dispute over the collateral consequences requirement is emblematic of a more general lack of jurisprudential uniformity" in the coram nobis context in which the courts of appeals have taken "myriad approaches." *United States* v. *George*, 676 F.3d 249, 254-55 (1st Cir. 2012). Whether Kimberlin can meet these requirements is therefore not a valid basis for denying certiorari. In some circuits, he wouldn't have to.

In any event, Kimberlin's other claims are meritorious and timely. Kimberlin was wrongly convicted of serious crimes based on evidence obtained through hypnosis and microscopic hair analysis, in a trial that also had "other substantial problems" that "raise[] real questions of prejudice." *United States* v.

Kimberlin, 805 F.2d 210, 254-256 (7th Cir. 1986) (Cudahy, J., concurring). After serving out his sentence, Kimberlin discovered new evidence that further undermined the junk science that plagued his trial, and this Court invalided the legal theory on which one of his convictions rested. Kimberlin brought these issues to the Court's attention as soon as he discovered them. Kimberlin therefore has a strong claim for relief.

With these false obstacles cleared, it is plain that this Court can and should step in to resolve the split. The Seventh Circuit reached a result that is inconsistent with this Court's precedent. *See* Pet. 19-24. The courts on the other side of the split do not apply the civil disability requirement and would have reached the merits of these claims. *Id*. at 17-19. And the practical significance of the civil disability requirement cannot be overstated. *See* Rights Behind Bars Amicus Br. at 2-8. If Kimberlin had been able to bring his petition in Maryland (where he has lived for decades), instead of Indiana (where he was convicted), he likely would not be wrongfully convicted today. That same disparity plays out throughout this nation. This Court should grant review.

ARGUMENT

I. AS THE GOVERNEMNT ACKNOWLEDGES, THERE IS A CLEAR SPLIT ON THE CIVIL DISABILITY REQUIREMENT.

The Government does not deny the split. The Government concedes that "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." Opp. 11. While

some courts of appeals require petitioners "to show that their allegedly wrongful conviction actually results in an ongoing civil disability," "[o]ther courts apply a presumption that 'continuing collateral consequences invariably flow from a felony conviction alone.'" *Id*. at 11-12 (citation omitted).

The Government does not suggest that further percolation is warranted. Nor could it. More than 30 years have elapsed since the courts first split from one another, *see United States* v. *Keane*, 852 F.2d 199 (7th Cir. 1988), *cert. denied*, 490 U.S. 1084 (1989); *United States* v. *Mandel*, 862 F.2d 1067 (4th Cir. 1988), *cert. denied*, 491 U.S. 906 (1989), and "[s]ince then the courts' paths have diverged farther," *United States* v. *Bush*, 888 F.2d 1145, 1148 (7th Cir. 1989). Courts on both sides of the split have acknowledged the disagreement, and none has indicated a willingness to switch sides. The courts of appeal have simply taken to pleading for this Court's guidance. *See* Pet. 25-27.

Instead, the Government attempts to downplay the importance of the split by noting (Opp. 11) that "[m]ost of the courts of appeals" agree with the Government's position, and arguing (*id.* at 13) that the court of appeals decisions articulating the minority view are "outliers." But the Government cites no published decision in which the Fourth, Ninth, or Eleventh Circuits has ever employed the Seventh Circuit's approach. Petitioner's counsel is not aware of any. These courts have long and repeatedly held that a court can presume that any conviction has collateral consequences that provide adequate standing to seek coram nobis relief. *See* Pet. 17-19. The decisions on the short side of a four-three split cannot be fairly

characterized as outliers. The Court should resolve this clear division in authority.

II. THIS PETITION IS A GOOD VEHICLE TO ADDRESS THE QUESTION PRESENTED.

A. No Alternative Holdings Bar This Court's Review.

In an attempt to dissuade this Court from granting the petition, the Government asserts that "the question presented challenges only one of the three independent" holdings in the decision below. Opp. 8; *see also id*. at 9-11. According to the Government, the court of appeals' three holdings were: first, "that petitioner's challenges to his Section 912 convictions were 'meritless'," second, "that petitioner lacked sound reasons for failing to previously seek relief" for those "challenges to his Section 912 convictions," and third that "his unchallenged felony convictions would maintain his civil disabilities." *Id*. at 10 (internal quotation marks and alterations omitted).

The Government is wrong. The Seventh Circuit's analysis of the merits of Kimberlin's challenge to his § 912 conviction does not bar this Court's review because Kimberlin's coram nobis petition *also* challenged his other convictions arising from the Speedway Bombings. *See* Pet. App. 5a ("He wants the district court to vacate his convictions for impersonating a federal official, illegally using the presidential seal and an insignia of the Department of Defense, *and his role in the bombings*.") (emphasis added). In addition to his conviction of impersonating a federal official, *see* 18 U.S.C. § 912, Kimberlin had been convicted in the Speedway Bombing trials of unlawfully possessing official insignia and a Presidential seal, *see* 18 U.S.C. §§ 701, 713(a); being a felon in possession of

explosives, *see* 18 U.S.C. § 842(i)(1); illegally transporting ammunition, *see* 18 U.S.C. § 922(g); possessing and manufacturing destructive devices, *see* 26 U.S.C. § 5861(d), (f); 18 U.S.C. § 5871; and causing damage by means of explosives, *see* 18 U.S.C. § 844(f), (i). *See United States* v. *Kimberlin*, 781 F.2d 1247, 1248 (7th Cir. 1985). Kimberlin's coram nobis petition challenged these other convictions, too. *See* Kimberlin C.A. Br. at 12-28, 34-41.

However, the Seventh Circuit discussed the merits of only one conviction: Kimberlin's challenge to the conviction for impersonating a federal official. The court believed that it could "focus on the § 912 conviction because * * * a coram nobis challenge that might eliminate some felony convictions but leaves intact others that yield the same civil disabilities does not warrant relief." Pet. App. 6a. Indeed, the only alternative holding that the court of appeals made was to double down on the civil disability requirement by holding that earlier, unchallenged convictions buttressed the court's decision not to reach the merits of his challenges to the bombing-related convictions. In the court's words:

> Kimberlin is not challenging his felony convictions for marijuana possession and perjury. And he does not contest the district court's conclusion that his ongoing civil disabilities will remain intact by virtue of these unchallenged convictions (as well as by virtue of the intact § 912 conviction). Thus, for this reason as well, he cannot obtain relief he seeks in his coram nobis petition.

Id. at 7a.

The Seventh Circuit's analysis of the merits of Kimberlin's § 912 claim is therefore not "independent" of its analysis of the civil disability requirement. The Seventh Circuit used the civil disability requirement to justify its decision to consider only the § 912 claim. There are no alternative holdings that bar this Court's review of the question presented.

B. Kimberlin Is Entitled To Relief.

Belatedly acknowledging that Kimberlin's challenge to his § 912 convictions was not the only basis for his coram nobis petition, the Government attempts to throw up roadblocks for Kimberlin's other claims. The Government claims (Opp. 13-17) that Kimberlin lacks a meritorious claim of error and argues (*id.* at 17-18) that there is no justification for Kimberlin's delay in bringing his claims.

1. The Government presents these requirements as though they form two parts of a well-settled, three-part test for coram nobis relief. They don't. "The dispute over the collateral consequences requirement is emblematic of a more general lack of jurisprudential uniformity" in the coram nobis context. *George*, 676 F.3d at 254; *see also* Rights Behind Bars Amicus Br. at 9-11.

The courts of appeal are confused about what constitutes a meritorious claim of error. For example, "[w]hen it is alleged that a federal criminal statute does not reach certain conduct,"—as Kimberlin argued with respect to his § 912 and § 842 convictions here—"some courts focus narrowly on whether the record still sets out a crime." *Id*. at 254 (citing *United States* v. *Peter*, 310 F.3d 709, 711-716 (11th Cir. 2002); *Allen* v. *United States*, 867 F.2d 969, 971-972 (6th Cir.1989)). While "other courts focus on a wider

universe" of considerations that can "includ[e] whether the petitioner had exhausted his rights to appeal," "and the interest of finality." *Id*. at 254-255 (citing *United States* v. *Osser*, 864 F.2d 1056, 1059-62 (3d Cir. 1988); *United States* v. *Craig*, 907 F.2d 653, 658 (7th Cir. 1990); *United States* v. *Travers*, 514 F.2d 1171, 1176-79 (2d Cir. 1974) (Friendly, J.)).

The courts of appeal are similarly divided on the question of delay. Some count "unjustifiable delay" as a barrier to the grant of a coram nobis petition. *See, e.g.*, *United States* v. *Riedl*, 496 F.3d 1003, 1006 (9th Cir. 2007). Others ask, as part of the coram nobis analysis, only whether the error was "unknown at the time of trial," and then treat delay separately under the doctrine of laches. *Blanton* v. *United States*, 94 F.3d 227, 231-232 (6th Cir. 1996). Others do not require a justification for delay at all. *See, e.g.*, *United States* v. *Lesane*, 40 F.4th 191, 201 (4th Cir. 2022) ("[A] failure to explain a lack of effort in seeking relief earlier can be relevant, but will not categorically preclude the writ").

The Government's arguments about other purported requirements for coram nobis relief therefore reinforce that this Court's intervention is needed. Resolving the split on the civil disability requirement—where the courts of appeals have done the most work to define and refine their disagreement, *see* Pet. 13-19—is a necessary first step.

2. Even if the Government is right about what the requirements for coram nobis relief are, the Government is wrong to assert that Kimberlin doesn't meet them.

a. Kimberlin presents two meritorious claims of error. One is that, under *Rehaif* v. *United States*, 139 S.

Ct. 2191 (2019), his conviction for being a felon in possession of explosives is invalid. *See* Pet. App. 27a. In *Rehaif*, this Court examined analogous statutes and held that a felon-in-possession charge requires proof that the individual knew that he belonged to the relevant category of persons banned from possession. 139 S. Ct. at 2200. But the government never proved that Kimberlin knew he was a felon.

The predicate felony was a perjury conviction. When he was a teenager, Kimberlin testified before a grand jury without an attorney and falsely answered an incriminating question. Pet. App. 29a. He spent 15 days in jail and served an 11-month probationary period. *Id.* The probation officer and his attorney erroneously told Kimberlin that his sentence would be expunged at adulthood. *Id*. About a year later, Kimberlin was present when a developer used explosives to remove tree stumps on his property. *Id*. And five years after that, Kimberlin was indicted for receiving the explosives as a felon. *Id*.

At the close of trial, Kimberlin's attorney asked the judge to direct an acquittal on the receipt charge because there was no proof of intent. *Id*. at 31a. The Government responded that "there is no criminal intent required." *Id*. Siding with the Government, the judge denied the motion, *id*. at 32a, and instructed the jury that "[i]f the jury finds * * * that the defendant received the explosives," then "it is not necessary to show that the defendant knew he was violating the law," *id*. at 31a.

The Government now argues that "trial evidence" showed Kimberlin's "knowledge of his felon status." Opp. 14 n.4. That is wrong. Kimberlin's brother testified that Kimberlin "need[ed] some explosives in

developing the property, moving tree stumps," and "[Kimberlin] said he couldn't be involved with any of that because he was on probation so [the architect] was in charge of that operation." Gov't C.A. Br. 29. Kimberlin's concern for the possibility that his probation might be revoked is not "knowledge of his felon status."

b. Kimberlin also makes a second meritorious claim that the evidentiary irregularities in his case undermine his convictions' validity. There were "substantial problems in [Kimberlin's] trial." *Kimberlin*, 805 F.2d at 255 (Cudahy, J., concurring). Most of the witnesses were hypnotized, yet "few, if any, of the requirements [for hypnosis] had been followed." *Id*. The jury was also shown "mug shots of the defendant taken in connection with another charge." *Id*. at 255-256. "[T]he jury also learned in one way or another about Kimberlin's connection with a variety of other 'bad acts' like possession of the uniform of a Defense Department security officer, participation in a drug conspiracy and possession of weapons." *Id*. at 256. Judge Cudahy found "these and a number of other problems * * * very troubling." *Id*. "Many of these matters, taken individually, may not be in themselves of crucial significance. But the cumulative impression on the jury raises real questions of prejudice." *Id*.

Compounding the prejudice, Kimberlin recently learned that Brooke Appleby, the local police detective who had hypnotized the trial witnesses, had been investigating Kimberlin for years prior to the bombings. Pet. App. 49a-50a. Kimberlin also learned that Appleby had shared his investigative file with the federal agents investigating the Speedway Bombings, and that Appleby was related to a juror. *Id*. at 50a-51a.

Kimberlin also recently learned about the fallibility of microscopic hair evidence, which also featured in his trial. *Id*. at 71a-72a.

The Government addresses each of these errors separately, but its explanations provide little comfort. *First*, the Government argues that "hypnotism * * * was thoroughly addressed on direct appeal." Opp. 14. But it was a close question, and the new evidence of Appleby's bias may have led to a different result. *Second*, the Government argues that Kimberlin did not show that the Appleby file contained "exculpatory" material. Opp. 15. But regardless of the file's contents, its existence suggests that Appleby may have influenced the hypnotized witnesses' recollections. *C.f. Kimberlin*, 805 F.2d at 217 (explaining that one "danger[] * * * associated with hypnosis" is "hyper-suggestiveness"). *Third*, the Government downplays Appleby's ties to a juror. Opp. 17. But Appleby himself thought it was significant, speculating that Kimberlin's attorneys must have provided ineffective assistance for failing to discover the family connection. Pet. App. 50a. *Fourth*, the Government argues that the use of microscopic hair analysis was invited error. Opp. 16. But regardless of who introduced it, that evidence further undermines the evidentiary basis of Kimberlin's conviction. The point is that, with the scientific understanding that we have today, we now know that none of the evidence supporting Kimberlin's convictions is reliable.

c. There was no unjustified delay in Kimberlin's bringing his claim. *Contra* Opp. 17-18. Kimberlin filed his challenge to the possession charges just one month after this Court's decision in *Rehaif*. *Compare Rehaif*, 139 S. Ct. 2191 (decided June 21, 2019) *with* Mem. In

Support of Pet'r's Mot. to Vacate In Light of *Rehaif* v. *United States*, *Kimberlin* v. *United States*, No. 1:18-cv-01141 (S.D. Ind. July 22, 2019), ECF No. 48. Kimberlin filed his broader challenge to the evidentiary bases of his conviction just months after he discovered Appleby's undisclosed interest in his case. *Compare* Pet. App. 49a (noting that Appleby interviews took place in early 2019) with Mot. to Vacate Conviction Based on Newly Discovered Evidence, *Kimberlin* v. *United States*, No. 1:18-cv-01141 (S.D. Ind. May 2, 2019), ECF No. 30. And although three years passed between the 2015 Department of Justice initiative regarding the unreliability of microscopic hair analysis and Kimberlin's petition, Mot. to Vacate Convictions as Unconstitutional, *Kimberlin* v. *United States*, No. 1:18-cv-01141 (S.D. Ind. Apr. 13, 2018), ECF No. 1, as the Government acknowledges (Opp. 16) they did not notify all defendants of this change in position.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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