No. 22-485 11/18/2022

In the Supreme Court of the United States

KENNETH C. MCNEIL,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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Question Presented for Review

The All-Writs Act provides federal courts the authority to issue writs in aid of their jurisdiction, "when no other remedy will suffice." *DiBella v. United States*, 369 U.S. 121, 125 n.4 (1962). The writ of error coram nobis is the only remedy available to former federal prisoners who seek correction of a conviction after completion of the sentence. Coram nobis "is an equitable means to obtain relief from a judgment." *United States v. Denedo*, 904, 913 (2009). Federal courts of equity decided equitable claims until 1938, when Congress merged law and equity into a single civil jurisdiction. If courts of equity were authorized to provide equitable relief to former prisoners, Congress provided no expressed intent to repeal this authority when it promulgated the civil rules. And this Court has long held that repeals by implication are not favored.

The question presented is:

Whether federal courts of equity had jurisdiction to correct criminal judgments after completion of the sentence, and, if so, whether federal courts violate the All-Writs Act in coram nobis proceedings by relying upon 28 U.S.C. § 2255 evidentiary hearing procedures instead of the courts of equity hearing procedures.

Related Proceedings

United States District Court (D. Haw.):
United States v. McNeil,
No. 02-cr-547 (Jun. 04, 2004)

McNeil v. United States,
No. 21-cv-212 (Jul. 12, 2021)

United States Court of Appeals (9th Cir.):
United States v. McNeil,
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Jurisdiction

The Ninth Circuit entered judgment on May 26, 2022. Pet. App. 1a-3a. Petitioner timely sought rehearing, which was denied on August 23, 2022. Pet. App. 37a-38a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Constitutional & Statutory Provisions Involved

Article III, Section 2 of the Constitution provides, in relevant part:

> The judicial power shall extend to all cases, in law and equity.

28 U.S.C. § 1651(a), also known as the All-Writs Act, provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

Equity Rule 46, 226 U.S. 627, 661 (1912) provides, in relevant part:

> In all trials in equity the testimony of witnesses shall be taken orally in open court, except as otherwise provided by statute or these rules.

28 U.S.C. § 2255(b) provides, in relevant part:

> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.

18 U.S.C. § 2262(a)(1) (effective Oct. 28, 2000, to Jan. 4, 2006), which stated, in relevant part, at the time of petitioner's conviction:

> A person who travels in interstate or foreign commerce, or enters or leaves Indian country, with the intent to engage in conduct that violates the portion of a protection order that prohibits or provides protection against violence, threats, or harassment against, contact or communication with, or physical proximity to, another person, or that would violate such a portion of a protection order in the jurisdiction in which the order was issued, and subsequently engages in such conduct, shall be punished . . . .

Statement

This case implicates the scope of the writ of coram nobis and the rules that govern its proceedings. Former Acting Solicitor General, Neal Katyal, is counsel of record in another pending petition, also asking this Court to provide coram nobis guidance. *Kimberlin v. United States*, No. 22-124 (S.Ct. Aug. 5, 2022) (*Kimberlin* Pet'n). The Court should grant this petition, ideally as a companion to *Kimberlin*. In the alternative, the Court should GVR to the circuit court with instructions to address the question in this petition - a question raised but ignored below.

United States v. Morgan, 346 U.S. 502 (1954) held that the writ of error coram nobis is available to correct a criminal judgment after completion of the sentence. Since *Morgan*, lower courts have pleaded with this Court for additional coram nobis guidance. This Court admits, "the precise contours of coram nobis have not been well defined." *United States v. Denedo*, 556 U.S. 904, 910 (2009). And the Solicitor General's office previously filed a petition for certiorari, saying, "there is considerable confusion in the courts of appeals with respect to the proper standard for granting coram nobis relief." Pet. for Cert., *United States v. Mandel*, No. 88-1759, 1989 WL 1174213, at *6 (U.S. Apr. 28, 1989) *(Mandel* Pet'n*)*. Due to the tremendous uncertainty regarding the scope and availability of the writ, "the courts of appeals have not yet developed anything resembling a uniform approach to [coram nobis] relief." *United States v. George*, 676 F.3d 249, 254 (1st Cir. 2012). Indeed, many coram nobis circuit conflicts exist.

Several years ago, this Court was one vote shy from granting certiorari in a coram nobis case. The potential fourth vote, Justice Kennedy, relisted the case from its original conference date. In the following conference, he voted to deny certiorari believing the case was resolvable without addressing the coram nobis question. In his letter to the Conference explaining his vote, Justice Kennedy emphasized that the case was not a good vehicle to provide "comprehensive consideration of coram nobis relief." Lee Epstein, Jeffrey A. Segal, & Harold J. Spaeth, *The Digital Archive of the Papers of Justice Harry A. Blackmun*, The Blackmun Archives at Washington University-St. Louis (2007), *Keane v. United States*, 88-1178 (May 18, 1989, Conference) at 10. Thus, this Court has previously recognized that comprehensive coram nobis guidance is sufficiently important to merit its review.

Mr. Katyal identified the need for comprehensive coram nobis guidance in the opening sentence of his introduction. *Kimberlin* Pet'n at 1. However, the question presented in *Kimberlin* implicates a well-entrenched circuit split, and the Court would need to reach outside that petition's question to provide comprehensive coram nobis guidance. The Court, however, would not need to reach outside the question in this petition to provide comprehensive guidance.

This petition's question implicates the scope and rules of coram nobis proceedings. The premise of petitioner's argument is 1) the former courts of equity had the authority to correct criminal judgments, including convictions, sentences, forfeitures, and restitution; 2) when Congress merged the courts of equity with the courts of law, there was no intent to repeal a district court's authority to provide equitable relief from a

criminal judgment; and 3) absent intervening higher authority, the Federal Equity Rules, including its rules on hearings, govern coram nobis proceedings.

In both the district court and the appellate court, petitioner argued at length that *United States v. Taylor*, 648 F.2d 565 (9th Cir. 1981), the circuit's precedent on coram nobis evidentiary hearing determinations, erred because the *Taylor* Court did not consider whether the rules governing the courts of equity were controlling. Pet. 9a-10a. The district court ignored the question and cited *Taylor* as its authority to deny an evidentiary hearing. The Ninth Circuit also avoided the question, citing its rule that a precedent cannot be overturned by a panel unless the precedent clearly conflicts with "intervening" authority. Pet. App. 3a. The courts also denied the coram nobis petition on other grounds; but under equity rules, a court cannot deny relief on those other grounds before conducting a hearing.

Therefore, this case is a great vehicle for review. First, the issue was raised and preserved below, and the error is outcome determinative. And second, this case implicates the scope and rules of coram nobis proceedings, an issue that this Court, the circuit courts, and the Solicitor General all deem to be sufficiently important to merit this Court's review.

Proceedings Below

On May 22, 2002, petitioner traveled from Los Angeles to Hawaii on a business trip. Four days later, he went to a shopping center where he crossed paths with a relative, J.B. A protective order existed preventing petitioner from contacting J.B. However, as their paths crossed, petitioner attempted to have a

conversation with his relative. As a result, petitioner was charged in a single-count indictment with traveling in interstate commerce with the intent to violate a protection order, in violation of 18 U.S.C. § 2262(a)(1). Pet. App. 20a. With regard to the elements of the charged offense, the jury instruction provided as follows:

> First, that there was a protection order that prohibited and provided protections against the defendant's contacting, another person; Second, that the defendant intentionally engaged in conduct that violated the protection order; Third, before violating the protection order, the defendant traveled in interstate commerce by crossing a state boundary; and Fourth, at the time the defendant crossed the state boundary, he had the intent to engage in conduct that would violate the protection order.

Pet. App. 27a-28a.

Both parties told the jury that the only real issue was the fourth element of the statute: whether petitioner had the intent to violate the protective order as he travelled to Hawaii. The government said, "So I'm sure [defense counsel] will tell you, and she's right, the issue in this case is, fourth, that the defendant, at the time the defendant crossed the state boundary, he had the intent to engage in conduct that would violate the protective order." Petitioner's defense attorney confirmed, saying, "The question is very narrow here. The question is, as [the government] pointed out: Is there proof beyond a reasonable doubt that, when [petitioner] boarded the plane in Los Angeles to come to Honolulu, he intended at that point in time to violate

the restraining order?" Neither the parties nor the court provided the jury with a definition of intent.

Petitioner's primary defense at trial was that he did not have the intent to violate the protective order because he did not have any knowledge or belief that J.B. would be at the shopping center. Throughout his testimony, petitioner emphasized the importance of his "knowledge." During direct examination, his attorney asked, "Did you have any idea that [J.B.] would be at the shopping center." Petitioner replied, "No, I had no idea that he ever went there." Petitioner would repeat this claim throughout his testimony, saying, "I just didn't think that that's where [J.B.] would be." "I really wasn't thinking that [J.B.] would be there." "I didn't know he was there." "I didn't know [J.B. would] be here." "I couldn't believe this was happening." "I just never thought that [J.B.] would ever go there." In cross-examination, petitioner told the jury his understanding of the definition of intent, saying, "If you don't know that someone's there, that's not a violation of a restraining order. You actually have to know somebody is there in order to violate it." Finally, in closing argument, petitioner's attorney also stressed the importance of 'knowledge', saying, "there's no evidence that he contrived to be there to run into [J.B.]. He couldn't have known that [J.B.] was going to be there."

In contrast, the government's theory of its case was that petitioner knew J.B. was at the mall. The government told the jury in its closing argument, "You know, if defendant had run into [J.B.] in Waikiki or the North Shore, you know, well, maybe it was an accident. He's going into [J.B.'s] backyard, Mililani Town Center right near the movie theater. He's got to know

[J.B.] goes there." Likewise, the government says in its rebuttal argument, "What did the defendant do? He went to Mililani Town Center, the one place where he was likely to see [J.B.]." The jury found petitioner guilty as charged. He was sentenced to a term of imprisonment of 51 months and a term of supervised release of 36 months.

In 2019, the Government – contrary to its theory at trial - stated in a brief to the Ninth Circuit: "On May 22, 2002, while he was still on the airplane, [petitioner] probably did not know that [J.B.] would go to the mall." This admission prompted petitioner to seek coram nobis relief. Petitioner's claim was that "he was prevented from raising a complete defense at trial (insufficiency of the evidence) because the government failed to disclose information it knew – or should have known – at that time." In support of this claim, petitioner said, "the commonly understood meaning of intent to commit a future act is a motive to commit the act and a belief there would be a likely opportunity to commit the act;" thus, without the belief that petitioner had an opportunity to violate the protective order, there can be no intent.

In the opening brief, petitioner did not claim that the government's change of its theory violated *Brady v. Maryland*, 373 U.S. 83 (1963). However, the government in its answer, said, "what [petitioner] really is making is a *Brady* claim—that the Government's posttrial statements undermined its theory of the case at trial." In the reply, petitioner agreed that the concession should be considered a *Brady* violation because the government argued a theory at trial that it knew or should have known was incorrect.

The same day petitioner filed his coram nobis petition, he filed a "Motion for Determination of Applicable Law." In that motion, petitioner asked the district court to decide the same question now presented to this Court: whether the rules governing the ancient courts of equity apply to the modern coram nobis proceedings. Specifically, he claimed the Ninth Circuit erred in *Taylor* because the *Taylor* court did not consider whether courts of equity rules applied to former prisoners. The court consolidated the motion for determination of applicable law with the petition for writ of coram nobis. The government did not address the *Taylor* question. Petitioner then filed a "Motion to Request Amicus Participation" in order to address the question. The court denied that motion.

The district court denied the motion to determine whether coram nobis petitions are governed by the courts of equity rules, saying, "McNeil seeks a determination of the law applicable to a coram nobis petition, that request is denied as unnecessary. This court's practice is to set forth the applicable law in its orders." Pet. App. 24a. The court would then cite *Taylor* as its authority for denying an evidentiary hearing. Pet. App. 34a. The district court denied the petition, saying petitioner's argument about the definition of intent should have been raised on direct appeal or a § 2255 motion. Pet. App. 31a. In its decision on petitioner's motion for reconsideration, the court rejected petitioner's *Brady* argument, saying, "the Government's statement on appeal was not exculpatory evidence." Pet. App. 14a. The court did not recharacterize the claim as a due process violation.

On appeal, petitioner raised three claims: First, he claimed the commonly understood definition of intent

within § 2262(a)(1) includes a belief (or knowledge) of an opportunity to violate the protective order while traveling in interstate commerce; therefore, he was not required to make this argument while in custody. Second, he claimed the government's concession should be considered a *Brady* violation. Third, he claimed that federal equity rules govern coram nobis proceedings; therefore, the *Taylor* panel erred by applying § 2255 evidentiary hearings upon coram nobis proceedings. Pet. App. 40a-43a. In his reply brief, petitioner first argued that if the concession was not a *Brady* violation, his claim should be recharacterized as a due process violation.

The Ninth circuit affirmed the district court. Regarding petitioner's argument about the definition of intent, the court determined that this claim should have been raised earlier. Pet. App. 2a. Regarding petitioner's *Brady* claim, the panel said, "arguments in briefs are not evidence," therefore, it could not be considered "withheld evidence" as defined in *Brady*. Pet. App. 3a. Furthermore, the panel declined to address the due process claim, saying, this claim was "raised for the first time in his reply brief." *Id.* Finally, the panel declined to address whether *Taylor* was incorrectly decided, saying, "we are bound by *Taylor* because McNeil has not shown that it is 'clearly irreconcilable' with intervening higher authority." *Id.* Petitioner then filed a petition for rehearing and rehearing en banc. The court denied the petition, saying, "no judge has requested a vote on whether to rehear the matter en banc." Pet. App. 38a.

Reasons for Granting the Petition

I. This issue is exceptionally important

The writ of error coram nobis is the only remedy available for courts to correct a federal conviction after completion of the sentence. The estimated population of those who have completed a federal criminal sentence is over one million, over three times the population of those currently in federal custody. Brief of Amici Curiae Congress of Racial Equality, et al. in Support of Petitioner, *Walker v. United States*, No. 15-1027, 136 S.Ct. 2387 (2016), at 10-11. The writ has played an important role in our nation's history. This includes correcting some of this Court's most reprehensible decisions, restoring honor to the petitioners, and reaffirming public trust in the process. See *e.g. Hirabayashi v. United States*, 828 F.2d 591, 593 (9th Cir. 1987) ("The *Hirabayashi* and *Korematsu* decisions have never occupied an honored place in our history.")

While this Court regularly grants certiorari in habeas cases, the Court's only substantial decision providing coram nobis guidance is *Morgan*, a case decided nearly seven decades ago. Lower courts have subsequently asked for this Court's additional guidance on the standards governing coram nobis proceedings. The Seventh Circuit said, "coram nobis is a phantom in the Supreme Court's cases, appearing occasionally but only in outline." *United States v. Bush*, 888 F.2d 1145, 1146 (1989). The court then pleaded for guidance, saying, "[t]wo ambiguous decisions on the subject in the history of the Supreme Court are inadequate." *Id.* at 1149.

Carlisle v. United States, 517 U.S. 416 (1996) created additional confusion. *Carlisle* said, "it is difficult to conceive of a situation in a federal criminal case today where [a writ of coram nobis] would be necessary or appropriate." *Id.* at 429. This prompted Congress to say, "it is not clear whether the Supreme Court continues to believe that the writ of error coram nobis is available in federal court." Advisory Committee Notes to Fed. R. App. P. 4(a)(1)(C) (2002). (citing *Carlisle*). The *Carlisle* passage has been inconsistently interpreted. Congress interpreted *Carlisle* texturally - indicating the writ is no longer available, even to former prisoners. Indeed, the government occasionally cites *Carlisle* under this interpretation to oppose coram nobis relief. See *e.g. United States v. Arce-Flores*, No. 2:15-cr-00386 JLR, 2017 WL 4586326 (W.D. Wash. 2017) at *4 n.3. ("despite the Government's characterization, the court does not take this statement [in *Carlisle*] to mean that such a form of relief is generally unavailable, even when a petitioner meets the extraordinary circumstances necessary for relief.") Some circuits interpret *Carlisle* figuratively - justifying higher restrictions upon the writ. See *e.g. Mendoza v. United States*, 690 F.3d 157, 159 (3d Cir. 2012). ("This "sound reason" standard is even stricter than that used to evaluate § 2255 petitions. Indeed, 'it is difficult to conceive of a situation in a federal criminal case today where a writ of coram nobis would be necessary or appropriate.'") Other circuits interpret *Carlisle* contextually - denying coram nobis relief only where a statute specifically addresses the particular issue at hand. See *e.g. Murray v. United States*, 704 F.3d 23, 28 (1st Cir. 2013) ("The Supreme Court has noted that, given other statutes and rules of criminal procedure, 'it is difficult to conceive of a situation in a

federal criminal case today where a writ of coram nobis would be necessary or appropriate.'")

The ambiguous coram nobis decisions are problematic for petitioners. If a former federal prisoner discovers new information casting doubt upon the validity of a conviction, a coram nobis petition must be promptly submitted. A writ will not issue unless the petitioner provides "sound reasons" for failing to file the petition earlier. However, ignorance of the law is not a sound reason for a delay. See *United States v. Kroytor*, 977 F.3d 957, 962 (9th Cir. 2020) ("we join the Third Circuit in holding that a lack of clarity in the law is not itself a valid reason to delay filing a coram nobis petition.") This requirement is troubling for former prisoners, many of whom have little education or funds to hire an attorney. To avoid forfeiting their last chance of ridding themselves from a lifetime of collateral consequences, these litigants must be able to understand the metes and bounds of the writ. Therefore, comprehensive coram nobis guidance is exceptionally important for both the courts and petitioners.

II. Multiple conflicts exist with respect to the proper standard for granting coram nobis relief

Due to the tremendous uncertainty regarding the scope and availability of the writ, "the courts of appeals have not yet developed anything resembling a uniform approach to such relief." *George*, 676 F.3d at 254. See also *Bush*, 888 F.2d at 1148. ("*Keane* recognized that the courts of appeals disagreed about several aspects of coram nobis practice. Since then, the courts' paths have diverged farther.") Indeed, the circuit courts are admittedly divided in multiple areas of coram nobis jurisprudence. These conflicts

demonstrate the need for comprehensive coram nobis guidance. What follows below is a list of seven *recognized* conflicts.[1] The first two conflicts pertain to doctrines, the third and fourth conflicts pertain to rules governing the writ, and the last three conflicts pertain to the scope of the writ.

1. The *Kimberlin* petition asks the Court to resolve a conflict over the civil disability doctrine. In four circuits, coram nobis petitioners must demonstrate that they suffer from a "civil disability" before a court can grant the writ. However, three other circuits have rejected this requirement. *Kimberlin* Pet'n at 14-19.

2. The Seventh Circuit, in conflict with four other circuits, held that the abuse-of-the-writ doctrine's cause and prejudice test is inapplicable in coram nobis cases. In *United States v. Miles*, 923 F.3d 798, 804 (10th Cir. 2019), the Tenth circuit held that coram nobis petitioners must pass the cause and prejudice test. *Miles* observed that its decision agreed with the Fourth, Eighth, and Eleventh circuits, but differed with the Seventh Circuit. *Id.* *United States v. Darnell*, 716 F.2d 479, 481 n.5 (7th Cir. 1983) said, "we decline to extend the cause and prejudice test to coram nobis actions."

3. The Eighth Circuit, in conflict with the Third, Sixth, Ninth, and Tenth circuits, held that restrictions on second or successive motions set forth in § 2255(h)(1) and (2) apply to coram nobis petitioners. See *Baranski v. United States*, 889 F.3d 459, 460 (8th

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[1] Other conflicts or inconsistencies are not included in this list. For example, no circuit has expressly recognized the inconsistent interpretations of *Carlisle*.

Cir. 2018) (Stras, CJ., dissenting from the denial of the petition for rehearing en banc, acknowledging that its decision conflicts with the Sixth, Ninth, and Tenth circuits); and see *United States v. De Castro*, 49 F.4th 836, 843 (3d Cir. 2022) ("Second and successive habeas petitions are governed by statutory language not applicable to coram nobis petitions.")

4. A conflict exists on whether 18 U.S.C. § 3006's grant of discretionary authority to appoint counsel applies to coram nobis proceedings. See *Evans v. United States*, No. 1:05-cr-00259, (D. Md. May. 30, 2018) ("At least one court has concluded that the absence of § 1651 from § 3006A(a)(2) means that appointment of counsel in a coram nobis proceeding is not permitted. However, a different court treated a coram nobis petition as falling within the scope of 18 U.S.C. § 3006(a)(2)(B).") (citations omitted).

5. There is a conflict between the Fifth and Seventh circuits on whether the writ of coram nobis is available to correct a restitution order. Compare *Barnickel v. United States*, 113 F.3d 704, 706 (7th Cir. 1997) ("[This Circuit has] approved the use of a writ of error coram nobis to challenge a restitution order that was based on inaccurate information.") with *United States v. Singh*, No. 4:17-CR-193, 2020 WL 4192899, at *3 (E.D. Tex. Jul. 20, 2020) ("the Fifth Circuit has held that `a district court lacks jurisdiction to modify a restitution order under § 2255, a writ of coram nobis, or `any other federal law.'") (quoting *Campbell v. United States*, 330 F.App'x 482, 483 (5th Cir. 2009)).

6. While most circuits restrict the writ of coram nobis to former prisoners, courts in the Eleventh Circuit provide the writ to those in-custody to challenge forfeiture judgments. See *United States v. Dotson*, No.

18-cr-157, 2022 WL 10871240 (M.D. Fla. Oct. 18, 2022) ("Although the Dotsons are in custody [...] courts in this circuit have entertained challenges to forfeiture under the writ of error coram nobis.") But see *United States v. Kroytor*, 977 F.3d 957, 961 (9th Cir. 2020) ("A writ of error coram nobis affords a remedy to attack a conviction when the petitioner has served his sentence and is no longer in custody.")

7. A split exists between the Third and Seventh circuits on the power of a district court to correct a criminal sentence obtained by fraud. Compare *United States v. Washington*, 549 F.3d 905, 917 (3d Cir. 2008) ("we are dubious that federal courts ever had the inherent power to vacate criminal sentences that were procured by fraud.") with *United States v. Bishop*, 774 F.2d 771, 774 n. 5 (7th Cir.1985) (courts have the inherent power to correct a criminal sentence gained through fraud). The Eighth Circuit was also asked to decide this issue, but it resolved the case on other grounds. However, the court recognized the circuit conflict and observed that the Seventh Circuit's decision aligned with a *United States v. Smith*, 331 U.S. 469 (1947). *United States v. Smiley*, 553 F.3d 1137, 1142-1143 (8th Cir. 2009) ("*Washington* differs with the Seventh Circuit's holding in *Bishop* and the statement in *Smith*.")

In conclusion, this consolidated list of coram nobis conflicts demonstrates a lack of uniformity in coram nobis jurisprudence. Therefore, comprehensive coram nobis guidance is worthy of this Court's review.

III. Circuit courts apply habeas rules upon coram nobis proceedings in violation of the All-Writs Act

Pursuant to well-established decisions of this Court, circuit courts violate the All-Writs Act by relying upon § 2255 hearing rules in coram nobis proceedings instead of the courts of equity hearing rules for these reasons:

A. Courts of equity had the authority to provide equitable relief in criminal cases

Coram nobis "is an equitable means to obtain relief from a judgment." *Denedo*, 556 U.S. at 913. Article III § 2 of the Constitution provides that federal courts may exercise jurisdiction over cases and controversies "in Law and Equity." Thus, in 1792, Congress created separate federal courts: courts of equity and courts of law. The Federalist Papers defended Article III's jurisdictional grant over cases in equity by explaining that federal courts need the power to fairly adjudicate cases within their jurisdiction involving, "ingredients of fraud, accident, trust, or hardship." Alexander Hamilton later explained, "the great and primary use of a court of equity is to give relief in extraordinary cases, which are exceptions to general rules." The Federalist No. 83, at 569 (J. Cooke ed. 1961) (A. Hamilton).

Until the Federal Rules of Civil Procedure were promulgated in 1938, federal courts of equity decided equitable claims. No known case exists where a federal court of equity granted equitable relief in a criminal case; however, there are two cases where a federal court of equity denied such relief. In both cases, the courts denied relief, citing a lack of jurisdiction.

Needham v. United States, 89 F.2d 72 (7th Cir. 1937) and *Flynn v. Templeton*, 1 F.Supp. 238 (W.D. N.Y. 1932). These courts said that a court "lost" its jurisdiction to correct a judgment whenever the sentence had been served. This was also the primary argument of the dissent in *Morgan*. See *Morgan*, 346 U.S. at 515 (Minton, J., dissenting). Thus, the *Morgan* Court rejected the reasoning provided by *Needham* and *Flynn* to deny equitable relief to former prisoners.

Furthermore, as mentioned in the previous section, there is a circuit split on whether district courts have an "inherent equitable power" to correct a criminal sentence obtained by fraud. In all three circuits to address this issue, the government argued that federal courts have this power. The Eighth Circuit also observed that this Court has "commented on the power of a court to correct a judgment gained through fraud in a criminal case." *Smiley*, 553 F.3d at 1142-1143, citing *Smith*, 331 U.S. at 475 n. 4.[2] Therefore, while the courts of equity never corrected a judgment in a criminal case, these courts, nevertheless, had the authority to do so.

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[2] The *Smith* footnote is important, and the Court should clarify its meaning. First, the *Carlisle* Court's inconsistently interpreted passage is a direct quote from the *Smith* footnote. Second, *Smiley* cites this footnote to indicate that federal courts have the inherent equitable power to correct criminal sentences obtained by fraud. Finally, *Morgan* cites this footnote to justify writs of coram nobis, saying, "In *Smith* we referred to the slight need for a remedy like coram nobis in view of the modern substitutes." *Morgan*, 346 U.S., at 509, n. 15 (citation omitted).

B. Absent intervening higher authority, the rules governing the former courts of equity govern coram nobis proceedings

Courts of equity were governed by the Rules of Practice for the Courts of Equity of the United States ("Federal Equity Rules") and set out in 226 U.S. 649-673 (1912) (adopting formal rules of equity practice). These rules were replaced with the Federal Rules of Civil Procedure in 1938. However, the new rules did not provide an equitable means to obtain relief from a criminal judgment. The purpose of the civil rules was to create a uniform system of procedural rules for federal courts in civil cases. The promulgation of these rules had no intent to "abridge, enlarge or modify any substantive right." *Grupo Mexicano de Desarrollo, SA v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 322 (1999). An implied repeal will only be found where provisions in two statutes are in "irreconcilable conflict," or where the latter Act covers the whole subject of the earlier one and "is clearly intended as a substitute." *Branch v. Smith*, 538 U.S. 254, 273 (2003). The civil rules did not "cover the whole subject of" the federal equity rules because it did not address equitable relief from a criminal judgment. The new rules were also not "intended as a substitute" because promulgation of the civil rules had no intent to modify any substantive right. Thus, pursuant to *Branch*, the federal equity rules still govern equitable proceedings in criminal cases. However, courts, in violation of *Branch*, apply federal habeas rules by analogy upon coram nobis proceedings.

The All-Writs act provides courts the authority to apply other rules by analogy upon coram nobis proceedings. Pursuant to the All-Writs Act, a court may

issue writs in aid of their jurisdiction, "when no other remedy will suffice." *DiBella v. United States*, 369 U.S. 121, 125 n.4 (1962). Furthermore, the All-Writs Act prohibits courts from applying modern procedures that appear more convenient than ancient remedies. See *Pennsylvania Bureau of Correction v. U.S. Marshals Service*, 474 U.S. 34, 43 (1985) ("Although that Act empowers federal courts to fashion extraordinary remedies when the need arises, it does not authorize them to issue ad hoc writs whenever compliance with statutory procedures appears inconvenient or less appropriate.") Thus, while § 2255 rules may appear more practical and convenient than the equity rules, pursuant to the All-Writs Act, courts are not authorized to apply § 2255 rules by analogy in coram nobis proceedings whenever the equity rules adequately provide a solution.

C. The circuit courts err by applying § 2255 evidentiary hearing rules "by analogy" upon coram nobis proceedings

Circuit courts all apply § 2255 evidentiary hearing procedures by analogy upon coram nobis proceedings. See *e.g. Fleming v. United States*, 146 F.3d 88, 90 (2d Cir. 1998) ("Because of the similarities between coram nobis proceedings and § 2255 proceedings, the § 2255 procedure often is applied by analogy in coram nobis cases.") Section 2255 provides district courts the authority under certain conditions to dispose of a case without an evidentiary hearing. In contrast, the federal equity rules required that, "all testimony was to be received orally in open court." *United States v. Microsoft Corp.*, 165 F.3d 952, 957 (D.C. Cir. 1999) (citing Equity Rule 46, 226 U.S. 627, 661 (1912)). If the equity rules applied to former prisoners and those rules were

not repealed, federal courts violate the All-Writs Act, by applying § 2255 evidentiary hearing rules upon coram nobis proceedings.

Furthermore, the circuit courts violate *United States v. Hayman*, 342 U.S. 205 (1952). *Hayman* said, "it by no means follows that an issue of fact could be determined in a coram nobis proceeding without the presence of the prisoner, the New York Court of Appeals recently holding that his presence was required under the common law." *Id.* at 221 n. 36, citing *People v. Richetti*, 302 N.Y. 290 (1951). The *Richetti* court explained that a hearing was required in coram nobis proceedings, saying, "improbable or unbelievable though the allegations may seem — though they `may tax credulity' — the defendant is entitled to a hearing." *Id.* at 297. In contrast, § 2255 permits a district court to dismiss a coram nobis petition without an evidentiary hearing if the "motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." § 2255(b). Thus, even if the equity rules did not apply to former prisoners or if those rules were repealed, federal courts still violate *Hayman* by relying upon § 2255 evidentiary hearing rules in coram nobis proceedings.

IV. The decision below is incorrect

The Ninth Circuit denied all three of petitioner's claims in violation of well-established doctrine. Furthermore, the courts below violate *Hayman* and the rules governing the former courts of equity by deciding all of petitioner's claims prior to a hearing.

A. The Ninth Circuit erred by refusing to address whether its precedent on coram nobis evidentiary hearing determinations was incorrectly decided

Taylor is the Ninth Circuit's controlling authority on coram nobis evidentiary hearing determinations. Like other circuits, *Taylor* applies § 2255 evidentiary hearing procedures upon coram nobis proceedings, saying, "whether a hearing is required on a coram nobis motion should be resolved in the same manner as habeas corpus petitions." *Taylor, 648 F.2d* at 573 & n. 25. Petitioner argued that *Taylor* erred because neither the parties nor the *Taylor* panel considered 1) whether the courts of equity evidentiary hearing rules apply to coram nobis proceedings, or 2) whether *Hayman* is controlling. However, the courts below relied upon *Taylor* without addressing petitioner's arguments. The Ninth Circuit declined to address the question, saying, "we are bound by *Taylor* because McNeil has not shown that it is 'clearly irreconcilable' with intervening higher authority." Pet. App. 3a. The panel erred because it relied on a rule that is applicable whenever a party asks the court to overrule a precedent that conflicts with *intervening* authority. A different rule applies whenever a party asks the court to overrule a precedent that conflicts with authority *existing* when the court decided the precedent but was not considered.

This Court has long held that, "questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157 (2004), citing *Webster v. Fall*, 266

U.S. 507, 511 (1925). However, the Ninth Circuit determined *Taylor* was controlling although these questions were not considered by the *Taylor* panel. Therefore, the decision below violates *Webster*.

B. The courts below violate equity rules by addressing claims prior to a hearing

Pursuant to Equity Rule 46, 226 U.S. 627, 661 (1912) and *Hayman*, the district court is required to conduct an evidentiary hearing on newly discovered and controverted issues of fact, even if the court deems petitioner's claims to be "improbable or unbelievable," *supra* at 21. In this case, the government conceded a fact in a prior Ninth circuit proceeding. Petitioner promptly filed a coram nobis petition based on this newly discovered issue of fact, *supra* at 8. Therefore, pursuant to both *Hayman* and the rules governing the former courts of equity, petitioner was entitled to a hearing.

The district court determined that the government's concession did not constitute a *Brady* violation and that petitioner should have provided to the jury the definition of intent. However, according to *Hayman* and the equity rules, the court could not determine these issues without a hearing. Therefore, the question presented to this Court is determinative of the case.

C. The Ninth Circuit ignores a fundamental premise underlying the jury system

After the government admitted that petitioner did not have any belief that J.B. would be at the mall, petitioner claimed he is actually innocent because the commonly understood definition of intent includes the ingredients of "motive" and "belief". Pet. App. 44a-45a.

Indeed, Judge Learned Hand said, "one cannot intend that which he has no belief in his power to do." *Knickerbocker Merch. Co. v. United States*, 13 F.2d 544, 546 (2d Cir. 1926) (L. Hand, J.). Furthermore, "the presumption that jurors understand common English terms and concepts, moreover, is one of the fundamental premises underlying the jury system." *United States v. Poole*, 545 F.3d 916, 921 & n.4 (10th Cir. 2008) (citations omitted). However, the courts below determined that petitioner "had not shown a valid reason why he did not raise [this claim] earlier." Pet. App. 2a. As petitioner argued, "the only reason" he asked the court to clarify the definition of intent was because the government now claims that § 2262(a)(1)'s intent requirement does not include a belief ingredient. Pet. App. 46a-47a. Thus, pursuant to this "fundamental premise," petitioner was not required to define any earlier the commonly understood definition of intent.

D. The Ninth Circuit should have recharacterized petitioner's *Brady* claim as a due process claim

In the district court, the opening sentence of petitioner's claims is an obvious claim of a due process violation: "petitioner claims that he was prevented from raising a complete defense at trial (insufficiency of the evidence) because the government failed to disclose information it knew - or should have known - at that time." Petitioner makes no reference to a *Brady* claim at any time in his coram nobis petition. However, in its answer, the government recharacterized the claim, saying, "what [petitioner] really is making is a *Brady* claim." In his reply, petitioner, for the first time, agreed that the concession should be considered a *Brady* violation because the government argued a

theory at trial that it knew or should have known was incorrect.

No published federal court case exists, to petitioner's knowledge, that addresses whether either a *Brady* or due process violation occurs when the government changes the theory of its case in post-conviction proceedings. When the government submitted its appellate answering brief, it no longer characterized the claim as a *Brady* violation. Petitioner then, for the first time, argued in his reply that if the claim was not a *Brady* violation, it should then be recharacterized as a due process violation. After filing his reply, petitioner filed supplemental citations, pursuant to Federal Rules of Appellate Procedure § 28(j), citing an unpublished case from the sixth circuit and a case from the District of Columbia Court of Appeals. These cases determined that a government's inconsistent theories of its case can constitute a due process violation.

The Ninth Circuit decided that the claim did not constitute a *Brady* violation, but it did not decide whether the claim constituted a due process violation because this claim was, "raised for the first time in his reply brief." The panel erred because this Court has repeatedly said that all pleadings filed by *pro se* litigants, "shall be so construed as to do substantial justice." See *Erickson v. Pardus*, 551 U.S. 89, 94 (2007). This is especially true when no published decision exists on the subject and petitioner's claim clearly implicates a due process violation. Thus, the Ninth Circuit erred by refusing to consider whether the government's revised theory of its case constitutes a due process violation.

In conclusion, the decision below is directly contrary to numerous decisions of this Court. This is not

a mere oversight or mistake. This is an egregious error that deserves correction.

V. The Court should grant this petition as a companion to *Kimberlin*. In the alternative, the Court should remand this case to address the question presented

A. This case would be an appropriate companion to *Kimberlin*

By granting certiorari in both cases, the Court can simultaneously resolve the entrench circuit conflict addressed in *Kimberlin* while providing circuit courts with comprehensive coram nobis guidance. *Kimberlin*'s circuit conflict can be resolved without addressing the scope of the writ or the rules that govern it. In that conflict, the circuits disagree over whether a coram nobis petitioner must provide proof of an ongoing civil disability. The circuits that require a civil disabilities test believe that, in the interest of finality, requirements for relief of a judgment must be more stringent than those in § 2255 proceedings. This issue was not addressed by courts of equity and the equity rules do not provide any guidance on this topic. The question in this petition, however, implicates the scope and rules of coram nobis proceedings. Petitioner argues that coram nobis is an equitable means to correct convictions, sentences, forfeitures, and restitution judgements obtained by fraud in criminal cases, and that coram nobis proceedings are governed by the rules governing courts of equity.

The seven recognized circuit conflicts discussed earlier in this petition (*supra* at 13-16) can be divided into three areas: conflicts on the scope of the writ, conflicts on the rules that apply to the writ, and conflicts

involving doctrines that apply to the writ. This petition implicates two of these three categories (scope and rules), and the *Kimberlin* petition implicates one of the two conflicts related to doctrines. Therefore, by combining this petition with *Kimberlin*, the Court can efficiently resolve six of the seven conflicts, resolve the *Carlisle* inconsistency, and provide the comprehensive coram nobis guidance that courts and petitioners need.

B. Remand is appropriate

Alternatively, the Court should grant this petition, vacate the circuit court's decision, and remand with instructions to decide, in the first instance, whether coram nobis proceedings are governed by the equity rules. While this Court can address questions that were raised but ignored below, it prefers well percolated questions. But this Court should not deny this petition and expect that this question will be percolated in other cases. It has been nearly seventy years since *Morgan*; yet, since that decision, no other case has addressed the connection between the modern writ of coram nobis and the ancient courts of equity. Lower courts have been pleading for comprehensive coram nobis guidance while former federal prisoners, deserving of equitable relief, muddle through convoluted coram nobis case law. If this Court is to provide accurate guidance, this question must be addressed first. Thus, GVR is appropriate in order to expeditiously provide this Court and other courts with a reasoned decision on this question.

C. A response is warranted

Petitioner raised the same question presented to this Court with the courts below. In both courts,

petitioner's arguments on this question comprised nearly two-thirds of his total arguments. Compare Pet. App. 43a-54a with 54a-75a. However, the government did not address the question in its answering briefs, even with the Ninth Circuit's warning that a "failure to address an issue in an answering brief may waive any argument on the issue." *United States v. McEnry*, 659 F.3d 893, 902 (9th Cir. 2011). Petitioner understands how extraordinary it seems for a *pro se* litigant to claim that over the past seven decades, every federal court overlooked the question raised in this petition. Petitioner also understands that he advocates a decision that would be unpopular with both the courts and the government. But these reasons do not justify a lack of any response to the question. While petitioner extensively researched this issue, information possibly exists somewhere that would unequivocally defeat petitioner's arguments. If so, a response could provide this information. If not, the Court should grant this petition and provide the coram nobis guidance that courts and litigants need. The Solicitor General once asked this Court to grant review, conceding, "there is considerable confusion in the courts of appeals with respect to the proper standard for granting coram nobis relief." *Mandel* Pet'n at 6. Therefore, if the Solicitor General believes comprehensive coram nobis consideration is cert-worthy, then petitioner's question, implicating comprehensive coram nobis guidance, is likewise worthy of at least a response.

Conclusion

For the forgoing reasons, the petition for a writ of certiorari should be granted either independently or as a companion to *Kimberlin*.

Respectfully Submitted,

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