APPENDIX

Appendix A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,
Plaintiff- Appellee,

v.

KENNETH CHARLES McNEIL, AKA Chip
Defendant - Appellant.

No. 21-16750
D.C. Nos. 1:21-cv-00212-SOM-RT
1:02-cr-00547-SOM-1

MEMORANDUM*1

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* This disposition is not appropriate for publication and is not precedentexcept as provided by Ninth Circuit Rule 36-3.

Appeal from the United States District Court
for the District of Hawaii
Susan Oki Mollway, District Judge, Presiding

Submitted May 17, 2022**2

Before: CANBY, TASHIMA, and NGUYEN, Circuit Judges.

Kenneth Charles McNeil appeals pro se from the district court's orders denying his petition for a writ of error coram nobis and motion for reconsideration. We have jurisdiction under 28 U.S.C. § 1291. We review de novo the denial of a petition for a writ of error coram nobis, see *United States v. Riedl*, 496 F.3d 1003, 1005 (9th Cir. 2007), and for abuse of discretion the denial of a reconsideration motion, see *Sch. Dist. No. 1J, Multnomah Cnty., Or. v. ACandS, Inc.*, 5 F.3d 1255, 1262 (9th Cir. 1993). We affirm.

McNeil contends that the district court ignored a "fundamental concept of intent" when analyzing his claim regarding the definition of intent. However, the court correctly concluded that this claim did not warrant coram nobis relief because McNeil had not shown a valid reason why he did not raise it earlier. See *Riedl*, 496 F.3d at 1006 (to be eligible for coram nobis relief, a petitioner must show "valid reasons exist for not attacking the conviction earlier"). Moreover, our review of the record shows that McNeil has not shown an error "of the most fundamental character" with respect to his intent claim. *See id.*

** The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

McNeil next argues that the government made a concession in its answering brief to a prior coram nobis appeal that constitutes impeaching evidence that should have been disclosed under *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972). We agree with the district court that the statement on which McNeil relies is not evidence, see *Comstock v. Humphries*, 786 F.3d 701, 709 (9th Cir. 2015) ("arguments in briefs are not evidence"), and that McNeil failed to show an error "of the most fundamental character," *Riedl*, 496 F.3d at 1006. Contrary to McNeil's contention, the district court did not err in its analysis of this claim.

McNeil also contends that the district court erred by deciding his petition without conducting an evidentiary hearing. The district court did not err because the record conclusively shows that McNeil is not entitled to relief. See 28 U.S.C. § 2255(b); *United States v. Taylor*, 648 F.2d 565, 573 n.25 (9th Cir. 1981) ("Whether a hearing is required on a coram nobis motion should be resolved in the same manner as habeas corpus petitions."). Contrary to McNeil's argument, we are bound by *Taylor* because McNeil has not shown that it is "clearly irreconcilable" with intervening higher authority. See *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc).

We do not consider McNeil's claim, raised for the first time in his reply brief, that the government's alleged change in its theory of the case violates his right to due process. See *Padgett v. Wright*, 587 F.3d 983, 985 n.2 (9th Cir. 2009).

AFFIRMED.

Appendix B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

UNITED STATES OF AMERICA,
Plaintiff-Respondent,
vs.
KENNETH CHARLES McNEIL,
Defendant-Petitioner.

Crim. No. 02-00547 SOM Civ. No. 21-00212 SOM/RT
ORDER DENYING DEFENDANT'S MOTION SEEKING RECONSIDERATION OR CLARIFI-CATION OF THE ORDER DENYING HIS FOURTH PETITION FOR WRIT OF CORAM NOBIS

ORDER DENYING DEFENDANT'S MOTION SEEKING RECONSIDERATION OR CLARIFICATION OF THE ORDER DENYING HIS FOURTH PETITION FOR WRIT OF CORAM NOBIS

I. INTRODUCTION.

On July 12, 2021, this court denied Defendant Kenneth Charles McNeil's most recent post-trial request for collateral relief from his conviction and judgment, ruling that McNeil's latest coram nobis petition (his fourth, following an unsuccessful motion under 28 U.S.C. § 2255) had failed to show any trial error of a fundamental nature and/or why he could not have raised his arguments earlier. See Order Denying Defendant's Petition for Writ of Coram Nobis, ECF No.

208. On July 23, 2021, McNeil sought reconsideration or clarification of that order. See ECF No. 209. That motion is denied.

I. RECONSIDERATION STANDARD.

Although the Federal Rules of Criminal Procedure do not expressly authorize the filing of motions for reconsideration, circuit courts, including the Ninth Circuit, have held that motions for reconsideration may be filed in criminal cases. See *United States v. Fiorelli*, 337 F.3d 282, 288 (3d Cir. 2003) ("As noted by the Second and Ninth Circuits, motions for reconsideration may be filed in criminal cases"); *United States v. Martin*, 226 F.3d 1042, 1047 n.7 (9th Cir. 2000) ("As the Second Circuit noted . . . , post-judgment motions for reconsideration may be filed in criminal cases"); *United States v. Amezcua*, 2015 WL 5165235, at *1 (E.D. Cal. Sept. 2, 2015) ("The Ninth Circuit allows parties to file motions for reconsideration in criminal cases, although the Federal Rules of [Criminal] Procedure do not explicitly provide for such motions."), aff'd, 670 F. App'x 454 (9th Cir. 2016).

In ruling on motions for reconsideration in criminal cases, courts have relied on the standards governing Rule 59(e) and Rule 60(b) of the Federal Rules of Civil Procedure. See *Amezcua*, 2015 WL 5165235, at *1.

A Rule 59(e) motion must be filed within 28 days of the final order or judgment in issue and may only be granted when: "1) the motion is necessary to correct manifest errors of law or fact upon which the judgment is based; 2) the moving party presents newly discovered or previously unavailable evidence,

3) the motion is necessary to prevent manifest injustice, or

4) there is an intervening change in controlling law." *Hiken v. Dep't of Def.*, 836 F.3d 1037, 1042 (9th Cir. 2016) (quotation marks and citations omitted). Rule 59(e) motions based on new evidence may not be based on "matters already available or known to the party submitting them as new evidence." 3 Moore's Manual–Fed. Practice & Procedure § 24.82 (Lexis Advance 2020).

Rule 60(b) of the Federal Rules of Civil Procedure permits relief from final judgments, orders, or proceedings. Such a motion may be granted on any one of six grounds:

> (1) mistake, inadvertence, surprise, or excusable neglect;
>
> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
>
> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
>
> (4) the judgment is void;
>
> (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
>
> (6) any other reason that justifies relief. Fed. R. Civ. P. 60(b).

III. ANALYSIS.

McNeil seeks reconsideration or clarification of this court's order denying his petition for coram nobis relief. That order denied coram nobis relief because McNeil had failed to meet the requirement that he establish all of the following:

> (1) a more usual remedy is not available;
>
> (2) valid reasons exist for not attacking the conviction earlier; (3) adverse consequences exist from the conviction sufficient to satisfy the case or controversy requirement of Article III; and (4) the error is of the most fundamental character.

Hirabayashi v. United States, 828 F.2d 591, 604 (9th Cir. 1987); accord *Matus-Leva v. United States*, 287 F.3d 758, 760 (9th Cir. 2002) (same); *Estate of McKinney v. United States*, 71 F.3d 779, 781-82 (9th Cir. 1995) (same).

McNeil was convicted of having violated 18 U.S.C. § 2262(a)(1), which stated at the time of his 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 . . . .

18 U.S.C. § 2262(a)(1) (effective Oct. 28, 2000, to Jan. 4, 2006).

At trial, the jury was instructed:

> In order for you to find the defendant guilty of the offense charged against him in the indictment, the government must prove each of the following elements beyond a reasonable doubt:
>
> First, that there was a protection order that prohibited and provided protection against the defendant contacting, communicating with, or being in the physical proximity to 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.
>
> With respect to the first element, the parties have stipulated that the order granting petition for injunction against harassment filed on September 25th, 2001, . .
>
> . is a protection order within the meaning of the statute, Title 18, United States Code, Section 2262, sub (a), sub (1).
>
> With respect to the fourth element, it is possible that the defendant may have had more than one purpose in coming to Hawai`i. It is not necessary for the government to prove

> that the sole and single purpose of the defendant's travel to Hawai`i was to engage in conduct that would be in violation of the protection order. You may find that the intent element has been satisfied if you are persuaded that one of the dominant purposes that the defendant had in coming to Hawai`i was to engage in conduct that would be in violation of the protection order.

ECF No. 202-2, PageID #s 1811-12.

McNeil had flown to Hawaii, then went to a shopping center where he interacted with J.B., a minor he was prohibited from having contact with under a state court's temporary restraining order.

A. McNeil's Misrepresentation of the Record Does Not Justify Reconsideration.

This is McNeil's fourth coram nobis motion. On appeal from the denial of his third coram nobis petition, McNeil argued that he lacked the requisite intent to violate the protective order because he did not expect J.B. to be at the shopping center at the time he ran into him. See ECF No. 202-4, PageID # 1990. The Government responded by arguing that it "did not have to show that McNeil intended [to] violate the protection order at a specific time and place (such as the mall) or in a specific manner. Of course, the government did not have to show that McNeil knew [J.B.] would be at the mall on May 26, 2002." ECF No. 198, PageID # 1140. The Government stated: "On May 22, 2002, while he was still on the airplane, he probably did not know that [J.B.] would go to the mall alone on May 26, 2002, but that does not translate into a lack of

knowledge that he might be able to act in violation of the protection order." Id.

On appeal from the denial of his third coram nobis petition, McNeil asserted that he could not have traveled to Hawaii with an intent to violate the protective order because he had not believed there would be an opportunity to violate it. The Ninth Circuit rejected that argument, ruling that McNeil did not demonstrate valid reasons for having failed to make that argument on direct appeal or in his § 2255 motion. *United States v. McNeil*, 812 F. App'x 515, 516 (9th Cir. 2020). The Ninth Circuit further ruled, "McNeil has also failed to meet his burden of demonstrating the jury erred at all in convicting him, much less that it was an error of the most fundamental character." Id. (quotation marks and citation omitted). It noted that intent is a factual determination made by the jury. Id. The jury instructions were uncontested. Id. The Ninth Circuit ruled, "Based on the evidence presented at the trial, a reasonable jury could conclude that McNeil traveled to Hawaii with intent to engage in conduct violative of the protective order." Id. Contrary to what McNeil says, the Ninth Circuit did not rule that McNeil knew J.B. would be at the mall. See id.

Now, in his fourth coram nobis petition, McNeil again challenges proof of the intent element. This time he contends in a *Brady*-ish argument that the Government failed to disclose before trial that, "[o]n May 22, 2002, while he was still on the airplane, he probably did not know that [J.B.] would go to the mall alone on May 26, 2002." See ECF No. 197, PageID # 1112. McNeil further argues that, had the Government made that concession at trial, there would not have

been sufficient evidence to convict him. Id., PageID #s 1113-14. The fourth element the jury was instructed on states, "[A]t the time the defendant crossed the state boundary, he had the intent to engage in conduct that would violate the protection order." Id.

In denying McNeil's fourth coram nobis request, this court ruled that McNeil failed to show any error, let alone one of a fundamental character:

> The Government's so-called concession is nothing more than logic or common sense. Absent having arranged to meet J.B. ahead of time, McNeil could not have known at the time he was on the plane to Hawaii that J.B. would be at the mall four days later. The Ninth Circuit has already determined that there was sufficient evidence from which a jury could find the requisite intent to support a § 2262(a)(1) conviction, stating: "Based on the evidence presented at the trial, a reasonable jury could conclude that McNeil traveled to Hawaii with intent to engage in conduct violative of the protective order." *McNeil*, 812 F. App'x at 516. In other words, McNeil could be convicted if he traveled to Hawaii with the intent to violate the protective order. He did not need to know exactly when or how he would do so. The Government's post-trial statement about what McNeil probably knew or did not know on the plane does not negate the intent element.

ECF No. 208, PageID # 2096.

In his motion for reconsideration, McNeil argues that this court erred because its decision necessarily

implies that the jury convicted him because he followed J.B. to the mall. He claims that the jury was not presented with that argument and that it is factually unsupported. See ECF No. 209, PageID

2107. These arguments misrepresent this court's ruling and the record.

First, this court did not rule that McNeil followed J.B. to the mall. This court simply noted that the Ninth Circuit had already determined that, "[b]ased on the evidence presented at the trial, a reasonable jury could conclude that McNeil traveled to Hawaii with intent to engage in conduct violative of the protective order." *McNeil*, 812 F. App'x at 516. Whether McNeil followed J.B. to the mall was not part of this court's analysis.

Second, the prosecution actually argued to the jury that McNeil could be convicted if the jury determined that McNeil followed J.B. to the mall. Based on circumstantial evidence and inferences that the jury was allowed to draw from the factual evidence (i.e., that McNeil knew J.B. frequented the mall he lived near), the Government contended in its closing argument at trial:

> [McNeil] went to Mililani Town Center, the one place where he was likely to see [J.B.]. Did he follow him there? We don't know. But how is it that he's there at the exact same minute? You know, if it's purely a coincidence, then he should have bought a lottery ticket that day.

ECF No. 202-2, PageID # 1803. Thus, the jury was clearly presented with the argument that McNeil either followed J.B. to the mall or waited for him there.

In his Reply, McNeil argues that he could not have been convicted if he was coincidentally at the mall when he ran into J.B, representing that his sole argument at trial was that it was a coincidence that he ran into J.B. at the mall. Regardless of whether McNeil is accurately portraying the argument he made to the jury, the jury necessarily rejected that argument when it convicted him.

In his Reply in support of reconsideration, McNeil also argues that § 2262(a)(1) is an unconstitutional infringement on his right to travel. Because that argument was not made in his motion for reconsideration, this court disregards it under Local Rule 7.2. See L.R. 7.2 ("Any argument raised for the first time in the reply shall be disregarded."). This, of course, does not mean that McNeil may turn around and file a fifth coram nobis petition. Any such petition would have to demonstrate a valid reason for not having raised the argument earlier. See *Hirabayashi*, 828 F.2d at 604.

B. There Was No Violation of *Brady v. Maryland*, 373 U.S. 83 (1963).

McNeil argues that this court erred in failing to conduct an analysis to determine whether the Government had improperly failed to disclose exculpatory evidence indicating that, "[o]n May 22, 2002, while he was still on the airplane, he probably did not know that [J.B.] would go to the mall alone on May 26, 2002." There are generally three components to a violation of *Brady v. Maryland*, 373 U.S. 83 (1963): "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene*, 527

U.S. 263, 281-82 (1999); see also *Hamilton v. Ayers*, 583 F.3d 1100, 1110 (9th Cir. 2009). In denying his fourth coram nobis petition, this court implicitly rejected McNeil's *Brady* argument.

The Government's statement on appeal was not exculpatory evidence that was suppressed by the Government. Instead, as this court noted, it "is nothing more than logic or common sense. Absent having arranged to meet J.B. ahead of time, McNeil could not have known at the time he was on the plane to Hawaii that J.B. would be at the mall four days later." ECF No. 208, PageID # 2096. It was not necessary for the Government to prove that, while traveling to Hawaii, McNeil knew J.B. would be at the mall four days later. All that was necessary to establish the intent necessary for the conviction was proof that McNeil traveled to Hawaii with the intent to violate the protective order. He did not need to know exactly when or how he would do so. The Government's post-trial statement about what McNeil probably knew or did not know on the plane does not negate the intent element and is certainly not exculpatory evidence.

C. McNeil Shows No Error With Respect to This Court's Rejection of His Definition of Intent.

In his fourth coram nobis petition, McNeil had made other arguments with respect to the definition of intent. This court ruled that those arguments were not timely asserted:

> To the extent McNeil makes other arguments about the definition of intent, he fails to show why he did not or could not have raised those issues on direct appeal or in his § 2255

> motion. Those arguments therefore fail because McNeil fails to satisfy the second prong of the coram nobis standard-- valid reasons exist for not attacking the conviction earlier. See *Hirabayashi*, 828 F.2d at 604.

ECF No. 208, PageID # 2097. McNeil's reconsideration motion shows no error by this court. Moreover, the Ninth Circuit has already ruled that McNeil's challenge to the jury instruction regarding intent to violate the protective order did not show an error of fundamental character that would support coram nobis relief. *United States v. McNeil*, 693 F. App'x 554 (9th Cir. 2017).

D. McNeil's Reply's AEDPA Argument is Not Relevant.

In his Reply, McNeil argues that this court should determine whether AEDPA's requirement that an appellate court certify a second or successive § 2255 motion applies here. This court sees no reason to address that subject in the present reconsideration ruling.

In this court's order, this court noted:

> A petitioner may not seek coram nobis relief when § 2255 relief is barred by the Antiterrorism and Effective Death Penalty Act ("AEDPA"). See *Matus-Leva*, 287 F.3d at 761 ("A petitioner may not resort to coram nobis merely because he has failed to meet the AEDPA's gatekeeping requirements. To hold otherwise would circumvent the AEDPA's overall purpose of expediting the presentation of claims in federal court and enable prisoners to bypass the limitations and successive petitions provisions.").

ECF No. 208, PageID # 2092. However, this court did not rule that McNeil's fourth coram nobis petition is barred by AEDPA's second or successive requirement.

While the Ninth Circuit's guidance recognizes that there may be cases in which a coram nobis petition is an attempt to evade AEDPA's gatekeeping requirements, such evasion was not the basis of this court's ruling. Instead, this court's "timeliness" analysis turned on the second coram nobis element a petitioner must demonstrate--"valid reasons exist for not attacking the conviction earlier." *Hirabayashi*, 828 F.2d at 604. McNeil was required to "explain why he did not seek relief . . ., and he is only barred from coram nobis eligibility if he fails to show that he had valid reasons for delaying." See *United States v. Kwan*, 407 F.3d 1005, 1012 (9th Cir. 2005), abrogated on other grounds by *Padilla v. Kentucky*, 559 U.S. 356 (2010). This court ruled that McNeil had failed to show why he did not or could not have raised issues concerning the definition of intent on direct appeal or in his § 2255 motion. See ECF No. 208, PageID # 2097.

IV. CONCLUSION.

The court denies McNeil's motion for reconsideration or clarification of this court's order denying his fourth coram nobis petition.

Given that ten days was the longest McNeil has waited between a prior coram nobis petition becoming final and the filing of a new one, this court provides some guidance to him.

First, "the writ of coram nobis is a highly unusual remedy, available only to correct grave injustices in a narrow range of cases where no more conventional remedy is applicable." *United States v. Riedl*, 496 F.3d

1003, 1005 (9th Cir. 2007). The writ is "extraordinary, used only to review errors of the most fundamental character." Id. (quotation marks and citations omitted); see also *Carlisle v. United States*, 517 U.S. 416, 429 (1996) ("[I]t is difficult to conceive of a situation in a federal criminal case today where a writ of coram nobis would be necessary or appropriate." (quotation marks, brackets, and citation omitted)). None of McNeil's four coram nobis petitions established an error of a fundamental nature.

Second, McNeil is reminded that, should he file a fifth coram nobis petition, he must establish a valid reason for not having raised arguments earlier. See *Hirabayashi*, 828 F.2d at 604.

Third, petitions for coram nobis relief should not be used in bad faith--to harass the Government by rearguing positions rejected in previous proceedings, or for any other improper purpose. In other words, McNeil should be careful not to file another petition for coram nobis relief based on arguments already rejected by this court or by an appellate court. Should McNeil do so, this court may grant a future request for sanctions. However, this court denies the Government's present request for sanctions with respect to bad faith conduct, see ECF No. 212, PageID # 2137, even though McNeil has made the same or similar arguments about intent in previous petitions. McNeil is on notice that he might face monetary sanctions if he files a future motion in bad faith.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, August 19, 2021

/s/ Susan Oki Mollway

Susan Oki Mollway

United States District Judge

United States v. McNeil, Crim No. 02-00547 SOM; Civ. No. 21-00212 SOM/RT; ORDER DENYING DEFENDANT'S PETITION FOR WRIT OF CORAM NOBIS; ORDER DENYING DEFENDANT'S MOTION SEEKING RECONSIDERATION OR CLARIFICATION OF THE ORDER DENYING HIS FOURTH PETITION FOR WRIT OF CORAM NOBIS

Appendix C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

UNITED STATES OF AMERICA,
Plaintiff-Respondent,
vs.
KENNETH CHARLES McNEIL,
Defendant-Petitioner.

Crim. No. 02-00547 SOM Civ. No. 21-00212 SOM/RT

ORDER DENYING DEFENDANT'S PETITION FOR WRIT OF CORAM NOBIS; ORDER DENYING AS UNNECESSARY DEFENDANT'S MOTION FOR DETERMINATION OF APPLICABLE LAW

ORDER DENYING DEFENDANT'S PETITION FOR WRIT OF CORAM NOBIS; ORDER DENYING AS UNNECESSARY DEFENDANT'S MOTION FOR DETERMINATION OF APPLICABLE LAW

I. INTRODUCTION.

This is Defendant Kenneth Charles McNeil's fifth post- trial motion or petition for collateral relief from his conviction and judgment. Because McNeil fails to show any trial error of a fundamental nature and/or why he could not have raised his arguments earlier, his latest petition is denied.

II. PROCEDURAL HISTORY.

On December 8, 2002, Defendant Kenneth Charles McNeil was charged in a one-count indictment with traveling in interstate commerce with the intent to engage in conduct that violated a protective order in violation of 18 U.S.C. § 2262(a)(1).

A jury trial was conducted before visiting judge Ann Aiken. On July 25, 2003, the jury convicted McNeil. See ECF No. 54. On June 4, 2004, Judge Aiken sentenced McNeil to 51 months of imprisonment, 3 years of supervised release, and a $100 special assessment. See ECF No. 67 (Minutes of Sentencing Proceeding); ECF No. 69 (Judgment).

McNeil appealed, and the Ninth Circuit Court of Appeals affirmed the decision but remanded for resentencing in light of *United States v. Booker*, 543 U.S. 220 (2005), and *United States v. Ameline*, 409 F.3d 1073, 1084-85 (9th Cir. 2005) (en banc). See ECF Nos. 70 and 82 (Appellate No. 04-10379); *United States v. McNeil*, 141 F. App'x 552, 554 (9th Cir. 2005).

McNeil was then resentenced to 50 months of imprisonment, 3 years of supervised release, and a $100 special assessment. See ECF No. 88 (Minutes of Sentencing Proceeding); ECF No. 89 (Judgment).

McNeil filed a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. See ECF No. 102. On July 9, 2010, Judge Aiken denied that motion. See ECF No. 108. McNeil appealed, and the Ninth Circuit affirmed on the basis that his motion was untimely. See ECF Nos. 117 and 125 (Appellate No. 10-17216); *United States v. McNeil*, 451 F. App'x 694, 694 (9th Cir. 2011). On October 1, 2012, the United States Supreme Court denied McNeil's petition for certiorari. See ECF No. 129.

On October 11, 2012, ten days after the Supreme Court denied certiorari with respect to his § 2255 motion, McNeil filed his first petition for writ of coram nobis. See ECF No. 131. On November 2, 2012, Judge Aiken denied the petition and subsequently denied a motion to reconsider. See ECF Nos. 131 and 141. McNeil appealed, and the Ninth Circuit affirmed. See ECF Nos. 137 and 144 (Appellate No. 13-15020); *United States v. McNeil*, 557 F. App'x 687 (9th Cir. 2014). On October 9, 2014, the United States Supreme Court denied McNeil's petition for certiorari. See ECF No. 147.

The next day, October 10, 2014, McNeil filed his second petition for writ of coram nobis. See ECF No. 146. On January 20, 2016, Judge Aiken denied this second petition. See ECF No. 149. She subsequently denied a motion to reconsider. See ECF No. 153. McNeil appealed, and the Ninth Circuit affirmed. See ECF Nos. 154 and 164 (Appellate No. 16-15472); *United States v. McNeil*, 693 F. App'x 554 (9th Cir. 2017) (ruling that McNeil's challenge to jury instruction regarding intent to violate the protective order did not show an error of fundamental character).

On January 25, 2018, the day after the mandate issued from the Ninth Circuit with respect to Appellate No. 16-15472, McNeil filed his third petition for writ of coram nobis. See ECF Nos. 165-66. On December 7, 2018, Judge Aiken denied this third petition. See ECF No. 171. McNeil again appealed, and the Ninth Circuit again affirmed. See ECF Nos. 180 and 192 (Appellate No. 19-15111); *United States v. McNeil*, 812 F. App'x 515 (9th Cir. 2020). On appeal, McNeil asserted that he could not have traveled to Hawaii with an intent to violate the protective order because he did not

believe there would be an opportunity to violate it. The Ninth Circuit ruled that McNeil did not demonstrate valid reasons for not making the argument on direct appeal or in his § 2255 motion. Id. at 516. The Ninth Circuit further ruled, "McNeil has also failed to meet his burden of demonstrating the jury erred at all in convicting him, much less that it was an error of the most fundamental character." Id. (quotation marks and citation omitted). It noted that intent is a factual determination made by the jury. Id. Here, the jury instructions were uncontested. Id. It ruled, "Based on the evidence presented at the trial, a reasonable jury could conclude that McNeil traveled to Hawaii with intent to engage in conduct violative of the protective order." Id. The United States Supreme Court denied McNeil's petition for certiorari on April 19, 2021. See 2021 WL 1520849.

During the pendency of the most recent appellate proceedings, this case was assigned to this judge. See ECF No. 190.

On April 28, 2021, nine days after the Supreme Court denied his petition for certiorari, McNeil filed his fourth and latest petition for writ of coram nobis. See ECF No. 197.

III. EVIDENCE INTRODUCED AT TRIAL.

J.B., a 12-year-old boy, lived with his mother and stepfather in the town of Mililani on Oahu, Hawaii. See ECF No. 202-1, PageID #s 1437, 1439. McNeil, the stepfather's cousin, lived in Houston, Texas. Id., PageID # 1440; ECF No. 202-2, PageID # 1675.

J.B.'s parents became concerned about the appropriateness of McNeil's relationship with J.B. See id., PageID # 1448. On September 25, 2001, after a

hearing, the District Court for the First Circuit, State of Hawaii, issued an Order Granting Petition for Injunction Against Harassment. See ECF Nos. 198, PageID #s 1266-67; ECF No. 202-2, PageID # 1837-64 (transcript of proceeding). For a period of three years, this protection order prohibited McNeil from intentionally being within 100 yards of J.B. Id.

On or about May 17, 2002, McNeil sent an email to J.B.'s stepfather, asking to meet both parents at 6:30 p.m. at the Chili's restaurant in Mililani on May 22, 2002, which is located near the Mililani Town Center. See ECF No. 198, PageID # 1265; ECF No. 202-1, PageID # 1613. The parents did not respond. See id. PageID # 1610.

On or about May 22, 2002, McNeil flew to Honolulu. See ECF No. 198, PageID # 1264. After landing, McNeil went to the Mililani Chili's to see whether J.B.'s parents would show up. Id. J.B.'s mom showed up and, with McNeil's knowledge, recorded the meeting. She told McNeil why she wanted him to stay away from J.B. See id., PageID #s 1610-11; ECF No. 202-2, PageID #s 1886-1910 (unofficial transcript of meeting taken from recording).

On May 26, 2002, J.B. rode his bicycle to the Mililani Town Center to buy something. See ECF No. 202-1, PageID # 1513. While there, he ran into McNeil outside of RadioShack. See ECF No. 202-1, PageID #s 1614. McNeil started to talk with J.B., who told him they were not supposed to be talking and told McNeil to go away. See id., PageID # 1615. When J.B. tried to ride away, McNeil put his hands on the bicycle's handle bars and J.B.'s wrist. J.B. jerked away and then rode home. See id., PageID # 1616. When J.B. got home, he was distraught, teary-eyed, and shaking.

See id., PageID # 1514. He told his parents that he had run into McNeil, and they called the police. See id., PageID # 1617.

According to McNeil, he was at the Mililani Town Center to buy a cord for his laptop. See ECF No. 202-1, PageID #s 1612-13. McNeil claimed that he was in Hawaii for a business meeting with a money manager, Charles Lanphier. See ECF No. 202-1, PageID # 1609. However, he admitted that he was using vacation time for the trip. Id. While confirming that he met with McNeil on May 23, 2002, Lanphier said that McNeil told him that his trip was to visit family (rather than primarily to attend the meeting). See ECF No. 202-2, PageID #s 1733, 1736. McNeil had not told Jay Comeaux, the co-president of his company, that he was going to Hawaii to meet with Lanphier. See id., PageID # 1741. Comeaux testified as a rebuttal witness that McNeil was not reimbursed by the company for any expenses relating to the meeting with Lanphier. See id., PageID # 1742.

The jury convicted McNeil of having violated 18 U.S.C. § 2262(a)(2). See ECF No. 54.

IV. WRIT OF CORAM NOBIS STANDARD.

To the extent McNeil seeks a determination of the law applicable to a coram nobis petition, see ECF No. 199, that request is denied as unnecessary. This court's practice is to set forth the applicable law in its orders. In this case, the law pertaining to coram nobis petitions is set forth below.

The 1946 amendments to Rule 60(b) of the Federal Rules of Civil Procedure abolished several common law writs, including the writ of coram nobis. See *Doe v. I.N.S.*, 120 F.3d 200, 202 (9th Cir. 1997). In *United*

States v. Morgan, 346 U.S. 502, 511 (1954), the Supreme Court held that, despite that abolishment, district courts still retained limited authority to issue common law writs, including writs of coram nobis in collateral criminal proceedings. See also 28 U.S.C. § 1651(a) ("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.").

The common law writs survive "only to the extent that they fill 'gaps' in the current systems of postconviction relief." *United States v. Valdez-Pacheco*, 237 F.3d 1077, 1079 (9th Cir. 2001). "[T]he writ of coram nobis is a highly unusual remedy, available only to correct grave injustices in a narrow range of cases where no more conventional remedy is applicable." *United States v. Riedl*, 496 F.3d 1003, 1005 (9th Cir. 2007). The writ is "extraordinary, used only to review errors of the most fundamental character." Id. (quotation marks and citations omitted); see also *Carlisle v. United States*, 517 U.S. 416, 429 (1996) ("[I]t is difficult to conceive of a situation in a federal criminal case today where a writ of coram nobis would be necessary or appropriate." (quotation marks, brackets, and citation omitted)). Errors are of the most fundamental character when they render a proceeding invalid. See *Hirabayashi v. United States*, 828 F.2d 591, 604 (9th Cir. 1987).

Unlike claims under 28 U.S.C. § 2255, which applies only when convicted defendants are in "custody," the writ of coram nobis allows a defendant to attack a conviction when the defendant has completed a sentence and is no longer in custody. See *Matus-Leva v.*

United States, 287 F.3d 758, 761 (9th Cir. 2002) (holding that a prisoner who is in custody may seek relief under § 2255, not under the writ of coram nobis); *Estate of McKinney v. United States*, 71 F.3d 779, 781 (9th Cir. 1995). It "provides a remedy for those suffering from the lingering collateral consequences of an unconstitutional or unlawful conviction based on errors of fact and egregious legal errors." *McKinney*, 71 F.3d at 781.

To qualify for coram nobis relief, a petitioner must establish all of the following:

> (1) a more usual remedy is not available; (2) valid reasons exist for not attacking the conviction earlier; (3) adverse consequences exist from the conviction sufficient to satisfy the case or controversy requirement of Article III; and (4) the error is of the most fundamental character.

Hirabayashi v. United States, 828 F.2d 591, 604 (9th Cir. 1987); accord *Matus-Leva*, 287 F.3d at 760 (same); *McKinney*, 71 F.3d at 781-82 (same). "Because these requirements are conjunctive, failure to meet any one of them is fatal." *Matus-Leva*, 287 F.3d at 760.

A petitioner may not seek coram nobis relief when § 2255 relief is barred by the Antiterrorism and Effective Death Penalty Act ("AEDPA"). See *Matus-Leva*, 287 F.3d at 761 ("A petitioner may not resort to coram nobis merely because he has failed to meet the AEDPA's gatekeeping requirements. To hold otherwise would circumvent the AEDPA's overall purpose of expediting the presentation of claims in federal court and enable prisoners to bypass the limitations and successive petitions provisions.").

V. ANALYSIS.

McNeil claims that the Government has made two statements that constitute new evidence establishing his innocence. Neither statement establishes an error of fundamental character. Additionally, McNeil fails to explain why he could not have brought his argument arising out of 2010 statements earlier. Accordingly, McNeil's fourth petition for writ of coram nobis is denied.

McNeil was convicted of having violated 18 U.S.C. § 2262(a)(1), which stated at the time of his 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 . . . .

18 U.S.C. § 2262(a)(1) (effective Oct. 28, 2000, to Jan. 4, 2006).

At trial, the jury was instructed:

> In order for you to find the defendant guilty of the offense charged against him in the indictment, the government must prove each of the following elements beyond a reasonable doubt:

First, that there was a protection order that prohibited and provided protection against the defendant contacting, communicating with, or being in the physical proximity to 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.

With respect to the first element, the parties have stipulated that the order granting petition for injunction against harassment filed on September 25th, 2001, . .. is a protection order within the meaning of the statute, Title 18, United States Code, Section 2262, sub (a}, sub (1).

With respect to the fourth element, it is possible that the defendant may have had more than one purpose in coming to Hawai`i. It is not necessary for the government to prove that the sole and single purpose of the defendant's travel to Hawai`i was to engage in conduct that would be in violation of the protection order. You may find that the intent element has been satisfied if you are persuaded that one of the dominant purposes that the defendant had in coming to Hawai`i

> was to engage in conduct that would be in violation of the protection order.

ECF No. 202-2, PageID #s 1811-12.

A. The Government's Statement That McNeil Probably Did Not Know When He Was On The Plane That He Would Run Into J.B. Four Days Later Does Not Support the Issuance of a Writ of Coram Nobis.

On appeal from the denial of his third coram nobis petition, McNeil argued that he lacked the requisite intent to violate the protective order because he did not expect J.B. to be at the shopping center at the time he ran into him. See ECF No. 202-4, PageID # 1990. The Government responded by arguing that it "did not have to show that McNeil intended [to] violate the protection order at a specific time and place (such as the mall) or in a specific manner. Of course, the government did not have to show that McNeil knew [J.B.] would be at the mall on May 26, 2002." ECF No. 198, PageID # 1140. The Government stated: "On May 22, 2002, while he was still on the airplane, he probably did not know that [J.B.] would go to the mall alone on May 26, 2002, but that does not translate into a lack of knowledge that he might be able to act in violation of the protection order." Id.

In this fourth coram nobis petition, McNeil argues that the Government failed to disclose pretrial that, "[o]n May 22, 2002, while he was still on the airplane, he probably did not know that [J.B.] would go to the mall alone on May 26, 2002." See ECF No. 197, PageID # 1112. McNeil argues that, had the Government made that concession at trial, there would not have been sufficient evidence to convict him. Id.,

PageID #s 1113-14. McNeil argues that the fourth element the jury was instructed on could not have been proven beyond a reasonable doubt had the Government made that concession at trial. Id. The fourth element the jury was instructed on states, "at the time the defendant crossed the state boundary, he had the intent to engage in conduct that would violate the protection order." McNeil is not challenging the instruction itself. Id.

McNeil fails to show any error, let alone one of a fundamental character. The Government's so-called concession is nothing more than logic or common sense. Absent having arranged to meet J.B. ahead of time, McNeil could not have known at the time he was on the plane to Hawaii that J.B. would be at the mall four days later. The Ninth Circuit has already determined that there was sufficient evidence from which a jury could find the requisite intent to support a § 2262(a)(1) conviction, stating: "Based on the evidence presented at the trial, a reasonable jury could conclude that McNeil traveled to Hawaii with intent to engage in conduct violative of the protective order." *McNeil*, 812 F. App'x at 516. In other words, McNeil could be convicted if he traveled to Hawaii with the intent to violate the protective order. He did not need to know exactly when or how he would do so. The Government's post-trial statement about what McNeil probably knew or did not know on the plane does not negate the intent element.

To the extent McNeil makes other arguments about the definition of intent, he fails to show why he did not or could not have raised those issues on direct appeal or in his § 2255 motion. Those arguments therefore fail because McNeil fails to satisfy the second prong of

the coram nobis standard--valid reasons exist for not attacking the conviction earlier. See *Hirabayashi*, 828 F.2d at 604.

B. The Government's Statement That Comeaux's Testimony Regarding Lanphier Was Irrelevant or Not Critical Does Not Support the Issuance of a Writ of Coram Nobis.

In footnote 1 on page 12 of the Government's opposition (dated May 26, 2010) to McNeil's § 2255 motion, the Government stated that "the issue at trial was whether or not **one** of McNeil's dominant reasons for travel . . . to Hawaii was to see [J.B.] in violation of the protection order, it did not have to be the sole or even the primary one. Thus, the entire issue raised herein regarding Mr. Comeaux's testimony regarding Mr. Lanphier is irrelevant." ECF No. 106, PageID # 215. The Government later stated that Comeaux's testimony "was not critical" and that Comeaux was "only a rebuttal witness." Id., PageID # 217. McNeil now argues that he would not have been convicted if the Government had told the jury that Comeaux's testimony was irrelevant or not critical. See ECF No. 197, PageID # 1114. This argument does not justify coram nobis relief.

McNeil fails to satisfy the second prong of the coram nobis standard, as he fails to demonstrate valid reasons for not attacking the conviction earlier. See *Hirabayashi*, 828 F.2d at 604. The Government made the statement in a brief filed with this court more than 11 years ago. McNeil actually raised this argument to the Ninth Circuit in his most recent appeal, which the Ninth Circuit rejected. See ECF No. 202-4, PageID # 1998; *United States v. McNeil*, 812 F. App'x 515 (9th

Cir. 2020). Not only does McNeil fail to demonstrate a valid reason for not having made the argument earlier, the Ninth Circuit's decision is now the law of this case and binds this court with respect to that argument.

McNeil also fails to show an error of a fundamental character. McNeil takes the Government's statement out of context. The Government was only saying that, even without Comeaux's testimony, there was sufficient evidence to support the conviction. With respect to the fourth element for a § 2262(a)(1) crime, the jury was instructed:

> [I]t is possible that the defendant may have had more than one purpose in coming to Hawai`i. It is not necessary for the government to prove that the sole and single purpose of the defendant's travel to Hawai`i was to engage in conduct that would be in violation of the protection order. You may find that the intent element has been satisfied if you are persuaded that one of the dominant purposes that the defendant had in coming to Hawai`i was to engage in conduct that would be in violation of the protection order.

ECF No. 202-2, PageID # 1812. Because Comeaux's testimony only rebutted McNeil's claim that he was in Hawaii on business, it was unnecessary to support the conviction. A jury could have found that one of the dominant purposes McNeil had in coming to Hawaii was to violate the protection order even without Comeaux's testimony.

This is exactly what Judge Aiken stated in denying McNeil's § 2255 motion on July 9, 2010. See ECF No.

108 (construing § 2255 motion as a coram nobis petition and stating that "Comeaux's testimony was not critical to petitioner's conviction"). The Ninth Circuit has already held, "Based on the evidence presented at the trial, a reasonable jury could conclude that McNeil traveled to Hawaii with intent to engage in conduct violative of the protective order." See *McNeil*, 812 F. App'x at 516. McNeil's argument about the relevance of Comeaux's statement does not affect the sufficiency of the evidence.

C. The Government's Statement That Its Decision to Prosecute Him had Nothing to Do With His Employment Does Not Support the Issuance of a Writ of Coram Nobis.

It is not clear from McNeil's petition whether he is basing his coram nobis petition on the Government's 2011 statement in its Answering Brief to the Ninth Circuit in Appellate No. 10-17216. There, the Government stated, "McNeil terrified [J.B.] and that is why the government decided to prosecute him. It had absolutely nothing to do with McNeil's employment . . . . It had to do solely with the fact that McNeil refused to obey a court order . . . ." ECF No. 198, PageID # 1173. While McNeil mentions this statement in his petition, see ECF No. 197, PageID # 1111, he makes no argument about it. He certainly does not explain why he did not or could not raise the issue earlier or why it amounts to an error of a fundamental character. See *Hirabayashi*, 828 F.2d at 604.

Perhaps McNeil did not articulate his argument about the Government's reasons to prosecute him because he had already made and lost that argument to the Ninth Circuit in his first coram nobis petition. Appellate No. 13-15020. In his Opening Brief in that

case, he argued that the Government committed a *Brady* violation by failing to disclose that his employment had nothing to do with the decision to prosecute him. See ECF No. 202-3, PageID #s 1953-54. The Ninth Circuit rejected that argument. See *United States v. McNeil*, 557 F. App'x 687 (9th Cir. 2014). McNeil also made this argument in his most recent appeal and the Ninth Circuit again rejected it. See ECF No. 202- 4, PageID # 1998; *United States v. McNeil*, 812 F. App'x 515 (9th Cir. 2020).

VI. CONCLUSION.

The court denies McNeil's fourth coram nobis petition without a hearing because the record conclusively shows that McNeil is not entitled to relief. See 28 U.S.C. § 2255(b); *United States v. Taylor*, 648 F.2d 565, 573 n.25 (9th Cir. 1981) ("Whether a hearing is required on a coram nobis motion should be resolved in the same manner as habeas corpus petitions."). The Clerk of Court is directed to enter judgment against McNeil in Civil No. 21-00212 SOM/RT and to close the civil case.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, July 12, 2021

/s/ Susan Oki Mollway

Susan Oki Mollway

United States District Judge

United States v. McNeil, Crim No. 02-00547 SOM; Civ. No. 21-00212 SOM/RT; ORDER DENYING DEFENDANT'S PETITION FOR WRIT OF CORAM NOBIS; ORDER DENYING AS UNNECESSARY DEFENDANT'S MOTION FOR DETERMINATION OF APPLICABLE LAW

Appendix D

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

UNITED STATES OF AMERICA,
Plaintiff-Respondent,
vs.
KENNETH CHARLES McNEIL,
Defendant-Petitioner.

Crim. No. 02-00547 SOM Civ. No. 21-00212 SOM/RT

EO: The court denies the motion to stay and instead grants the alternative motion to add the motion for determination of applicable law to the coram nobis petition. The government may respond to both the motion for determination of applicable law and to the coram nobis petition in a single memorandum of no more than 9000 words no later than June 7, 2021. Mr. McNeil may file a single optional reply memorandum of no more than 4500 words by June 21, 2021. At this time, the court sets a hearing to be held by videoconference on the matter for July12, 2021 at 11:00 a.m., but the court reserves the right, after reviewing the briefs, to take the matter off the hearing calendar and to decide the matter based on the briefs. If the court proceeds with a hearing, directions for joining by video will be provided at a later date. re [3],[4].
(JUDGE SUSAN OKI MOLLWAY)

Apr. 29, 2021

Appendix E

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
AUG 23 2022
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,
Plaintiff- Appellee,

v.

KENNETH CHARLES McNEIL, AKA Chip
Defendant - Appellant.

No. 21-16750
D.C. Nos. 1:21-cv-00212-SOM-RT
1:02-cr-00547-SOM-1
District of Hawaii,
Honolulu

ORDER

Before: CANBY, TASHIMA, and NGUYEN, Circuit Judges.

The panel has voted to deny the petition for panel rehearing.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. See Fed. R. App. P. 35.

McNeil's petition for panel rehearing and petition for rehearing en banc (Docket Entry No. 15) are denied.

No further filings will be entertained in this closed case.

Appendix F

No. 21-16750

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

KENNETH CHARLES MCNEIL,

Defendant- Appellant

On Appeal from the United States District Court

for the District of Hawaii

USDC No. 1:02-CR-00547-SOM-RT & 1:21-CV-00212-SOM

The Honorable Susan Oki Mollway

Senior United States District Judge for the District of Hawaii

APPELLANT'S OPENING BRIEF

II. Statement of Issues Presented

1. Whether the district court erred in rejecting a fundamental concept of intent?
2. Whether the district court violated *United States v. Jernigan* by not analyzing the

conceded evidence in the context of the entire record?

3. Whether the panel in *United States v. Taylor*, 648 F.2d 565 (9th Cir. 1981) conflicts with *United States v. Hayman*, 342 U.S. 205 (1952) and *United States v. Kwan*, 407 F.3d 1005 (9th Cir. 2005) and therefore erred by applying 28 U. S. C. § 2255(b) evidentiary hearing procedures to coram nobis proceedings.
4. Whether the district court erred by making factual determinations without an evidentiary hearing in a coram nobis proceeding.

III. Introduction

The district court committed three errors. First, the district court misinterpreted a decision by this Court; second, the district court admittedly did not consider key facts as part of its *Brady* analysis; and third, the district court violated *United States v. Morgan*, 346 U.S. 502 (1954) by failing to provide an evidentiary hearing.

Claim #1:

The district court misinterpreted decisions from this Court and relied upon its interpretations as its basis for rejecting a fundamental concept of intent

"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, emphasis added.) This case is about Appellant's intent as he travelled in interstate commerce. The jury instructions did not define the definition of intent, so, pursuant to this

"fundamental premise," the jury understood fundamental concepts of intent. As Judge Learned Hand said, one of the fundamental concepts of intent is that "one cannot intend that which he has no belief in his power to do." *Knickerbocker Merch. Co. v. United States*, 13 F2d 544, 546 (2d Cir. 1926) (L. Hand, J.). This fundamental concept of intent cannot be rejected as a legitimate line of defense, but the district court believed this Court had, in fact, rejected it in a prior decision. Thus, the district court rejected the concept that "a person cannot intend that which he has no belief." However, this Court did not reject this fundamental concept of intent. Rather, this Court rejected the timing of Appellant's argument because, at that time, his argument was not accompanied by newly discovered factual evidence.

Claim #2:

The district court violated *United States v. Jernigan*, 492 F.3d 1050 (9th Cir. 2007) (en banc) during its *Brady* analysis

At trial, the jury was presented with two theories about how Appellant intended to violate a protective order. The district court determined, "the jury was clearly presented with the argument that [Appellant] either followed J.B. to the mall or waited for him there." (ER-10.) The government has now conceded that Appellant could not have committed the crime under one of the two theories – the theory that Appellant waited for J.B. at the mall. This concession is considered "newly discovered evidence" that could not have been raised earlier. Appellant claims the government violated *Brady v. Maryland*, 373 U.S. 83 (1963) by failing to disclose this concession at trial. Based on

this concession, Appellant filed a coram nobis petition with the district court.

The district court conducted a *Brady* analysis on the conceded theory and determined that the jury would not have convicted appellant on that theory. However, the court admittedly did not conduct any *Brady* analysis on the sufficiency of the non-conceded theory, saying, "Whether [Appellant] followed J.B. to the mall was not part of this court's analysis." (ER-10.) The court simply assumed the non-conceded theory was sufficient because it considered the conceded theory to be insufficient. However, if the court had conducted an analysis on the non-conceded theory, it would have found it to be much less sufficient than the theory the government conceded. The district court's failure to analyze the entire record violates *United States v. Jernigan*, 492 F.3d 1050, 1054 (9th Cir. 2007) (en banc) ("withheld evidence must be analyzed `in the context of the entire record.'")

Claim #3:

The district court violated *United States v. Morgan* and the All-Writs Act by failing to provide an evidentiary hearing

United States v. Taylor, 648 F.2d 565 (9th Cir. 1981) provides this Court's standard of review for denials of an evidentiary hearing in coram nobis proceedings. However, in a question of first impression, Appellant argued to the district court that *Taylor* conflicts with *United States v. Morgan*, 346 U.S. 502 (1954), *United States v. Hayman*, 342 U.S. 205 (1952), and the All-Writs Act. *Morgan* fashioned the writ of coram nobis to incorporate the former federal equity courts' requirements for equitable relief. Those

requirements include a requirement that district courts must hear all controverted issues of fact. *Taylor*, however, in violation of the All-Writs Act, applied 28 U. S. C. § 2255(b) evidentiary hearing procedures to coram nobis proceedings. In a decision that has been overlooked by lower courts, the Supreme Court said, "by no means [can] an issue of fact [be] determined in a coram nobis proceeding without the presence of the [petitioner]." *Hayman*, 342 U.S. at 221 n.36.

[...]

VI.Arguments

A. The district court erred by rejecting a fundamental concept of intent

The district court incorrectly ruled that Appellant should have raised his arguments about the definition of intent while he was in custody. The court said,

> To the extent [Appellant] makes other arguments about the definition of intent, he fails to show why he did not or could not have raised those issues on direct appeal or in his § 2255 motion. Those arguments therefore fail because [Appellant] fails to satisfy the second prong of the coram nobis standard--valid reasons exist for not attacking the conviction earlier. *See Hirabayashi*, 828 F.2d at 604.

(ER-13.) The district court erred because a defendant has no obligation to request an instruction that explains a commonly understood meaning of intent.

1. A fundamental concept of intent is that a person cannot intend that which he has no belief in his power to do.

The trial court did not define the statute's "intent" element within its jury instructions.[4] If words are not defined, then the terms "have plain and ordinary meanings within the statute, and the court had no obligation to provide further definitions." *United States v. Dhingra*, 371 F.3d 557, 567 (9th Cir. 2004). **One of the fundamental 'premises underlying the jury system' is that jurors are presumed to understand the common and ordinary meaning and concepts of words in the English language.** See *United States v. Poole*, 545 F.3d 916, 921 & n.4 (10th Cir. 2008) ("The presumption that jurors understand common English terms and concepts, moreover, is one of the fundamental 'premises underlying the jury system.'") (citations omitted.) Thus, the jury in this case is presumed to have known and understood the plain and ordinary meaning of intent in its deliberations as well as its fundamental concepts. The definition of intent is:

> Design, resolve, or determination with which [a] person acts. A state of mind in which a person seeks to accomplish a given result through a course of action.... A state of mind existing at the time a person commits an offense and may be shown by act, circumstances and inferences deducible therefrom. [...] Intent and motive should not be confused. Motive is what prompts a person to act

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4 Appellant is not challenging the jury instructions.

> or fail to act. Intent refers only to the state of mind with which the act is done or omitted.
>
> "Intent" Black's Law Dictionary 810 (6th ed. 1990)

The "state of mind" referenced within this definition includes a person's motive and belief. See Davis, W. (1984). *A Causal Theory of Intending*. American Philosophical Quarterly, 21(1), 43-54. Pg. 43. ("[B]elieving and desiring something are necessary for intending it.") As 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.).

This Court is also aligned with this concept of intent. See *Mitchell v. Prunty*, 107 F.3d 1337, 1341 (9th Cir. 1997) ("Because Mitchell could not have known that [the victim] would appear outside his apartment, there is no way Mitchell could have admitted fellow gang members into his apartment with the intent to commit murder. [...] Evidence that Mitchell may have wanted [the victim] dead — that is to say, that he had a motive for murder — is not proof of intent.")

Thus, a fundamental concept of intent is that a person cannot intend that which he has no belief in his power to do. Hence, in this case, according to 'one of the fundamental premises underlying the jury system,' the jury, through its verdict, found there was sufficient evidence that Appellant believed he would violate the protective order. Therefore, when a district court conducts a *Brady* analysis, it must also rely upon this fundamental concept when reviewing the record.

2. This Court did not reject an argument that a person cannot intend that which he has no belief in his power to do.

While Appellant has asked this Court in prior appeals to address whether intent includes the ingredients of motive and belief, the prior panels resolved those cases on other grounds without addressing the question. Furthermore, a panel would not reject "fundamental 'premises underlying the jury system" implicitly in an unpublished order. However, the district court indicated this Court has, in fact, rejected this fundamental premise, saying,

> On appeal from the denial of his third coram nobis petition, [Appellant] asserted that he could not have traveled to Hawaii with an intent to violate the protective order because he had not believed there would be an opportunity to violate it. The Ninth Circuit rejected that argument, ruling that [Appellant] did not demonstrate valid reasons for having failed to make that argument on direct appeal or in his § 2255 motion. *United States v. McNeil*, 812 F. App'x 515, 516 (9 Cir. 2020).

(ER-7.)

The district court misinterpreted this Court's decision. This Court did not reject this fundamental concept of intent. Rather, this Court rejected the timing of Appellant's argument because that argument was not accompanied by newly discovered factual evidence. Furthermore, the only reason appellant asked the court to clarify the meaning of intent was because the government indicated that it is not required to prove appellant believed he would have an

opportunity to contact J.B. Therefore, it is the government, not appellant, who seeks to reject this fundamental concept of intent.

In conclusion, the jury instructions did not define the definition of intent, therefore, according to fundamental 'premises underlying the jury system'," the jury understood fundamental concepts of intent; including the fundamental concept that "one cannot intend that which he has no belief in his power to do." Therefore, the district court erred by rejecting this concept.

B. The district court erred in its *Brady* analysis by not considering the sufficiency of the lone remaining theory of Appellant's intent

1. The district court found there were two theories presented to the jury – one has now been conceded

The theories presented to the jury as to how Appellant planned to violate the protective order is an important factor when determining Appellant's intent while he travelled to Hawaii. As explained in the previous section, Appellant could not have had an intent to violate the protective order without a plan. Thus, the jury deliberations must have included discussions about how Appellant planned to violate the protective order while he travelled to Hawaii.

According to the district court, the government presented to the jury two theories as to how Appellant intended to violate the protective order.5 The court

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5 In the arguments below, Appellant argued that the government's only theory was that he waited for J.B. at the mall. (ER-79.) In contrast, the government, however, argued that Appellant

said, "the jury was clearly presented with the argument that [Appellant] either followed J.B. to the mall or waited for him there." (ER-10.) Thus, the two theories presented to the jury were 1) Appellant followed J.B. to the mall and 2) Appellant waited for J.B. at the mall.6

The government has now conceded the second of these two theories. In the previous appeal to this Court, the government, in its answering brief, conceded for the first time that Appellant, "probably did not know that [J.B.] would go to the mall alone on May 26, 2002." (ER-97.) The government then reaffirmed this concession to the district court saying, "the Government's position at trial—and since that time—was that [Appellant] had followed J.B. to the mall." (ER-32 n.4.) Furthermore, the government claims, "it is indisputable that [Appellant] either followed J.B. to the mall or it was a coincidence they were at the mall on the same day at the same time," (ER-32.) The district court said the concession was nothing more than a commonsense statement from the government. However, it was a concession of one of only two theories

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followed J.B. to the mall. (ER-32 n.4.) The district court, however, ruled that the jury was presented with both theories.

6 While there are other ways Appellant could have intended to violate the protective order, these two options are the only theories that would accomplish a goal of contacting J.B. without being caught by others. The government has previously admitted that it would be 'ridiculous' to argue that Appellant intended to break into the home to violate the protective order. (ER-103.) Furthermore, the government has previously admitted that the statute requires proof of unconditional intent to violate the protective order. (ER-115.)

presented to the jury. Therefore, the concession is important and deserves a full *Brady* analysis.

2. The district court failed to conduct a proper *Brady* analysis

There are three elements that petitioners must prove to show a *Brady* violation. First, the suppressed evidence must be favorable to the accused. Second, the evidence must have been suppressed by the government, either willfully or inadvertently. And third, the suppressed evidence must be material to the guilt or innocence of the defendant. *United States v. Jernigan*, 492 F.3d 1050, 1053 (9th Cir. 2007) (en banc). The *Jernigan* en banc court also held that a district court must analyze the entire context of the record, saying,

> A defendant need not show that she would more likely than not have received a different verdict with the evidence." Instead, she must show only that the government's evidentiary suppression `undermines confidence in the outcome of the trial. In considering whether the failure to disclose exculpatory evidence undermines confidence in the outcome, judges must undertake a careful, balanced evaluation of the nature and strength of both the evidence the defense was prevented from presenting and the evidence each side presented at trial. In other words, the withheld evidence must be analyzed `in the context of the entire record."

Id. at 1053-1054. (emphasis added) Furthermore, *Brady* "turns on the cumulative effect of all such evidence suppressed." *United States v. Bruce*, 984 F.3d

884, 896 (9th Cir. 2021) citing *Kyles v. Whitley*, 514 U.S. 419, 421 (1995).

However, the district court did not perform a *Brady* analysis as directed by *Jernigan* admitting, **"[w]hether [Appellant] followed J.B. to the mall was not part of this court's analysis."** (ER-10.) (emphasis added.)

3. The prior panel did not consider the concession because federal appellate courts generally do not address issues raised for the first time on appeal

The district court explained that it did not conduct a full analysis because, "the Ninth Circuit had already determined that, '[b]ased on the evidence presented at the trial, a reasonable jury could conclude that [Appellant] traveled to Hawaii with intent to engage in conduct violative of the protective order.'" (ER-9-10.) However, in the prior appeal, this Court did not address whether the evidence is sufficient in light of the government's concession. The government provided its concession within its appellate brief during Appellant's prior case before this Court. (ER-97.) Although Appellant first challenged his conviction based upon that concession in that case's appellate reply brief, the prior panel did not consider the government's concession because federal appellate courts generally do not address issues raised for the first time on appeal. *Raich v. Gonzales*, 500 F.3d 850, 868 (9th Cir. 2007). It was not mentioned in the Court's decision. Thus, pursuant to the law of the case doctrine, the prior panel did not address the concession. *Hall v. City of Los Angeles*, 697 F.3d 1059, 1067 (9th Cir. 2012).

4. If the district court had conducted a proper *Brady* analysis, the court would have found the evidence of the remaining theory insufficient to sustain the verdict

The only remaining, unconceded theory as to how Appellant intentionally violated the protective order at the mall is that Appellant followed J.B. from his house to the mall. If the district court had conducted a *Brady* analysis on the entire record, it would have found the evidence of the remaining theory insufficient to sustain the verdict.

The evidence presented at trial contradicts (not supports) the theory that Appellant followed J.B. to the mall. The jury understood that 1) the mall was at least a mile from J.B.'s home, 2) J.B. rode a bike while Appellant drove a car, and 3) the protective order violation occurred only after J.B. had finished his shopping and was returning home. (ER-189.) So, in order for this theory to be true, Appellant would have watched J.B. ride his bike past the supposed "surveillance point", followed J.B. on his bike in his car at a speed of 13.5 miles per hour[7], and then wait for J.B. to finish shopping before contacting him. Plus, since they were walking in opposite directions when they encountered each other, Appellant would have had to know which way J.B. would return home. This reasoning is nonsensical. If Appellant intended to contact J.B., he would have done so at his first opportunity – shortly after J.B. left his house. He would not have

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7 13.5mph is the average road speed of a beginning road cyclist. Road Bike Rider, *What's the average speed of a beginner cyclist*?, Road Bike Rider online magazine, roadbikerider.com, https://www.roadbikerider.com/whats-the-average-speed-of-a-beginner-cyclist/ (retrieved June 12, 2021.)

waited for J.B. to ride to the mall, let him shop, and finally wait for him to begin returning home before contacting him. Doing so would risk his opportunity of contacting J.B. On his way home, J.B. could have been joined by a friend or take a different route home. Other than the fact that the mall is where the protective order violation occurred, there is simply no evidence whatsoever to support a theory that Appellant followed J.B. to the mall. Therefore, the jury could not have decided that Appellant intended to violate the protective order in this manner. And the only remaining theory is that Appellant and J.B. were coincidentally at the mall at the same time, which is not a violation of 18 U.S.C. § 2262(a)(1).

C. THE MEETING AT THE MALL WAS COINCIDENTAL

1. The coincidental encounter at the mall does not constitute a violation of § 2262(a)(1)

The government concedes that if Appellant did not follow J.B. to the mall, then Appellant and J.B. were coincidentally at the mall at the same time. However, the government claims "while it is indisputable that [Appellant] either followed J.B. to the mall or it was a coincidence they were at the mall on the same day at the same time, it doesn't matter which one occurred for there to be a violation of § 2262(a)(1)." (ER-32.) The district court did not decide whether a violation of the statute occurs if a protective order is violated during a coincidental encounter. However, if it had, the court would have found the claim to be frivolous.

The government's claim is wrong for a multitude of reasons. First, 'intentional' and 'coincidental' are

antonyms. In other words, it is impossible for a person to intentionally do something coincidentally. Second, Appellant's sole defense at trial was that it was a coincidence that he and J.B. were at the mall at the same time. If there was ever any indication that the statute could be violated even if the protective order violation occurred during a coincidental meeting, then Appellant would have pled guilty, and he would not have spent the past twelve years fighting his conviction, wasting his time and the courts time on these petitions. The government knew Appellant's defense was that he and J.B. were coincidentally at the mall at the same time. In fact, the government told the jury, "if it's purely a coincidence, then he should have bought a lottery ticket that day." (ER-180.)

2. Appellant's coram nobis petition was not "being used in bad faith"

Appellant understands there are litigants who abuse the system and file frivolous pleadings to the courts. Appellant is not among that group. While this is Appellant's fifth appeal since completing his sentence, this case is distinguishable than the previous four.8 The other four appeals challenged his conviction based upon a different underlying fact – the testimony of the SGC President. This appeal, instead, focuses solely on a new fact - the concession of one of the two theories of the case that was presented to the jury. The district court determined there were two theories presented to the jury, it is uncontested that the government has recently conceded one of those theories, and appellant could not have raised this claim earlier.

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8 Appellant did not think his other four petitions were frivolous either.

Therefore, contrary to the district court's warning, Appellant's coram nobis petition is not "being used in bad faith--to harass the Government by rearguing positions rejected in previous proceedings, or for any other improper purpose." (ER-15.)

D. The district court decided controverted issues of fact without an evidentiary hearing in violation of Supreme Court decisions and the All-Writs Act

Appellant contends: 1) the Supreme Court requires courts to provide an evidentiary hearing in coram nobis proceedings to resolve disputed issues of facts; because 2) *Morgan* kept the writ's common law procedures intact; and 3) pursuant to the All-Writs Act, circuit courts cannot apply Section 2255 evidentiary hearing rules upon coram nobis proceedings simply to make the writ more convenient or appropriate. This issue was raised with the district court in a "Motion for Determination of Applicable Law." (ER-73.) The court incorporated that motion within Appellant's coram nobis petition. (ER-72.) However, the court then decided not to address the issue. (ER-40.)

This section addresses questions that have deeply divided federal courts in well-recognized and acknowledged conflicts. The writ of error coram nobis ("writ of coram nobis" or "coram nobis") is the only remedy available for courts to correct a federal conviction after completion of the sentence. Unlike other post-conviction remedies, the writ of coram nobis is not specifically authorized by statute; hence, the writ's guidance is available only within caselaw. But the Supreme Court admits, "the precise contours of coram nobis have not been well defined." *United States v. Denedo*, 556 U.S. 904, 910 (2009). Similarly, the First Circuit

said, "[t]he metes and bounds of the writ of coram nobis are poorly defined and the Supreme Court has not developed an easily readable roadmap for its issuance." *United States v. George*, 676 F.3d 249, 253 (1st Cir. 2012).

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*) Thus, there is tremendous uncertainty regarding the scope and availability of the writ. "Consequently, the courts of appeals have not yet developed anything resembling a uniform approach to such relief." *George*, 676 F.3d at 254. Indeed, there are several deep and acknowledged conflicts over the scope of the writ.

Several years ago, the Supreme Court was one vote shy from granting certiorari for "comprehensive consideration of coram nobis relief." The Solicitor General asked the 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." Petition for Writ of Certiorari, *United States v. Mandel*, No. 88-1759, at 6. But the potential fourth vote, Justice Kennedy, believed the case was resolvable without addressing the coram nobis question. Thus, he voted to deny certiorari. Lee Epstein, Jeffrey A. Segal, & Harold J. Spaeth, *The Digitial 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 10.9 That denial prompted the Seventh Circuit to say, "Evidently the Supreme Court thinks this conflict tolerable for the time being." *United States v. Bush*, 888 F.2d 1145, 1149 (7th Cir. 1989).10 However, for those who rely on caselaw as guidance, it is not a tolerable situation. A coram nobis petitioner must provide sound reasons for any delays in filing the petition; yet lower courts have consistently held that ignorance of the law is not a sound reason. See e.g. *Mendoza v. United States*, 690 F.3d 157, 160 (3d Cir. 2012). Consequently, these "poorly defined" contours jeopardize petitioners deserving of coram nobis relief from their last opportunity to rid themselves of collateral consequences from an unjust conviction.

Under the authority of the All-Writs Act, *United States v. Morgan*, 346 U.S. 502 (1954) fashioned a remedy in the nature of the writ of coram nobis. This remedy provides former prisoners equitable relief of their convictions. However, *Morgan* failed to explain how it fashioned the writ. As a result, lower courts are sharply divided over the writ's intended scope. Therefore, deciding how Morgan fashioned the writ will not only assist this case, but it will also help provide needed guidance to other courts and litigants.

1. 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

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9 http://epstein.wustl.edu/research/blackmunMemos/1988/DM1988-pdf/88-1178.pdf

10 This conflict remains unresolved. *George*, 676 F.3d at 254.

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*, Pet. for Writ of Certiorari to the United States Supreme Court, No. 15-1027, 136 S.Ct. 2387 (2016), at 10-11. After completing the sentence, these former prisoners seldom discover important evidence that was unavailable while in custody. Thus, coram nobis petitions are extraordinary. But what it lacks in volume, it compensates for in magnitude. The writ has played an important role in our nation's history. This includes correcting some of the Supreme 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.") (affirming grant of coram nobis relief).

If a former federal prisoner discovers new information casting doubt upon the validity of their 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 *Kroytor*, 977 F.3d at 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 to rid themselves of a lifetime of collateral consequences, these litigants must

be able to understand the metes and bounds of the writ.

Congress has not enacted any statute specifically providing courts the authority to issue the writ of coram nobis. Instead, a court's authority to issue the writ originates from the All-Writs section of the Judicial Code. *Morgan*, 346 U.S. at 506. Thus, the contours of the writ lie not within statutes, but rather within caselaw. While those in custody can rely on the *Rules Governing Section 2255 Cases in United States District Courts* as guidance, coram nobis petitioners must wade through decisions of the federal courts. This is not an easy task. As the Seventh Circuit observed, "[c]oram 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 (7th Cir. 1989). It then pleaded for the Supreme Court's guidance, saying, "[t]wo ambiguous decisions on the subject in the history of the Supreme Court are inadequate." *Id.* at 1149.

In conclusion, former prisoners face an uphill battle when challenging a conviction. The caselaw's ambiguity may drive deserving petitioners to give up trying. For those who persevere, these unskilled and underfunded petitioners must comb through decisions to find the guidance they need. The Supreme Court realized "the precise contours of coram nobis have not been well defined." *Denedo*, 556 U.S. at 910. Considering the importance of this writ and the importance of clear and concise guidance, this Court should take this opportunity to help clarify the issue.

2. Courts should contextually interpret *Carlisle*

By the 1990s, circuit courts were already pleading for coram nobis guidance. See e.g. *Bush*, 888 F.2d at 1146. ("[c]oram nobis is a phantom in the Supreme Court's cases, appearing occasionally but only in outline.") But a brief statement about the writ in *Carlisle v. United States*, 517 U.S. 416 (1996) would further complicate matters. In that case, the petitioner submitted a motion for acquittal to the trial judge one day outside the time limit prescribed under Rule 29 of the Federal Rules of Criminal Procedure. There, the petitioner provided several arguments for why a district court has the authority to enter a judgment of acquittal after the due date. One of the many arguments was that courts have this authority with a writ of coram nobis. The Court rejected that argument, saying in these three sentences,

> Where a statute specifically addresses the particular issue at hand, it is that authority, and not the All-Writs Act, that is controlling." *Pennsylvania Bureau of Correction v. United States Marshals Service*, 474 U. S. 34, 43 (1985). As we noted a few years after enactment of the Federal 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.*" *United States v. Smith*, 331 U. S., at 475, n. 4.) In the present case, Rule 29 provides the applicable law.

Carlisle, 517 U.S. at 429. (emphasis added, alterations omitted)

This passage 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." Fed. R. App. P. 4(a)(1)(C) Committee Notes (2002).[11] The problem with the *Carlisle* passage is the phrase, "difficult to conceive." The definition of 'inconceivable' is "impossible to imagine or believe." *Oxford Advanced American Dictionary* (10th ed. 2020). Thus, the ***textual interpretation*** of *Carlisle* is that the Court found it difficult to imagine any appropriate situation for the writ of coram nobis in a federal case. This textual interpretation is inaccurate unless *Carlisle* overruled or failed to consider *Morgan*. In *Morgan*, the Court described an extraordinary situation where coram nobis relief was necessary and appropriate. *Morgan*, 346 U.S. at 512. So, when the Supreme Court decided *Carlisle*, it was very easy to conceive of a situation where coram nobis was necessary and appropriate. The Court only needed to review *Morgan* (or better yet, *Korematsu* and *Hirabayashi*) to find that situation.

Carlisle is a case where the Court rejected the petitioner's argument that coram nobis could be used to bypass Rule 29. Thus, by combining the first two sentences, the ***contextual interpretation*** is, "[Where a statute specifically addresses the particular issue at hand], 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." *Carlisle*, 517 U.S. at 429. This contextual interpretation then complements *Morgan*. However, most lower courts do not use this interpretation.

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11 Congress wrote this statement when it modified the Federal Rules of Appellate Procedure in 2002 to resolve *another* coram nobis circuit split.

Most circuit courts have applied a ***figurative interpretation*** of this passage to restrict coram nobis petitions. These courts construe the Supreme Court's "inconceivable" characterization of coram nobis to figuratively mean the writ must be held to the strictest standards. See e.g. *Mendoza*, 690 F.3d at 159 ("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.'") (citing *Carlisle*).

The figurative interpretation is wrong. If the Supreme Court intended to emphasize the writ's stringent requirements or the exceptional nature of the writ, it would have done so directly or by using a commonly understood analogy. "Inconceivable" is not synonymous with "exceptionally difficult". The figurative interpretation is also misleading. A reasonable person will read the *Carlisle* passage and question whether the Court believes there is a place for the writ in federal courts. This is how Congress interpreted it.

In a recent case, the government cited this passage to oppose a coram nobis petition. The district court in that case took the opportunity to comment on the dangers of using this passage, saying, "[d]espite 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." *United States v. Arce-Flores*, No. 2:15-cr-00386 JLR, 2017 WL 4586326 (W.D. Wash. 2017) at *4 n.3. The court then granted coram nobis relief. That court is correct, and to avoid misunderstandings, other courts must stop relying on this interpretation.

And, under no circumstances, should *Carlisle* be cited to intentionally discourage deserving petitioners from seeking coram nobis relief. Therefore, to prevent courts and petitioners from misunderstanding the scope of the writ, this Court should help clarify *Carlisle.*

3. Courts overlook the significance of *Smith*

Lower courts all understand and agree that *Morgan* permits courts to entertain coram nobis proceedings. The lower courts, however, are deeply divided over how *Morgan* fashioned the writ. (*infra.* at 26-29.) Understanding how *Morgan* fashioned the writ begins with a review of the Court's authority to fashion writs. The All-Writs Act authorizes courts to issue "writs necessary or appropriate in aid of their respective jurisdictions." 28 U.S.C. § 1651(a). In *Pennsylvania Bureau of Correction,* the Supreme Court observed, "the scope of the all writs provision confined it to filling the interstices of federal judicial power when those gaps threatened to thwart the otherwise proper exercise of federal courts' jurisdiction." 474 U.S. at 41. Thus, *Morgan* identified a gap in the federal courts' jurisdiction and filled that gap by providing federal courts the authority to issue the writ of coram nobis. This section, therefore, explains why there was a gap.

The previous section discussed *Carlisle.* This section begins with a focus on *United States v. Smith,* the source of *Carlisle's* "difficult to conceive" passage. In *Smith,* the Court discussed the writ of coram nobis in a single, albeit significant, footnote. *Smith,* note 4, says in full,

> Although the Supreme Court has reserved decision on whether the federal district courts

> are empowered to entertain proceedings in the nature of coram nobis "to bring before the court that pronounced the judgment errors in matters of fact which had not been put in issue or passed upon and were material to the validity and regularity of the legal proceeding itself . . .," *United States v. Mayer*, 235 U.S. 55, 68, it is difficult to conceive of a situation in a federal criminal case today where that remedy would be necessary or appropriate. Of course, the federal courts have power to investigate whether a judgment was obtained by fraud and make whatever modification is necessary, at any time. *Universal Oil Co. v. Root Refining Co.*, 328 U.S. 575.
>
> *Smith*, 331 U. S., at 475, n. 4.

In *Morgan*, the Supreme Court clarified the meaning of this passage. However, a cursory reading of *Morgan* clouds, rather than clarifies, the *Smith* footnote. *Morgan* says, "In *United States v. Smith*, 331 U.S. 469, 475, note 4, 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.

At first glance, it is difficult to comprehend how *Smith* footnote 4 "referred to the slight need for a remedy like coram nobis." In fact, *Smith* seems to be suggesting quite the opposite. There are two keys to solving this quandary. First, the final sentence in *Smith* recognized the constitutional obligation of federal courts to provide equitable relief in criminal cases. Second, the "modern substitutes" referenced in *Morgan* is legislation abolishing bills of review in 1948, one year after *Smith*. A bill of review was the procedural instrument used to initiate equitable review of

a judgment. These two keys help reconcile the passages.

a. *Smith* recognized the constitutional obligation of a federal court to provide equitable relief in criminal cases

The last sentence of the *Smith* footnote says, "[o]f course, the federal courts have power to investigate whether a judgment was obtained by fraud and make whatever modification is necessary, at any time." *Smith*, 331 U.S., at 475, n. 4. When the Court decided *Smith,* only a court sitting in equity (as opposed to a court of law) had the authority to correct a judgment obtained by fraud (and other manifest errors) "at any time." See *Hazel-Atlas Co. v. Hartford Co.*, 322 U.S. 238, 244-245 (1944). *Smith* is a criminal case, and the footnote concentrates on the authorities available to challenge a criminal conviction. In this context, the *Smith* Court would not have mentioned this equitable jurisdiction unless it applied to criminal cases. Therefore, *Smith* observed that federal courts had the equitable power to correct manifest errors, including fraud, in criminal cases.

Smith is significant because, until that time, courts of equity rarely, if ever, became involved in criminal matters. See e.g. *Flynn v. Templeton*, 1 F.Supp. 238, 241 (W.D. N.Y. 1932) ("No case has been called to my attention in which a bill in equity has been sustained to vacate and set aside a criminal conviction.") In fact, before *Smith*, the Seventh Circuit held that although a *former prisoner's* conviction violated the constitution, "an equitable action to vacate and set aside the judgment of conviction will not lie." *Needham v. United States*, 89 F.2d 72, 74 (7th Cir. 1937).

The *Smith* Court understood the constitutional requirement providing equitable jurisdiction to criminal cases. The Constitution says federal courts may exercise jurisdiction over cases and controversies "in law and equity." U.S. Const. art. III, § 2. Congress implemented this jurisdiction in Section 11 of the Judiciary Act of 1789. Unlike the English judicial system, where the judiciary was divided into separate courts of common law and equity, the Judiciary Act created a single judicial system with law and equity sides. Federal courts of law held formal terms of operation lasting for a specified period. The courts of law could not correct a judgment after the completion of the term. *United States v. Mayer*, 235 U.S. 55, 67 (1914). However, federal courts of equity could set aside a judgment at any time where enforcement is "manifestly unconscionable." *Pickford v. Talbott*, 225 U.S. 651, 657-658 (1912).

b. *Smith* referred to the need for a writ like coram nobis because pending legislation would soon abolish bills of equity

Morgan said the *Smith* Court, "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. These "modern substitutes" were laws abolishing bills of review. In 1937, Congress enacted the Federal Rules of Civil Procedure. These Rules dissolved the courts of equity. However, federal courts continued to accept bills of review and heard cases under the old Federal Equity Rules. See e.g. *Hazel-Atlas Co.*, 322 U.S. at 249. This prompted Congress to say,

> Since the rules have been in force, decisions have been rendered that the use of bills of review, *coram nobis*, or *audita querela*, to obtain relief from final judgments is still

> proper, and that various remedies of this kind still exist although they are not mentioned in the rules and the practice is not prescribed in the rules.

Advisory Committee Notes to Fed. R. Civ. P. 60(b) (1946).

In 1946, Congress enacted amendments to the Rules which abolished bills of review and other methods of obtaining equitable relief. The purpose of the amendments was to simplify and standardize the procedure to obtain relief from judgment. *Id.* However, the amendments limited the procedures for obtaining relief to civil cases. Rule 60(b) is the modern substitute for the bill of review; but, "Rule 60(b) simply does not provide for relief from judgment in a criminal case." *United States v. Mosavi*, 138 F.3d 1365, 1366 (11th Cir. 1998). The amendment abolishing bills of review became effective in March 1948. In 1947, *in between* the amendment's enactment and effective dates, the Supreme Court decided *Smith*.

The *Smith* Court said, "it is difficult to conceive of a situation in a federal criminal case today where [coram nobis] would be necessary or appropriate." The word "today" is important. *Morgan* clarified the *Smith* Court was referring to a "need for a remedy like coram nobis in view of the modern substitutes." Thus, the only way to reconcile *Smith* and *Morgan* is to conclude that the *Smith* Court was aware the amendments would soon prohibit litigants from filing bills of review in criminal cases. In this context, the correct interpretation is that the *Smith* Court said it is difficult to conceive of a situation in a federal criminal case "today" (in 1947) where coram nobis would be necessary or appropriate; however, in 1948 (when the amendments

become effective), there will be a "need for a remedy like coram nobis."

In conclusion, *Smith* recognized the constitutional right of a federal court to provide equitable relief in criminal cases, and the Court believed a writ "like coram nobis" may be required to protect this right should a need arise. A few years later, *Morgan* would identify such a need, giving former prisoners the constitutional right to equitable relief of their criminal convictions. Thus, the significance of *Smith* is that, prior to 1948, former prisoners could challenge their conviction in a court of equity under those courts' requirements and procedures. See also *Denedo*, 556 U.S. at 913 ("coram nobis is an equitable means to obtain relief from a judgment.")

4. There is considerable confusion over how *Morgan* fashioned the modern writ of coram nobis

The first question is whether, and to what extent, *Morgan* fashioned the writ of coram nobis to incorporate former federal courts of equity requirements for equitable relief. After solving the *Smith* puzzle, the answer is not complicated. *Morgan* fashioned a writ that: 1) adopted the type of errors meeting the courts of equity standard for equitable relief; 2) adopted the equity courts' requirements to obtain this relief – requirements which safeguarded principals of finality; and 3) maintained the common law writ of coram nobis procedures. These procedures were all well-defined when the Court decided *Morgan*.

The All-Writs Act says the remedy must be "agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). This means courts should use "familiar

procedures" to fill the gap. *Harris v. Nelson,* 394 U.S. 286, 300 (1969). *Morgan* did not need to look far to find the most familiar procedures. Until 1948, former prisoners could challenge their conviction with a bill of equity. Congress abolished this procedural instrument, but there was no intent to deprive former prisoners of their constitutional right to equitable relief. So, the obvious analogous solution was to reapply the requirements (as defined by courts of equity) necessary to obtain equitable relief. These requirements broadened the types of errors the writ of coram nobis could correct, but it also added equitable requirements protecting the interest of finality. This is consistent with the Court's observation in *Denedo*, which said,

> Any rationale confining the writ to technical errors, however, has been superseded; for in its modern iteration coram nobis is broader than its common-law predecessor. This is confirmed by our opinion in *Morgan.* [...] To confine the use of coram nobis so that finality is not at risk in a great number of cases, we were careful in *Morgan* to limit the availability of the writ to "extraordinary" cases presenting circumstances compelling its use "to achieve justice."

Denedo, 446 U.S. at 911

Thus, *Morgan* replaced the requirements to obtain common law coram nobis relief with the requirements necessary to obtain equitable relief. *Morgan*, however, kept the writ's common law procedures intact. A comparison of common law coram nobis and bills of equity proceedings agrees with this analysis. At common law, a court could correct its own judgment at any time with a writ of coram nobis. *Morgan* kept these

procedures in the modern writ. But the common law writ could only correct technical, factual errors. In contrast, courts of equity could correct manifest errors of law or fact at any time, but the proceedings were very different. In equity proceedings prior to 1948, if a litigant wished to challenge a judgment with newly discovered evidence, the litigant was first required to obtain leave to file a bill of review from the court that issued the final decree. There were several requisites to obtain this leave (or "prerequisites" to file a bill of review): 1) the petitioner must have no other remedy available to challenge the judgment, *John Simmons Co. v. Grier Brothers Co.*, 258 U.S. 82, 88-89 (1922); 2) the claims raised must not have been known or discoverable by reasonable diligence before the judgment *Hazel-Atlas Co.*, 322 U.S. at 260 (Roberts, J. dissenting) (citing "well settled" principals); and 3) the petitioner must provide sound reasons for not raising the claims earlier. *Id.* These prerequisites confined the use of bills of equity so that finality was not at risk in a great number of cases. These prerequisites are also the same requirements *Morgan* placed upon the writ.

After obtaining leave, the litigant filed a bill of review. The requisites at this point were simple and straightforward. If the court of equity considered the enforcement of the judgment to be "manifestly unconscionable," the court granted the bill "without hesitation." *Id.* at 244-245. As Chief Justice Marshall wrote in 1813:

> Without attempting to draw any precise line to which courts of equity will advance, and which they cannot pass, in restraining parties from availing themselves of judgments obtained at law, it may safely be said

> that any fact which clearly proves it to be against conscience to execute a judgment [] will justify an application to a court of chancery.

Marine Ins. Co. of Alexandria v. Hodgson, 11 U.S. 332, 336 (1813).

Thus, when *Morgan* incorporated these prerequisites and requisites into the writ of coram nobis, it established, through the writ's requirements, a balance between finality and justice. But even with these requirements, coram nobis is an "extraordinary" writ. To succeed, a petitioner must somehow obtain information that was undiscoverable while in custody that renders the judgment "manifestly unconscionable." Cases meeting these requirements are indeed extraordinary.

In conclusion, the significance of *Morgan* is that the Court provided former prisoners the same equitable rights they had prior to 1948 while maintaining the writ's common law procedures. This is the guidance lower courts need. Without it, the courts will continue to make inconsistent decisions and petitioners will continue to lose their equitable rights.

5. Lower courts have refashioned the writ of coram nobis to make the writ more convenient or appropriate

The second question is whether courts have the authority to refashion a writ to make the *remedy* more convenient or appropriate. A similar question was raised in *Pennsylvania Bureau of Correction.* There, the Court held that courts cannot fashion writs whenever a "statutory procedure" is inconvenient. 474 U.S. at 43.

This question may have already been answered. In *dictum*, the Supreme Court used "remedy" instead of "statutory procedures". *DiBella v. United States*, 369 U.S. 121, 125 n.4 (1962) ("[the All Writs Act] has been most sparingly exercised, when no other remedy will suffice.") If *DiBella* is correct, then federal courts cannot modify the remedy *Morgan* fashioned unless a gap still exists in the court's jurisdiction. Otherwise, if lower courts could refashion writs at their own whim, it would wreak havoc with *stare decisis* and create enormous disparities within the courts. This is not what Congress intended when it enacted the All-Writs Act. This Act allows courts to make laws in extraordinary circumstances. The Judiciary exists to interpret laws, not make laws. Thus, Congress intended courts to use this Act sparingly, and only to fill a gap. If changes are subsequently needed, Congress would make modifications. Of course, Congress cannot modify the scope of the writ if it does not know how it was fashioned.

The writ of coram nobis sits at the end of post-conviction remedies. As such, courts have placed more restrictions upon coram nobis proceedings because it would appear less appropriate to do otherwise. See, e.g, *Baranski v. United States*, 880 F.3d 951, 956 (8th Cir. 2018) ("it would make no sense to rule that a petitioner no longer in custody may obtain coram nobis relief with a less rigorous substantive showing than that required by AEDPA's limitations for successive habeas corpus and § 2255 relief."); *Murray v. United States*, 704 F.3d 23, 29 (1st Cir. 2013); ("The standard for determining whether an error is fundamental is not precisely defined, but because coram nobis 'lies at the far end of [the] continuum' of methods for challenging a judgment it is a high standard.") These, and

other similar cases, exemplify how courts interpret the Supreme Court's coram nobis guidance. But these interpretations conflict with decisions of the Supreme Court. Therefore, this Court should clarify whether the All-Writs Act allows courts to refashion *Morgan*'s writ of coram nobis.

6. *Hayman* conflicts with lower court decisions that apply section 2255 rules upon coram nobis proceedings

The third question is whether federal courts err by applying 28 U.S.C. § 2255 rules upon coram nobis proceedings. In 1952, two years before *Morgan*, the Supreme Court issued its landmark opinion on the constitutionality of Section 2255 in *United States v. Hayman*, 342 U.S. 205 (1952). The *Hayman* Court took the opportunity in its decision to settle an argument raised in the briefs about a reference to the writ of coram nobis within the Reviser's Note on Section 2255. Here, *Hayman* instructs district courts to conduct a hearing before determining any issue of fact in coram nobis proceedings. *Hayman* footnote 36 provides in relevant part,

> Further, 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. *People v. Richetti*, 302 N.Y. 290, 297-298, 97 N.E. 2d 908, 911-912 (1951).

Hayman, 342 U.S. at 221 n. 36.

This judicial *dictum* is clear. *Hayman* requires a district court to conduct an evidentiary hearing on

contested issues of fact in coram nobis proceedings because this was the writ's procedure at common law. Eight of the nine justices on the *Hayman* Court were also on the *Morgan* Court. This is another indication that *Morgan* kept common law coram nobis procedures intact. If *Morgan* made any changes to the writ's procedures, it would have expressly overruled or distinguished *Hayman*. Thus, *Hayman* is controlling. However, contrary to *Hayman*, every circuit court applies, by analogy, Section 2255 evidentiary hearing procedures upon coram nobis proceedings. See e.g. *Blanton v. United States*, 94 F.3d 227, 235 (6th Cir. 1996) ("the § 2255 procedure often is applied by analogy in coram nobis cases."). See also C.A. Pet. Reh'g at 13 n.3 (collecting cases from all circuits). The lower courts did not mention the *Hayman* footnote in their decisions, but clearly, *Hayman* is in irreconcilable conflict. Therefore, this Court should clarify whether *Hayman* is controlling.

7. This Court should decide this issue

In conclusion, this appeal is the ideal opportunity to provide comprehensive coram nobis guidance. Appellant contends: 1) an evidentiary hearing was warranted in his coram nobis petition because *Hayman* is controlling; 2) *Hayman* is controlling because *Morgan* kept the writ's common law procedures intact; and 3) circuit courts cannot apply Section 2255 evidentiary hearing rules upon coram nobis proceedings simply to make the writ more convenient or appropriate. Determination of the questions presented will help resolve several conflicts in the federal courts.

The most important reason to grant this motion is because of its exceptional importance. *Carlisle*, as cited by several courts, indicates the Supreme Court

believes the writ of coram nobis to be inconceivable. As there are no clear rules providing the meets and bounds of the writ, caselaw is the only source of guidance. But the caselaw is causing enormous confusion, especially in how courts cite *Carlisle*. For the sake of justice, this Court should address these questions. The Constitution provides federal courts jurisdiction over cases and controversies "in law and equity." Former prisoners lose their equitable right for any delays due to ignorance of the law. Given how courts misunderstand and misapply coram nobis decisions, it is easy to conceive of a situation where a person deserving of coram nobis relief must instead be forever burdened with the heavy hand of the conviction's collateral consequences.

Federal courts misinterpret *Carlisle*, they overlook the significance of *Smith*, they misapply *Morgan*, and they ignore *Hayman* altogether. Congress cannot discern whether the Supreme Court believes coram nobis to exist; the Solicitor General concedes there is considerable confusion; the lower courts are hopelessly split, and they plead for guidance; and the Supreme Court even admits the precise contours of coram nobis have not been well defined. Navigating through the writ's caselaw can intimidate even the most experienced attorneys. Pity the poor pro se petitioner.

In conclusion, resolution of this issue will provide guidance to this Court and other courts on the proper rules to follow in coram nobis proceedings. Most importantly, it will help former prisoners, whose convictions are manifestly unconscionable, understand how to obtain their constitutional right to equitable relief.

VII. Conclusion

Based on the foregoing, the judgment of the district court order should be vacated and remanded for an evidentiary hearing.