No. _____

In The

Supreme Court of the United States

PATRICK SHIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

THOMAS M. OTAKE
Thomas M. Otake,
Attorney at Law, ALC
841 Bishop St, Ste. 2201
Honolulu, HI 96813
(808) 523-3325
thomas@otakelaw.com

DAVID J. MINKIN
Counsel of Record
JORDAN K. INAFUKU
McCorriston Miller Mukai
MacKinnon LLP
Five Waterfront Plaza
500 Ala Moana Boulevard
Honolulu, Hawai‘i 96813
(808) 529-7300
djminkin@m4law.com
jinafuku@m4law.com

QUESTIONS PRESENTED

1. Whether a district court may require an additional showing of prejudice to grant a writ of *coram nobis* in a criminal case, and, if so, whether the required showing of prejudice is consistent with the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), wherein the district court must analyze the defendant's decision making process, identify *the* determinative issue for the defendant, and analyze and resolve whether contemporary evidence supported the defendant's *post hoc* assertion that, if properly advised, the defendant would have gone to trial rather than plead guilty.

2. Whether *Bryan v. United States*, 524 U.S. 184 (1998) overruled *United States v. Carrier*, 654 F.2d 559, 561 (9th Cir. 1981), by requiring a showing that the defendant had knowledge that the false statement was unlawful to prove a willful state of mind when prosecuting an illegal false statement under 18 U.S.C. §1001.

RELATED PROCEEDINGS

Patrick Shin v. United States, Docket Nos. 1:04-cr-10150-SOM-1 and 1:20-cv-00390-SOM-KJM (D. Haw.).

Patrick Shin v. United States, Docket No. 21-16833 (9th Cir.).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Patrick Shin ("Mr. Shin") respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS AND ORDERS BELOW

The memorandum opinion of the court of appeals is not reported but is available at *Shin v. United States*, 2023 WL 2523613 (9th Cir.) (Mar. 15, 2023) and included in the Appendix ("App.") at App. 61. The court of appeals' denial of Mr. Shin's request for rehearing *en banc* is not reported; however, it is included at App. 74. The order of the United States District Court for the District of Hawaii denying Shin's second *coram nobis* petition is not reported but is available at *Shin v. United States*, 2021 WL 4944028 (D. Haw.) (Oct. 22, 2021) (unpublished) and included at App. 1.

Proceedings on a prior *coram nobis* and/or *audita querela* petition resulted in the following unpublished orders and opinions: *Shin v. United States*, 140 S.Ct. 1123 (Mem) (Feb. 24, 2020) (order denying writ of *certiorari*); *Shin v. United States*, 782 Fed.Appx. 595 (9th Cir.) (July 26, 2019) (unpublished); and *Shin v. United States*, 2017 WL 2802866 (D. Haw.) (June 28, 2017) (unpublished amended order).

Mr. Shin did not directly appeal the underlying criminal matter.

STATEMENT OF JURISDICTION

The court of appeals issued its memorandum opinion on March 15, 2023 and denied rehearing *en banc* on April 21, 2023. App. 61, 74. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provision is Section 1001(a)(3) of Title 18 of the United States Code, which states in relevant part:

> (a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully— … (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry; shall be fined under this title or imprisoned not more than 5 years, or both.

18 U.S.C. §1001 (1996).

STATEMENT OF THE CASE

1. Mr. Shin Submitted a Bid on a Project for the Navy

On behalf of a protégé small business that Mr. Shin mentored under the Small Business Administration Mentor-Protégé Program, Mr. Shin submitted a general bid on a construction project for the United States Navy in

September 2003. The Navy official who oversaw the project described the overall bid submitted by Mr. Shin as fair for the Navy.

As later acknowledged by Navy officials, the Navy used an incorrect contracting vehicle for the project that deprived the general contractor from being able to recover necessary overhead costs (e.g., mobilizing and demobilizing, obtaining permits, providing "as-built" drawings, obtaining insurance and appropriate bonding, performing inspections, providing office support, quality control, safety oversight, software and equipment support, traffic control, etc.) or compensation to possibly return a fair profit (an opportunity far from guaranteed on a complicated job involving a unique and decades old dry dock and pump system). Nevertheless, the Navy deliberately chose this contracting vehicle to accelerate the bidding process and commit funding for the project before the end of the fiscal year. The Navy was concerned that funds for the maintenance project would lapse if it used the correct, but significantly more time consuming, contracting vehicle for the project. To recoup overhead and fair profit for the general contractor foreclosed by the Navy's incorrect contracting vehicle, the overall general bid submitted by Mr. Shin included two subcontractor quotes that were altered to account for the general contractor's lost overhead costs and provided the opportunity for a fair profit.

2. <u>A Federal Investigation Recorded Mr. Shin's Lack of Evil Intent.</u>

A whistleblower's tip triggered a federal investigation into Mr. Shin's submission to the Navy. The federal investigation included the use of a cooperating

subcontractor, who wore a concealed wire and recorded a conversation he had with Mr. Shin, without Mr. Shin knowing he was being recorded. The recording captured Mr. Shin rejecting the subcontractor's solicitation of an illegal kickback and, more importantly, being insulted by it. The recording also captured Mr. Shin insisting that he was not doing anything illegal by changing the subcontractor bids to recoup overhead costs and fair profit because he was not increasing the overall bid and was not cheating the Navy in any way. App. 11 (DC Order). As a Navy official later admitted, it was understood by everyone that Mr. Shin "needed to 'roll' overhead and profit into the line items" under the incorrect contracting vehicle the Navy was using for the project. *Shin v. United States*, 2017 WL 2802866, at *4 (D. Haw.) (June 8, 2017) (unpublished).

Despite that recording memorializing Mr. Shin's lack of evil intent, the United States charged him in April 2004 with making a false statement in violation of 18 U.S.C. §1001(a)(3). Mr. Shin explained to his trial counsel that he felt railroaded because the Navy pushed him to make things work—so the project could be funded under an incorrect contracting vehicle that the Navy knew left no room to recoup overhead costs or a fair profit—but then the federal government turned around and prosecuted him when he did so. Mr. Shin also adamantly maintained that he never harbored an evil intent to cheat the Navy.

3. Mr. Shin's Trial Counsel Advised Him Incorrectly.

Consistent with his recorded statements, Mr. Shin explained to his trial counsel that he changed the subcontractor quotes to protect the Navy's project and

ensure it could proceed within the time constraints of the fiscal year. Mr. Shin did not know his statements were illegal and did not intend to act in an unlawful manner; he meant only to support the Navy's project.

Despite Mr. Shin's explanations, his trial counsel incorrectly advised him that his lack of evil intent did not matter because, to convict Mr. Shin of a false-statement offense under §1001(a), the government only needed to prove that he knew the two subcontractor quotes were false and material to the Navy. Trial counsel's advice, however, was contrary to case law from the Supreme Court of the United States, which described what the government must prove to establish a "willful" violation of a federal statute. In *Bryan v. United States*, 542 U.S. 184, 193 (1998), this Court analyzed 18 U.S.C. §924(a)(1)(D)'s sentencing provision for willfully violating federal firearm laws and held that proving willfulness required proof that the defendant specifically knew that "his conduct was unlawful." *Id.* at 193. Knowledge of illegality, this Court explained, meant "that an evil-meaning mind directed the evil-doing hand." *Id.*

The *Bryan* holding changed prior Ninth Circuit case law that "willfulness" under 18 U.S.C. §1001(a) did not require knowledge that making the material false statement at hand was illegal. *Compare Bryan*, 542 U.S. at 193 *with United States v. Carrier*, 654 F.2d 559, 561 (9th Cir. 1981) (holding that such "evil intent" was "not necessary"). In *Carrier*, the Ninth Circuit allowed the government to establish a willful violation of §1001(a) by proving that the defendant simply knew the statement was false and material. *Id.* When eventually asked to reconsider this holding in light of *Bryan*, the Ninth Circuit refused to do so and chose to double-down on

Carrier instead. *See United States v. Tatoyan*, 474 F.3d 1174, 1182 (9th Cir. 2007).

Trial counsel served as Mr. Shin's counsel from the commencement of his prosecution through 2020, when this Court previously denied Mr. Shin's petition for a writ of *certiorari* in his first *coram nobis* proceeding, which raised issues of materiality. Throughout that time, trial counsel advised Mr. Shin in accord with *Carrier* and remained unaware of *Bryan*. Even so, at every step of the way—from his recorded remarks to the cooperating subcontractor, to the agents that arrested and interrogated him, to prosecutors during plea negotiations, to the judge at sentencing, to the judge again when testifying in his first *coram nobis* proceeding, and yet again in this second *coram nobis* proceeding—Mr. Shin has consistently explained that he never harbored an evil intent, even though his hand did wrong. To the contrary, he only ever intended to assist the Navy in commencing the project before funding lapsed.

Mr. Shin did not understand his acts—modifying subcontractor quotes without effect to the overall bid—were illegal. He knew that altering the overall bid amount would be illegal, because doing such a thing cheated the Navy, but, he has always and consistently maintained that he did not know modification without effect to the overall bid was illegal. Notwithstanding his state of mind, his trial counsel, the investigating federal agents, the prosecutors, and the trial judge all told him that his knowledge (or lack of knowledge) regarding illegality was not relevant. From 2003 to 2020, Mr. Shin was repeatedly advised that he was guilty simply if he knew the quotes were false and material to the Navy's consideration of the overall general bid.

4. Mr. Shin Pled Guilty Based on this Wrong and Incorrect Advice.

Based on this wrong and incorrect advice, Mr. Shin pled guilty to a single §1001(a)(3) count. At the plea colloquy, Mr. Shin admitted that his hand had done "wrong" by altering and submitting the two subcontractor quotes. App. 14-15 (DC Order). But he was never asked to admit that he acted with an evil-meaning mind, a mind that knew altering the quotes was illegal. And the plea hearing almost derailed when, asked to admit his guilt in his own words, Mr. Shin again tried to explain that he felt railroaded and had sought to protect the project in a way that was fair to both the Navy and the general contractor. *Id.* The prosecutor thought such remarks undercut admitting materiality. But, when Mr. Shin repeated that he knew he was wrong to change the quotes and that the quotes were important to the Navy, the prosecutor was satisfied that Mr. Shin admitted materiality. *Id.*; *see also* App. 97-106 (Plea Colloquy Tr.).

The evidence adduced at his sentencing in 2006 established that Mr. Shin's modification of the subcontractor quotes did not inflate the overall bid amount, which the Navy felt had been a fair bid that did not cheat the government. App. 15-19 (DC Order). Accordingly, the trial judge expressly found that Mr. Shin did not cause any actual loss and agreed that he did not intend to cause any loss to the government. App. 19 (DC Order). The district court sentenced him to three years of probation and imposed a significant fine. Mr. Shin served his term of probation without incident, paid the fine, and has since led a law-abiding life.

Mr. Shin did not directly appeal his conviction and sentence. But, when new case law allowed, he brought a *coram nobis* petition that sought to revisit the issue of materiality. Litigation on that petition was unsuccessful and did not conclude until February 2020.

5. Mr. Shin Filed a Second *Coram Nobis* Petition.

Following the conclusion of Mr. Shin's first *coram nobis* petition, Mr. Shin hired new counsel. For the first time, Mr. Shin was then advised of the *Bryan* case and the appropriate requirements for proving willfulness to prosecute a federal criminal statute. Additionally, Ninth Circuit law on willfulness gradually changed, albeit within unpublished opinions, and accepted that *Bryan* materially changed the willfulness requirements previously set forth in *Carrier*.

The Ninth Circuit's belated realization was precipitated by the government's concession in response to a *certiorari* petition in this Court. *See Ajoku v. United States*, 572 U.S. 1056 (Apr. 21, 2014). There, the government admitted that the willfulness standard set forth in *Bryan* applied to the false statement offense codified in 18 U.S.C. §1035. The Court summarily granted the defendant's *certiorari* petition, vacated, and remanded because *Bryan*'s willfulness standard (requiring knowledge of illegality), not *Carrier*'s, applied to prosecute a false statement in violation of §1035. *See United States v. Ajoku*, 718 F.3d 882, 889–890 (9th Cir. 2013) (reaffirming that *Carrier* applied to §1035 in a published opinion); *Ajoku v. United States*, 572 U.S. 1056 (Apr. 21, 2014). On remand, the Ninth Circuit issued an unpublished memorandum opinion that tersely accepted

the government's concession and acknowledged *Bryan*'s applicability to §1035. *See United States v. Ajoku*, 584 Fed. Appx. 824 (9th Cir.) (Sept. 23, 2014) (unpublished).

After *Ajoku*, the Ninth Circuit changed its model criminal jury instruction on willfulness to comply with *Bryan*.[1] Previously, when applying *Carrier*, the Ninth Circuit held that the willfulness required under §1035 and §1001 was the same and, thus, that *Carrier* applied to *both statutes*. *See United States v. Tatoyan*, 474 F.3d 1174, 1182 (9th Cir. 2007). But following *Ajoku*, and the Ninth Circuit's compliance with *Bryan*, Ninth Circuit panels have repeatedly, well into 2018, limited *Ajoku* as requiring the *Bryan* willfulness standard only to §1035, while insisting that *Carrier* remained good law and applied as to §1001. *See United States v. Mazzeo*, 735 Fed. Appx. 465, 466 (9th Cir.) (Aug. 24, 2018) (unpublished); *United States v. Eglash*, 640 Fed. Appx. 644 (9th Cir.) (Feb. 17, 2016) (unpublished). None of those panels explained how willfulness meant something different under §1001 than it did under §1035, nor did those panels reconcile the Ninth Circuit's previous view that the two statutes required the same thing when it came to willfulness.

Now, however, there is no dispute that *Bryan* applies to §1001 and that *Carrier* is no longer controlling.

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[1] In Mr. Shin's case, the district court judge personally recollected that the instructional change happened sometime in 2014. App. 22 n.9 (DC Order). But a different district court judge, in granting habeas corpus relief under 28 U.S.C. §2255 on a *Bryan* claim challenging a §1001 conviction, has said that the instructional change did not occur until 2016. *See Harris v. United States*, 2017 WL 3443207, at *6 (C.D. Cal.) (Aug. 9, 2017) (unpublished).

App. 31 n.10, 35-36 (DC Order); App. 64 (9th Cir. Mem. Opinion).

Mr. Shin filed a second *coram nobis* petition that sought to relieve him of the adverse consequences of his §1001 conviction because his plea was involuntary and, thus, invalid as a matter of due process under the Fifth Amendment, given that he was not properly informed of §1001's willfulness element by anyone, be it counsel, the prosecutor, or the judge during the plea colloquy. The district court agreed that Mr. Shin continued to suffer from adverse consequences from his conviction. App. 30 (DC Order); *see also Shin v. United States*, 2017 WL 2802866, at *7 (D. Haw.) (June 28, 2017) (unpublished). In addition, the district court further agreed that, having fully served and satisfied his sentence, no other remedy was available to him. App. 30 (DC Order). And the district court affirmatively ruled that Mr. Shin's plea was involuntary as a matter of due process because he was never properly informed about the element of willfulness. App. 31 (DC Order).

But the district court then required Mr. Shin to make an affirmative showing of prejudice under the *Sixth* Amendment and *Strickland v. Washington*, 466 U.S. 668 (1984), above and beyond fundamental due process error and its adverse consequences. App. 31 (DC Order). The district court, that is, required Mr. Shin to persuade it that he would not have pled guilty had he been properly advised. App. 31 (DC Order). The district court ruled that he failed to do that, relying largely on what the court felt was overwhelming evidence of guilt and Mr. Shin's admissions, during the invalid plea colloquy, that altering the subcontractor quotes was "wrong." App. 35-46 (DC Order). Though Mr. Shin made those remarks in support

of admitting falsity and materiality, and even though he did not understand that knowledge of illegality was an offense element, the district court construed Mr. Shin's use of the word "wrong" broadly. *Id.* The district court, that is, took such admissions to have knowingly, yet unwittingly, admitted an element—knowledge of illegality, rather than simply knowledge of falsity and materiality—that Mr. Shin did not know was an element. *Id.* The district court also ruled that continuity of counsel from 2003 into 2020 and the change in circuit law did not suffice to reasonably explain Mr. Shin's delay in raising his *Bryan* claim. App. 46-60 (DC Order).

The Ninth Circuit did not reach the latter ruling because it affirmed the district court's decision on the first prong. Like the district court, the Ninth Circuit interpreted Mr. Shin's admissions to the *Carrier* elements as also satisfying the *Bryan* standard of willfulness. App. 63-68 (9th Cir. Mem. Opinion).

REASONS FOR GRANTING THE PETITION

1. This Court should grant certiorari to resolve a circuit split concerning the prejudice necessary to grant *coram nobis* relief.

This Court should grant Mr. Shin's petition for writ of *certiorari* to resolve a circuit split over whether a petitioner seeking *coram nobis* relief must additionally show prejudice resulting from the fundamental wrong.

In Mr. Shin's case, the district court incorrectly required him to establish two forms of prejudice. First, he had to show that he continued to suffer adverse consequences from a fundamental error—that is, from Mr.

Shin's involuntary guilty plea. Second, he had to establish an additional layer of prejudice by showing he would have proceeded to trial on a winnable defense if the fundamental error that invalidated his plea had not occurred. This two-step showing that the district court required Shin to meet contradicts case law from both the Ninth Circuit and this Court. Further, it highlights a circuit split on the issue.

United States v. Morgan, 346 U.S. 502 (1954), marks this Court's modern understanding of the scope of *coram nobis* relief. After surveying the writ's history, this Court held that a writ of *coram nobis* could be sought under the All Writs Act, 28 U.S.C. §1651. *See Morgan*, 346 U.S. at 506-511. This Court acknowledged a writ for *coram nobis* should issue "under circumstances compelling such action to achieve justice." *Morgan*, 346 U.S. at 511. This Court further noted that a petitioner should be allowed to seek a writ of *coram nobis* when "no other remedy" was available and "sound reasons" existed for not seeking such relief "earlier," because "[o]therwise a wrong may stand uncorrected," which granting a writ of *coram nobis* "would right." *Id.* at 512. Notably, *Morgan* does not require any showing of prejudice at all, beyond showing that a fundamental error occurred.

More recently, in *United States v. Denedo*, 556 U.S. 904 (2009),[2] this Court held that Article I military courts could entertain *coram nobis* petitions "to consider allegations that an earlier [military] judgment of conviction was flawed in a fundamental respect." *Denedo*, 556 U.S. at 917. But once again, this Court did not flesh

[2] *Denedo* appears to be the last time that this Court addressed the substance of the writ of coram nobis.

out any additional requirements a petitioner must prove to be entitled to *coram nobis* relief. This Court noted that "the precise contours of *coram nobis* have not been well defined," *id.* at 910 (quotation marks and citation omitted), but did further clarify or describe those contours. Instead, this Court saw no need in *Denedo* to do more than repeat that *coram nobis* in its modern form "is broader than its common-law predecessor," *id.* at 911, and that the writ was "an extraordinary tool to correct a legal or factual error," after a criminal sentence was fully served and the petitioner was no longer in custody in a way that would allow for a habeas corpus relief. *Id.* at 912-913; *see also*, *e.g.*, *United States v. Addonizio*, 442 U.S. 178, 186 (1979) (saying coram nobis should be available when a fundamental error "rendered the proceeding itself irregular and invalid"). In sum, this Court's jurisprudence regarding the standard for granting a writ of *coram nobis* does not require any showing of prejudice.

That there is not much, if any, discussion in this Court's *coram nobis* cases about the need to show prejudice makes a good deal of sense. The writ, after all, only applies when *habeas corpus* does not; *coram nobis*, that is, can be sought only after a criminal sentence has been fully satisfied. Avoiding, ending, or undoing punishment is, thus, not on the scale and needs no counterweight. And much of the purpose of a criminal conviction, insofar as providing justification for punishment, has been fulfilled. The only thing *coram nobis* corrects is the finality of the judgment and its negative collateral consequences, such as those that affect the petitioner's reputation, livelihood, and some civil rights (most notably, the right to serve on a jury and to have a firearm). When years (here, decades) have gone by

and persuasively attest to the petitioner's successful rehabilitation and, too, that the conduct underlying conviction was aberrant, the interest in finality in a conviction predicated on a fundamental error leaches most, if not all, of its weight.

To whatever degree *coram nobis* requires some degree of prejudice, a showing of continuing adverse consequences should be sufficient to supply it. The vast majority of the circuit courts require a *coram nobis* petitioner to show that the fundamental error continues to cause "lingering collateral consequences." *United States v. Walgren*, 885 F.2d 1417, 1420 (9th Cir. 1989); *see also United States v. George*, 676 F.3d 249, 254 (1st Cir. 2012); *United States v. Mandanici*, 205 F.3d 519, 524 (2d Cir. 2000); *United States v. Stoneman*, 870 F.2d 102, 105 (3d Cir. 1989); *United States v. Akinsade*, 686 F.3d 248, 252 (4th Cir. 2012); *Jimenez v. Trominski*, 91 F.3d 767, 768 (5th Cir. 1996); *United States v. Sloan*, 505 F.3d 685, 697 (7th Cir. 2007); *Stewart v. United States*, 446 F.2d 42, 43-44 (8th Cir. 1971) (per curiam); *Hirabayashi v. United States*, 828 F.2d 591, 604 (9th Cir. 1987).

The Sixth, Tenth, and Eleventh circuits depart in opposite directions from the majority middle ground. The Sixth Circuit holds that a *coram nobis* petitioner must demonstrate that fundamental error "probably altered the outcome of the challenged proceeding," which, in a criminal case, seems to require a showing of probable acquittal. *United States v. Johnson*, 237 F.3d 751, 755 (6th Cir. 2001). The Tenth Circuit does not appear to have a published case on point, but in an unpublished case, it sided with the Sixth Circuit. *See United States v. Carpenter*, 24 Fed. Appx. 899, 904-905 (10th Cir.) (Nov. 29, 2001) (unpublished); *United States v. Deberry*, 2023

WL 3819342, at *6, n.10 (D. Col.) (June 5, 2023) (unpublished) (noting the Tenth Circuit's failure to clearly weigh in on the issue). The Eleventh Circuit, on the other hand, requires no showing of prejudice at all—neither lingering adverse consequences nor probable acquittal. *See Gonzalez v. United States*, 981 F.3d 845, (11th Cir. 2020) (holding *coram nobis* may issue when sound reasons explain delay and fundamental error that rendered the proceeding irregular and invalid).

The split in authority as to what, if any, prejudice must be shown to justify *coram nobis* relief from a criminal conviction can only be settled by this Court. It should grant this petition and settle these inconsistent approaches and differing conclusions. Whether a petitioner successfully corrects past injustice through a *coram nobis* petition should not depend on where a petitioner files such a petition.

Mr. Shin's case is especially appropriate for this Court's intervention. Here, the district court and Ninth Circuit panel denied Mr. Shin *coram nobis* relief based on a lack of prejudice, an analysis contrary to and inconsistent with Ninth Circuit case law. First, they found that the government's evidence of guilt was overwhelming; and second, they construed Mr. Shin's admission that his actions were "wrong" as an admission that he knew his actions were illegal. Accordingly, the district court and Ninth Circuit panel both concluded that Mr. Shin was not sufficiently prejudiced.

Such an analysis, however, is a marked departure from both Ninth Circuit and Supreme Court precedents, which require nothing more than fundamental error and adverse consequences. Instead, the district court and

Ninth Circuit panel's analysis more closely resembles the minority view requiring a heightened prejudice requirement in the Sixth and (maybe) the Tenth Circuits. The turn to a showing of prejudice under *Strickland*, moreover, is all the more odd in Mr. Shin's case because the fundamental error that he primarily relied upon was that his plea was invalid as a matter of Fifth Amendment due process—because he was not properly informed about §1001's elements by *anyone* (counsel, prosecutor, or judge)—rather than a denial of effective assistance of counsel under the Sixth Amendment, a significantly more targeted and narrow claim. And, more, the district court agreed that the plea was indeed involuntary and violated due process, App. 31 (DC Order), which, in other cases, the Ninth Circuit has recognized is fundamental error of the sort *coram nobis* should correct. *See Vaglarski v. Whitaker*, 761 Fed. Appx. 738 (9th Cir.) (Feb. 13, 2019) (unpublished).

This Court's intervention is not only needed to ensure consistency among the circuits but also to ensure consistency among panels and districts within the Ninth Circuit and between its published and unpublished decisions.

2. <u>This Court's intervention is necessary to ensure consistent application of its decision in *Lee*.</u>

A second reason this Court should grant this petition is to ensure the even-handed application of *Lee v. United States*, 582 U.S. 357 (2017).

As noted, both the district court and the Ninth Circuit denied Mr. Shin *coram nobis* relief upon finding

that he did not establish that he would have gone to trial had he known *Bryan* applied to §1001. In reaching that conclusion, the lower courts misapplied *Lee*, which further exacerbated their misapplication of the willfulness standard and the *coram nobis* requirements.

During plea negotiations on a federal drug charge, trial counsel told Lee that trial was very risky, pleading guilty would yield a lower sentence, and he would not be deported. Lee pled guilty, only to learn thereafter that his plea triggered mandatory deportation. On Lee's subsequent mis-advice claim, this Court addressed what Lee had to show to establish actual prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984); that is, that the mistaken advice deprived Lee of his right to counsel under the Sixth Amendment.

This Court recognized that the focus should be "on a defendant's decision making, which may *not* turn solely on the likelihood of a conviction after trial." *Lee*, 582 U.S. at 367 (emphasis added). This Court noted that where there is "no plausible chance of an acquittal at trial, it is highly likely that [a defendant] will accept a plea." *Id.* But this Court cautioned that the focus was not on "the probability of a conviction for its own sake." *Id.* Instead, the analysis turned on whether the defendant would have accepted the plea or gone to trial. While "defendants obviously weigh their prospects at trial in deciding whether to accept a plea" deal, "common sense (not to mention our precedent) recognizes that there is more to consider than simply the likelihood of success at trial," because a defendant's decision making process "also involves assessing the respective consequences of a conviction after trial and by plea." *Id.* The inquiry into the defendant's decision making process thus requires the

court to identify what "*the* determinative factor" was for the defendant at hand. *Id.* In *Lee*, the defendant's determinative factor was not conviction or jail time; rather, it was avoiding deportation. "He says he accordingly would have rejected any plea leading to deportation—even if it shaved off prison time—in favor of throwing a 'Hail Mary' at trial." *Id.* at 368. The "possibility of even a highly improbable result," this Court emphasized, "may be pertinent to the extent it would have affected [the defendant's] decision making." *Id.*

Addressing the concern that focusing on the defendant's decision making might upset pleas "solely because of *post hoc* assertions from a defendant about how he would have pleaded" if correctly advised by trial counsel, this Court tutored that lower courts should "look to contemporaneous evidence to substantiate" such *post hoc* assertions. *Id.* at 368-369. To that end, this Court viewed what Lee had said to trial counsel during plea negotiations, during which he asked about and emphasized his concerns about deportation. *Id.* at 369. This Court also looked at the plea colloquy, during which Lee responded affirmatively when the judge told him a guilty plea could lead to deportation and asked if that affected his plea decision, and Lee only agreed to proceed upon being assured by trial counsel that the judge's remarks were simply a "standard warning." *Id.* at 369. Such contemporaneous evidence left "no reason to doubt the paramount importance Lee placed on avoiding deportation." *Id.*

And, perhaps most importantly, this Court also rejected the notion that rationality was a zero-sum game. Instead, this Court recognized that some defendants might rationally draw a line between the certain

consequences of a guilty plea and the "*almost*" certain consequences of conviction at trial. *Id.* at 371 (this Court's italics). On this point, the Court emphasized that simply because "[n]ot everyone in Lee's position would make the choice to reject [a] plea [deal]" was not something that spoke to whether it would have been irrational for Lee to do so. *Id.* Both decisions could be rational, this Court signaled, on the same set of circumstances. *See id.*

In their unpublished decisions in Mr. Shin's case, the lower courts failed to identify *the* determinative factor for Mr. Shin or analyze any contemporaneous evidence to consider his decision making (e.g., Mr. Shin's and trial counsel's testimony in support of his second *coram nobis* petition, in which both said under oath that Mr. Shin would have gone to trial had he known *Bryan* would allow him to tell his story to jurors). The record here makes unequivocally plain that the determinative issue for Mr. Shin was telling jurors his story about being railroaded by the government, and about not having an evil-minded intent to cheat the government, and about having acted with the well-meaning thought of protecting the project and helping the Navy. *Bryan* opens the door to that story, even if convincing jurors may have been unlikely. Instead, Mr. Shin was repeatedly told that his story was entirely irrelevant under *Carrier* and that, even if he went to trial, he would not be able to tell his story to jurors. That Mr. Shin's plea colloquy almost went sideways because he tried to tell his story to the judge further supports his *post hoc* assertions that he would have chosen trial if *Bryan* were explained to him. Mr. Shin's remarks to the cooperating subcontractor, to arresting agents, and to trial counsel and prosecutors during plea negotiations all support the same conclusion.

Instead of looking at the contemporaneous evidence that substantiates Mr. Shin's *post hoc* assertions that he would have gone to trial if properly advised, the lower courts looked at contemporaneous evidence that would have supported rationally choosing to plead guilty. They looked at the weight of the evidence against him for its own sake, rather than for what effect it had on *Mr. Shin*'s decision making and they looked at all the reasons someone in his shoes might have rationally chosen *not* to go to trial. Even more problematically, the lower courts looked at remarks Mr. Shin made *as a result of* the fundamental error that tainted the plea colloquy, without acknowledging that such remarks probably would not have been made at all—or, at least, would have been phrased differently—had he been properly informed about §1001's willfulness element.

What makes the lower courts' unpublished decisions denying Mr. Shin *coram nobis* relief on his *Bryan* claim all the worse is that, out of the shadows, in the daylight of its published case law, the Ninth Circuit properly complies with, rather than disregards (as it did in Mr. Shin's case), the analysis and framework set forth in *Lee*. *See*, *e.g.*, *United States v. Rodriguez*, 49 F.4th 1205 (9th Cir. 2022); *United States v. Werle*, 35 F.4th 1195 (9th Cir. 2022); *United States v. Pollard*, 20 F.4th 1252 (9th Cir. 2021). Instead, Mr. Shin's case is the next in line in a series of unpublished Ninth Circuit opinions that have repeatedly strayed from and run contrary to *Lee* and failed to identify and analyze what the determinative issue was for the defendants at hand or whether contemporary evidence supports those defendants' *post hoc* assertions that they would have gone to trial if properly advised. *See*, *e.g.*, *Edwards v. Godwin*, 2023 WL 2929316 (9th Cir.) (Apr. 13, 2023) (unpublished); *Kumar*

v. United States, 773 Fed. Appx. 420 (9th Cir.) (July 16, 2019) (unpublished). Once again, then, this Court's intervention is needed here to ensure that unpublished decisions do not unfairly depart, as it so drastically did in Mr. Shin's case, from what is done, more performatively, in the Ninth Circuit's published opinions.

3. **This Court's intervention is necessary to ensure consistent application of its decision in *Bryan*.**

A final reason this Court should grant this petition is to ensure adherence to *Bryan* and to declare, in the face of the Ninth Circuit's repeated refusal to do so, that *Carrier* is, indeed, no longer valid and now inapplicable.

The Ninth Circuit has repeatedly been asked to set aside and replace its *Carrier* analysis with *Bryan* in its circuit case law. Its belated and begrudging acceptance that *Bryan* applies in §1035 cases was done only in an unpublished case. *See United States v. Ajoku*, 584 Fed. Appx. 824 (9th Cir.) (Sept. 23, 2014) (unpublished). Its belated and half-hearted revision of its model jury instructions concerning willfulness to accord with *Bryan* has been repeatedly ignored in unpublished cases. *See United States v. Mazzeo*, 735 Fed. Appx. 465 (9th Cir.) (Aug. 24, 2018) (unpublished); *United States v. Eglash*, 640 Fed. Appx. 644 (9th Cir.) (Feb. 17, 2016) (unpublished); *United States v. Mazzeo*, 592 Fed. Appx. 559 (9th Cir.) (Jan. 23, 2015) (unpublished). And in at least one other case, the Ninth Circuit has disparaged the argument that *Bryan* supplanted *Carrier* in §1001 prosecutions, only to reject the distinction as irrelevant because the defendant would lose even if so. *See United*

States v. Snyder, 658 Fed. Appx. 859 (9th Cir.) (Aug. 2, 2016) (unpublished).

As noted, the Ninth Circuit agreed in Mr. Shin's case that circuit law has indeed changed, despite the lack of a published case acknowledging as much. But, again, that acknowledgement has been hidden in an unpublished, nonprecedential decision. The Ninth Circuit's reticence to overrule *Carrier* and declare in a published case that *Bryan* applies in §1001 is as inexcusable as it is inexplicable. As there is no reason, at this point, to believe that the Ninth Circuit will ever do so, this Court's intervention is needed to ensure that *Bryan* is consistently recognized and correctly applied in the Ninth Circuit.

CONCLUSION

For the foregoing reasons, Mr. Shin respectfully asks this Court to grant his petition for writ of *certiorari*.

Respectfully submitted,

THOMAS M. OTAKE
Thomas M. Otake,
Attorney at Law, ALC
841 Bishop St. #2201
Honolulu, HI 96813
(808) 523-3325
thomas@otakelaw.com

DAVID J. MINKIN
Counsel of Record
JORDAN K. INAFUKU
McCorriston Miller
Mukai MacKinnon LLP
Five Waterfront Plaza
500 Ala Moana Blvd.
Honolulu, Hawai'i 96813
(808) 529-7300
djminkin@m4law.com
jinafuku@m4law.com
Counsel for Petitioner

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