IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

PATRICK SHIN, Petitioner, vs. UNITED STATES OF AMERICA, Respondent.	)	CRIM. NO. 04-00150 SOM CIV. NO. 20-00390 SOM-KJM **ORDER DENYING DEFENDANT'S SECOND CORAM NOBIS PETITION**

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I. INTRODUCTION.

In 2004, with a plea agreement, Defendant Patrick Shin entered a plea of guilty to having made a false statement to the Government in violation of 18 U.S.C. § 1001. Shin's conviction arose out of a proposal his nephew's company, JHL Construction, Inc., submitted for work on a United States Navy contract. At the plea hearing, Shin admitted that he had used fake estimates from JHL's subcontractors to inflate JHL's estimated costs and raise the amount the Navy would pay JHL. Shin was sentenced in 2006 to three years of probation, which included twelve days of intermittent confinement, and to a $100,000 fine. Shin now seeks to vacate his conviction more than fifteen years after judgment was entered. Having long since paid his fine and completed his term of probation and intermittent confinement, he is no longer in custody and cannot proceed under 28 U.S.C.

§ 2255. Instead, for the second time, he seeks a common law writ of coram nobis.

Shin maintains that his conviction should be vacated because of a change in the law. After Shin was sentenced, the Ninth Circuit, departing from its prior precedent, indicated that, to secure a conviction under § 1001, the Government had to prove that a defendant knew that his conduct was unlawful. Shin says that, because he was not (and allegedly could not have been) aware of that element when he entered his guilty plea in 2004, his guilty plea was not "voluntary in [the] constitutional sense." *See Henderson v. Morgan*, 426 U.S. 637, 645 (1976).

A writ of coram nobis, however, is only available to correct errors of the most fundamental character. Even if Shin was unaware of one of the elements of the charge against him, his guilty plea was not marred by fundamental error because it is not reasonably probable that he would have maintained a not guilty plea if only he had known about that element. Shin admitted having intentionally submitted falsified documents to the Government. Quite apart from whether it is a common understanding that it is illegal to do such a thing, Shin, an experienced Government contractor, would not likely have risked going to trial to see whether the Government could establish beyond a reasonable doubt that he knew his conduct was unlawful. Moreover, Shin fails to meet his burden of showing that there

are valid reasons for his delay in making the argument he now advances. His petition for a writ of coram nobis is denied.

II. BACKGROUND.

A. The False Statements.

The basic facts surrounding Shin's conviction are not disputed. At all times material to his conviction, Shin was authorized to act as an agent on behalf of JHL Construction, Inc., a general contracting company owned by Shin's nephew, James Lee. Shin has repeatedly acknowledged that, during this time period, he was an experienced contractor who was very familiar with the process of applying for and securing federal contracts, particularly contracts involving work at Pearl Harbor. *See, e.g.*, ECF No. 209, PageID # 1811-13.[1] Shin estimated that, by 2003, he had completed "way over [one] hundred projects" for the Government. *Id.* at 1869. Shin knew that he had to be truthful and honest in his dealings with the Navy, and that he had to provide the Navy with accurate information. *Id.* at 1869.

In 2003, the Navy asked JHL to submit a proposal for work repairing Pump # 2, Drydock # 4, at Pearl Harbor Naval Shipyard. It appears that JHL had previously submitted a proposal for repairing another pump (Pump # 1) at the same

[1] All ECF and PageID references are to Crim No. 04-00150, rather than to the companion civil case.

drydock. After JHL submitted the proposal for Pump # 2, Wesley Choy, a Government official assigned to review the proposal, felt that it was "questionable." *See* ECF No. 100-1, PageID # 421; *see also* ECF No. 209, PageID # 1881-82. The price that JHL proposed exceeded Choy's own estimate of the costs of the project. *See* ECF No. 100-1, PageID # 421. Choy could not even begin to evaluate JHL's estimate of the costs, because, in the proposal "many costs were aggregated," and Choy lacked "data supporting the subcontractor costs." *See id.* Choy therefore asked Annette Ching, the Government's contract administrator, to obtain subcontractor quotes to substantiate JHL's proposal. *See id.*; *see also* ECF No. 209, PageID # 1882. Specifically, Choy asked for the prices that JHL's subcontractors had submitted for the work on Pump #1, because Pump #2 would involve the "same scope of work." ECF No. 209, PageID # 1882. Shin followed up with a reduced cost estimate, but the new proposal still did not include subcontractor quotes. ECF No. 100-1, PageID # 421. After reviewing the revised proposal, Choy again asked Ching to get the "actual quotes" for JHL's subcontractors' work. *Id.* at 422.

Upon receiving Ching's request, Shin called two of JHL's subcontractors, Conhagen and HSI, and asked them to submit falsely inflated quotes. Conhagen agreed. HSI, however, called the FBI. See ECF No. 64, ¶ 15-17; ECF No. 91, PageID # 263-66.

Because HSI did not respond immediately, Shin decided to produce an altered quote himself. *See* ECF No. 209, PageID # 1887-1894. Shin took a copy of the quote HSI had submitted for work on Pump #1 ($114,733) and ran that through the copy machine with a piece of white paper covering the first "1" digit. *Id.* at 1889-90. That created a blank space, and he then placed a "3" digit that had been cut out from another sheet of paper into that space, changing the quote to $314,733.[2] Shin submitted that document, along with the inflated quote he had received from Conhagen, to the Navy. *See* ECF No. 209, PageID # 1889-1897.

B. Shin's Justification For His Conduct.

According to Shin, his intent in falsifying the quotes was not to harm the Government or unfairly increase his profits. That assertion is central to Shin's present coram nobis motion. Shin maintains that he was correcting an error by the Navy, which had put him in an impossible position by choosing the wrong contract vehicle for the work on Pump # 2, Drydock # 4.

Shin says that the Navy was using a contract process under which JHL would not have been able to cover its overhead or to earn any profit. Shin was concerned that there was not enough time for the Navy to correct its error before the fiscal year ended. Any funds not obligated by the end of the fiscal

[2] Prior documents in this case referred to the use of "whiteout" to alter the HSI document, but Shin has testified that "whiteout" was not actually used.

year would lapse, meaning that the Navy would lose the ability to use those funds, which would go back to the general United States Treasury account. Agencies could compete for those funds to be allocated to them for the next fiscal year, but the Navy would have no guarantee that it would recover the amount of the lapsed funds in a subsequent allocation. In terms of the Pump # 2 contract, the Navy was at risk of losing its funding for the work, and JHL stood to lose the chance to do any work at all on Pump # 2 if the funds lapsed. Shin claims that he submitted the altered documents to solve this "problem" and "make the numbers work."

Shin testified that the Navy uses different categories of contracts in soliciting work. *See* ECF No. 209, PageID # 1813-20. One category involves an "invitation for bid" or "IFB" contract. *Id.* at 1814; *see also id.* at 1702. Under an IFB contract, the Navy's engineers hire an outside company to design the project, and then, once the design is completed, the Navy invites contractors to bid on the project. *Id.* at 1814. The IFB process takes approximately two years to complete. *Id.*

Because that process is lengthy and cumbersome, the Navy created a different contracting vehicle that could handle smaller projects more quickly. That contracting vehicle is called "indefinite delivery, indefinite quantity," or "IDIQ." *Id.* at 1817; *see also id.* at 1702. Under an IDIQ contract, the

Navy hires a contractor for a three-year or five-year period and can assign the contractor multiple projects during that period without soliciting competitive bids for the projects. *Id.* at 1817. For reasons discussed below, during the times relevant to this case, it appears that IDIQ contracts were only supposed to be used for construction contracts. *See* ECF No. 91, PageID # 250.

The price that contractors are able to charge under IDIQ contracts is determined by two factors: the Means Book and the contracting coefficient. *See* ECF No. 209, PageID # 1818. The Means Book contains estimated line-item prices for most components or costs that a contractor might incur while working on a small construction contract. *See id.* at 1819. Those estimates are based off of the average national cost for an item, with an adjustment for local conditions. *Id.* at 1818-1821. In Hawaii, the costs listed in the Means Book are approximately 30 to 40 percent higher than the national average. *Id.* at 1821.

The second relevant factor is the contracting coefficient. The coefficient is a multiplier applied to prices in the Means Book to ensure that contractors can cover their overhead and earn a profit. For instance, a coefficient of 1.20, or 120 percent, means that the Navy pays a contractor 120

percent of the price listed in the Means Book for every task the contractor completes. *See id.* at 1821-22.

JHL had an IDIQ contract with the Navy with a coefficient of 1.00, or 100 percent. *Id.* at 822. It thus agreed to do work at the prices listed in the Means Book for Hawaii. JHL agreed to that coefficient because it believed that it could do work more cheaply than the prices listed in the Means Book. *See id.* at 1820-22. That is, JHL believed that it could still "make [a] profit and [cover] overhead because [it] actually could do the work for less." *Id.* at 1822.

The system assumes that an IDIQ project involves matters listed in the Means Book. It appears that, if an item is not found in the Means Book, that item is simply listed in an IDIQ estimate at actual cost, meaning that, with respect to that particular task, a contractor cannot rely on being efficient to outperform the Means Book and earn a profit. *See* ECF No. 91, PageID # 251-52. For a contractor like JHL, which had agreed to a 1.00 coefficient, there would therefore be no way to cover overhead and make a profit in performing a task not listed in the Means Book. *See* ECF No. 209, PageID # 1823. Shin says that is why in 2003 the Navy's manual stated that a contract could only be awarded under an IDIQ contract if at least 80 percent of the work could be found in the Means Book. *See* ECF No. 91, PageID # 252.

The work on the Pump # 2 project did not fit into the Means Book. As Shin explained, because the project involved the overhaul of an existing pump, rather than the construction of a new pump, none of the work called for by the contract could be found in the Means Book. *See id.* at 255-56; *see also* ECF No. 209, PageID # 1827. Thus, if JHL had performed the work under its existing IDIQ contract, it would have only been able to recoup its actual costs, and it would not have earned any profit or been able to cover its overhead. *See* ECF No. 91, PageID # 256.

Because *none* of the work on Pump # 2 could be found in the Means Book, Shin believed that the Navy knew that the IDIQ contract was an inappropriate vehicle for the job. *See* ECF No. 209, PageID # 1898 ("And I mean I think Annette Ching knew it, Wes Choy knew it."). He believed that the Navy had nevertheless chosen that vehicle because the Navy had extra money in its budget towards the end of the fiscal year and wanted to execute the contract before the money lapsed. *See* ECF No. 209, PageID # 1824-28. According to Shin, if he had raised the problem with the Navy, there would not have been time for the Navy to reclassify the contract and get it signed before the end of the fiscal year. *Id.* at 1823. In short, Shin felt that the Navy was "coming to him with a problem that they wanted [his] help with." *Id.* at 1829.

Shin's solution was to inflate the subcontractors' estimates beyond the subcontractors' actual charges, allowing him to earn what he believed was a fair profit[3] under the improper IDIQ contract. In other words, as Shin would later say, he wanted to "hide" the profit that he believed that he was entitled to in the inflated subcontractor quotes.

Shin could have simply declined the contract on the ground that it would not have allowed JHL to earn a profit. That is, nothing in JHL's agreement with the Navy obligated JHL to take every job offered by the Navy. At the coram nobis evidentiary hearing, Shin stated that he nevertheless felt obliged to accept the contract because of his "loyalty" to the Navy. ECF No. 209, PageID # 1899. Although Shin has since admitted that he knew that doing this was wrong, he claims that he did not intend to defraud the Government.[4]

The record indicates that Shin first discussed the legality of submitting the fake quotes when he tried to convince HSI to go along with his scheme. *See* Def's Ex. 1.[5] During his

[3] Shin told FBI agents that JHL would have earned approximately $500,000 at his proposed price of $2,150,000. Government's Ex. 6, at 3.

[4] The funds ended up lapsing despite Shin's efforts, and the Navy ultimately had to invite bids for the work on Pump # 2.

[5] In this district, exhibits received in evidence at a trial or evidentiary hearing are retained by counsel, whose responsibility it is to provide them if notified by the Clerk of Court that the appellate court has requested them. Those

conversation with HSI on September 5, 2003, Shin said that the contract was a "special case" because the work was not reflected in the Means Book, and that he therefore needed to "hide" the profit and overhead in his paperwork. *Id.* at 6, 10. Shin was unaware that, with HSI's knowledge, the FBI was recording the conversation. HSI asked for a kickback in return for doing what Shin was asking. Shin refused. *Id.* He said that he "wasn't creating something illegal," and that what he was asking HSI to do was "legitimate." *Id.* at 14. He explained that the "government knows that . . . I gotta come up with some other way to make up [the profit and overhead]."[6] *Id.*

However, after the the FBI executed a search warrant at his office on September 23, 2003, Shin repeatedly admitted in interviews with investigators that what he had done was wrong. In his first FBI interview, for instance, Shin stated on more than one occasion that what he had done was "absolutely wrong." Government's Ex. 6, at 3, 5. Shin made similar statements in subsequent meetings with FBI agents and with an Assistant United States Attorney. *See, e.g.*, Government's Exs. 7, 10. In those meetings, Shin also explained that he had asked subcontractors

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exhibits are therefore usually not available on the electronic docket unless counsel has deliberately filed them.

[6] Shin made these statements while trying to convince HSI to falsify its quote. Shin tried to pressure HSI to agree to his scheme. For instance, when the subcontractor expressed hesitation, Shin told him that if "you wanna make friends with me you can help me." Def's Ex. 1, at 15.

to falsely inflate their quotes because his "profit coefficient . . . was zero." Government's Ex. 10 at 1.

C. The Guilty Plea.

Even before the Government had filed any charge against him, Shin's attorney engaged in plea negotiations with the Government on his behalf. *See* ECF No. 209, PageID # 1736. Ultimately, Shin agreed to plead guilty to a single-count Information charging him and JHL with having violated 18 U.S.C. § 1001, which prohibits the making of false statements to the United States Government. The charge was based on Shin's physical alteration of the quote from HSI. *See generally* ECF No. 8. In return, the Government agreed "not to bring any other criminal charges of which it is aware as of the date of this plea agreement against defendant relating to his negotiations with the United States Navy for work to be performed on Pump #2, Drydock #4." *Id.* at 1007. Several other charges might have been available to the Government. For instance, the Government certainly could have brought a second 18 U.S.C. § 1001 charge based on Shin's submission of the inflated Conhagen quote. The Government has stated in connection with the present coram nobis motion that it might also have brought charges of wire fraud, conspiracy to defraud, or major fraud. *See* ECF No. 203, PageID # 1673; *see also* ECF No. 203-1.

At a hearing on May 10, 2004, in which Shin entered his guilty plea, the magistrate judge asked the Government to summarize the essential elements of the § 1001 charge. ECF No. 179-1, PageID # 1518. The Government responded:

> As to both Mr. Shin and JHL Construction the government would have to prove, first, that the defendants knowingly and willfully made and used a false writing or document in a manner within the jurisdiction of the executive branch of the United States government, that is the United States Navy.
>
> Second, the defendants acted *knowingly and willfully, that is deliberately and with knowledge that the statement in the document was untrue, that is, the document contains a material false, fictitious . . . and fraudulent entry.*
>
> And third, the statement was material to the U.S. Navy's activities or decisions.

Id. at 1518-19 (emphasis added). As discussed in greater detail below, at the time, that summary was consistent with Ninth Circuit precedent. Shin did not object to the Government's description of the elements of the offense.

The magistrate judge then asked Shin to describe, in his own words, "what [he] did that constitutes the crime charged." ECF No. 179-1, PageID # 1520. Shin explained that, when he submitted JHL's final proposal to the Navy, he "wrongfully changed the number" that reflected the cost of the subcontractor's work. *Id.*

After the Government expressed concern that Shin was attempting to minimize the seriousness of his crime, Shin again indicated that he knew that changing the document he submitted was wrong:

> DEFENDANT SHIN: Well, I change the document, I know that it's wrong, but I have every right to believe that the subcontractor price is not -- is not what taken to the (indiscernible). I have to -- I have to have a contract with them and -- and if they don't perform, then it's my responsibility to deliver the good to the government. So I have every right to believe that the number doesn't reflect what they can do. That's -- but -- but what I did is wrong. I really -- way I -- way I present the price is wrong and it is wrong.
>
> THE COURT: Mr. Shin, let me ask you the question directly. When you changed the number on the HISE document from 114,000 to 314,000, you knew that was wrong? You knew that was incorrect?
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> DEFENDANT SHIN: Well, it is wrong to -- to -- to -- to -- it is wrong to change the document, yes, it is wrong.
>
> THE COURT: All right. And you did that for the purpose or with the intent to benefit JHL?
>
> DEFENDANT SHIN: Of course it is to benefit the JHL, but it benefits the government, too, by -- by protects the project.

Id. at 1523-24. At that point, the Government expressed concern that the court should not accept Shin's plea because of Shin's insistence that his actions benefitted the Government. *Id.* at 1524. While the court discussed that issue with counsel, Shin

volunteered, "Your honor, I -- *I know what I did was wrong and it is wrong what I did.*" *Id.* at 1525 (emphasis added). Ultimately, the court accepted Shin's guilty plea.[7]

D. Sentencing.

During sentencing, one of the primary areas of disagreement was whether Shin had intended to create a loss on the Government's part. The initial draft presentence report, prepared on December 3, 2004, recommended finding that because Shin had asked his subcontractors to inflate their quotes by $380,000, he had intended to cause the Government to lose that amount. ECF No. 64, ¶ 27. The Government agreed with that position. *See generally* ECF No. 54.

On December 23, 2004, Shin filed his first sentencing statement in response to the draft presentence report. In his first sentencing statement, Shin argued that the Government had

[7] Shin's plea agreement contained a waiver of the right to collaterally attack his sentence, but that waiver included an exception for claims of ineffective assistance of counsel. During the evidentiary hearing on his second coram nobis motion, Shin characterized his position as raising an ineffectiveness claim. In any event, in its opposition to Shin's first coram nobis petition, the Government conceded that, given the Ninth Circuit's decision in *United States v. Spear*, 753 F.3d 964 (9th Cir. 2013), the language in the collateral attack waiver did not apply to the type of challenge Shin was bringing. ECF No. 100, PageID # 402. The same rationale applies to Shin's second coram nobis motion. For that reason, the Ninth Circuit's recent decision in *United States v. Goodall*, which involved a collateral attack waiver with different language, does not preclude Shin's present motion. *See* 2021 WL 4768103, at *3 (9th Cir. Oct. 13, 2021).

inappropriately assigned the Pump # 2 job to an IDIQ contract with a zero coefficient. *See* ECF No. 32, PageID # 1170-78. Shin admitted that he "chose a completely inappropriate method of responding to the difficult situation into which JHL had been placed" and that "what he did was wrong." *Id.* at 1178. However, he also argued that he was not trying to steal money from the Government, but instead was seeking to use the subcontractors' quotes to "budget for [the] real costs of the job." *Id.* at 1176-77. He therefore argued that he had not intended to cause a loss to the Government. *Id.* at 1178-79. On December 30, 2004, Shin also filed a motion for downward departure based on his post-offense rehabilitation. ECF No. 34.

On December 6, 2005, after Shin's sentencing hearing had been continued several times, Shin filed a second sentencing memorandum that addressed the issue of whether Shin had intended to cause the Government a loss in much greater detail. In that memorandum, Shin again asserted that he had submitted the altered quotes because he was trying to solve the problems caused by the Navy's use of an improper contracting vehicle, and that he was not trying to cheat the Government or earn money that he was not entitled to. *See generally* ECF No. 48-1. He claimed that he had been "reacting to an 'unfair' situation," and "trying to recover reasonable profit and overhead for JHL while accommodating the Government's desire to rush the Drydock

4, Pump 2 negotiations to completion at the end of the Government's fiscal year." *Id.* at 1252. He said that he had had no "intent whatsoever to 'defraud' the Government or cause any 'loss' to the Government." *Id.*

Shin also attached declarations from several high-ranking Pearl Harbor officials to his sentencing memorandum. One of those officials was Robert Hokama, the Director of the Procurement Operations Division at Pearl Harbor. ECF No. 48-2, PageID # 1257. Hokama acknowledged that the Pump # 2, Drydock # 4 job had been a last-minute job that was assigned to an IDIQ contractor because that vehicle allowed the contract to be negotiated rapidly. *Id.* at 1259. He also noted that the Navy should not have assigned that job under an IDIQ contract because "the work consisted of substantially non-prepriced work." *Id.* at 1259. He therefore said that he believed Shin's statement that he was only trying to arrive at a fair and reasonable price, and that Shin was "put in a difficult situation by the way the Government chose to negotiate this contract." *Id.*

Nevertheless, Hokama made it clear that, even if Shin had not intended to cheat the Government, he certainly had acted illegally:

> I do not, however, condone in any way what he did. In fact, I was extremely disappointed in him when I heard about what happened.

> . . . .
>
> To reiterate, I was extremely disappointed to hear what Mr. Shin had done. Unfortunately, the Government has lost a contractor who I considered to be one of the best and one of the most responsive to Government requests and contracts. Mr. Shin chose to deal with a difficult situation in an inappropriate manner, although I do understand why he acted the way he did.

ECF No. 48-2, PageID # 1259-61.

Other Pearl Harbor officials expressed similar sentiments. *See, e.g.*, ECF No. 48-3, PageID # 1263 ("I was very disappointed to learn he chose to prepare his proposal in such a manner, but I also realize some of the factors driving his actions."); *id.* at 1265 ("Mr. Shin accepted the work to assist the ROICC office in dealing with an overwhelming fiscal year end workload, but he made a serious mistake by dealing with a difficult situation, caused by the Government's improper use of the 0% JOC, in an improper manner."); ECF No. 48-4, PageID # 1268 ("Unfortunately, his chosen solution, although good-intentioned, was obviously bad practice. Mr. Shin did do something wrong when he changed a subcontractor proposal prior to submission to the Navy, and he freely admits this.").

After reviewing Shin's second submission, the probation officer assigned to the case revised the draft presentence report. In those revisions, the probation officer explained that "it appears that [Shin] was only trying to

recover his overhead and profit," and that, even after his deception, Shin had "submitted a 'fair and reasonable' contract proposal that would have been accepted by the Government." ECF No. 64, at 4A-5A. The revised report therefore concluded that "the facts in this case do not clearly indicate that the defendant desired to cause an intended loss to the government." *Id.*

At a hearing on March 8, 2006, this court addressed the issue of whether Shin had intended to cause a loss to the Government. This court noted that while the issue was a "close call," and while Shin "clearly [had] an intent to deceive," the Government had "not met its burden of showing that the Defendant intended the loss of hundreds of thousands of dollars." ECF No. 99, PageID # 352. The Government strenuously objected to that ruling. That decision substantially reduced Shin's guideline range from 18 to 24 months to 0 to 6 months. *See* ECF No. 66, at 6A. Ultimately, this court imposed a sentence at the bottom of even that lesser range. This court sentenced Shin to three years of probation, a sentence that included twelve days of intermittent confinement, and a fine of $100,000. *See* ECF No. 62.

E. Subsequent Decisions Addressing the Elements of § 1001.

After Shin was sentenced, a series of Ninth Circuit decisions addressed the second element of a § 1001 charge: that the defendant "willfully" deceived the Government.[8] At the time of Shin's guilty plea, the controlling Ninth Circuit decision on the issue was *United States v. Carrier*, which had held that, in § 1001, "[t]he word 'willfull' means no more than that the forbidden act is done 'deliberately and with knowledge." 654 F.2d 559, 561 (9th Cir. 1981) (internal quotation marks omitted).

However, even before Shin was sentenced, the Supreme Court's 1998 decision in *Bryan v. United States* called *Carrier* into question. In *Bryan*, a case that did not involve § 1001, the Supreme Court held that to find a defendant guilty of acting willfully, "[t]he jury must find that the defendant acted with an evil-meaning mind, that is to say, that he acted with knowledge that his conduct was unlawful." *Id.* at 193. Thus, to establish willful conduct, the Government must prove that, as a general matter, the defendant knew that his conduct violated the law. *Id.* at 192-96. The Government does not have to prove that

[8] Those decisions have retroactive effect. *See Bousley v. United States*, 523 U.S. 614, 620-21 (1998).

the defendant knew about a specific law or legal obligation. *Id.* at 196-97.

The Ninth Circuit initially resisted applying that definition to § 1001. In its first post-*Bryan* case, *United States v. Tatoyan*, the Ninth Circuit reaffirmed that, under § 1001, "willfully" means "no more than acting deliberately and with knowledge." 474 F.3d 1174, 1182 (9th Cir. 2007) (internal quotation marks omitted). And in *United States v. Ajoku* (*Ajoku I*), the Ninth Circuit considered *Bryan* but concluded that it did not apply to 18 U.S.C. § 1035, a statute that is extremely similar to 18 U.S.C. § 1001. 718 F.3d 882, 889 (9th Cir. 2013).

The defendant in *Ajoku* sought a writ of certiorari. In its response to the certiorari petition, the Government reversed its position and conceded that, based on *Bryan*, 18 U.S.C. § 1035 required the Government to prove that a defendant knew that his conduct was unlawful to establish willfulness. On April 21, 2014, the Supreme Court therefore granted the petition and "remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of the confession of error by the Solicitor General in his brief for the United States filed on March 10, 2014." *Ajoku v. United States*, 572 U.S. 1056, 1056 (2014).

In a second decision (*Ajoku II*), the Ninth Circuit noted that, "[a]s conceded by the government in its opposition

brief to Ajoku's petition for certiorari, the district court erred by giving an instruction on the element of 'willfulness' that does not comply with [*Bryan*]." 584 F. App'x 824, 824 (9th Cir. 2014). The Ninth Circuit reversed the defendant's conviction because it was "undisputed that [the defendant's] jury received an erroneous instruction." 584 F. App'x 824 (9th Cir. 2014). The *Ajoku II* ruling issued on September 23, 2014.

Even before *Ajoku II*, the Ninth Circuit's § 1001 model jury instruction was revised. As reflected in an online amendment to model instruction 8.73 in June 2014 and at present, the instruction states that the Government must prove that "the defendant acted willfully; that is, the defendant acted deliberately and with knowledge both that the statement was untrue *and that his or her conduct was unlawful*." Ninth Circuit Model Criminal Jury Instruction 8.73 (emphasis added).[9] District

[9] The parties have referred to a version of the instruction that was updated in 2016. That, however, was not when the knowledge-of-illegality element was first reflected in the model instruction. The Ninth Circuit's Jury Instructions Committee meets quarterly to amend, add, or delete model jury instructions in response to recent Supreme Court and Ninth Circuit decisions. By June 2014, the committee had reacted to the Supreme Court's remand of *Ajoku I* by amending the model § 1001 instruction even before the *Ajoku II* unpublished decision was filed on September 23, 2014. The comment to the June 2014 model instructions notes "the requirement that the defendant knew that his or her conduct was unlawful is based on the Supreme Court's decision vacating and remanding the Ninth Circuit's decision in [*Ajoku I*] after the Solicitor General confessed error." The committee's quarterly adjustments to model jury instructions are promptly

courts in the Ninth Circuit have similarly acknowledged that "to violate section 1001, a person must act with knowledge that their conduct is unlawful." *See, e.g.*, *Harris v. United States*, 2017 WL 3443207, at *6 (C.D. Cal. Aug. 9, 2017).

F. Post-Conviction Motions.

On September 22, 2015, Shin filed his first petition for a writ of coram nobis, or, in the alternative, audita querela. *Shin*, 2017 WL 2802866 at *4. He did not discuss *Ajoku II* or argue that he was unaware that knowledge of unlawfulness was an element of § 1001 when he pleaded guilty. Instead, he contended that, after he was sentenced, the Supreme Court set forth a new definition of "materiality" that was retroactive and provided him with a defense that was not available to him at the time judgment was entered. *Id.* at *5. This court denied the motion on June 28, 2017, *id.* at *23, and the Ninth Circuit affirmed the denial on July 26, 2019. *Shin v. United States*, 782 F. App'x 595 (9th Cir. 2019).

Shin has now filed a second petition for a writ of coram nobis. In the present petition, he contends that his guilty plea was involuntary "in a constitutional sense," *see Henderson*, 426 U.S. at 645, because he was not aware of one of the essential elements of a § 1001 offense at the time of his

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posted on the Ninth Circuit's website, which is accessible to the public.

plea. ECF No. 172, PageID # 1389-1401. Specifically, he asserts that, in pleading guilty, he was unaware that the Government had to prove that he knew that his conduct was unlawful. *Id.* He also maintains that, if he had known about that element, he would not have entered a guilty plea. ECF No. 188, PageID # 1586-87. Because the latter assertion presents a factual question, this court held an evidentiary hearing on August 13, 2021, and September 3, 2021.

G. Evidentiary Hearing.

Two witnesses testified at the evidentiary hearing: Samuel King Jr., who represented Shin during his guilty plea and sentencing and during proceedings on his first coram nobis petition, and Shin himself. Both King and Shin testified that, if Shin had been aware of the knowledge-of-unlawfulness element in 2004, he would not have entered a guilty plea.

Neither witness was persuasive on the issue of whether Shin would have entered a guilty plea. Both witnesses based their testimony on a misunderstanding of the law. At the heart of the testimony by both witnesses was the implicit assumption that, to establish a § 1001 violation, the Government would have had to prove that Shin intended to somehow harm or defraud the Government. As discussed in greater detail later in this order, that is not the case. To prove that Shin knew he was acting

unlawfully, the Government only would have had to prove that Shin knew that he was breaking the law.

That misunderstanding is clear from both witnesses' testimony. King, for instance, stated:

> Well, you know, he wasn't happy because – let's put it this way: *He always said that what he did was wrong, but he never -- he never said that what he did was in any way trying to hurt the government.* He used the word "wrong." You mentioned the word "unlawful." He never said that. He just said what he did was wrong. He could have done it better. But -- so he wasn't happy about it, but he understood the reality of him to deal with the federal government, prosecutor.
>
> . . . .
>
> And that would have been -- well, that would have been fatal to any kind of a plea. We would have had to go to trial basically. Because he couldn't -- he couldn't and wouldn't admit to unlawfulness and I couldn't advise him that what he did was, quote/unquote, unlawful as opposed to material, which is a lot lower standard.
>
> . . . .
>
> [W]e had discussed many times, you know, in effect whether *what he did was unlawful as opposed to just technically a violation of 18 U.S.C. 1001,* ***in other words, whether he did anything to hurt the government***. And I would have told him that he wouldn't be able to get through the plea colloquy. So There's no way we could have taken a plea.

ECF No. 209, PageID # 1740-42 (emphases added).

King's reference to something that was "just technically a violation of 18 U.S.C. § 1001" is particularly troublesome. The court is unaware of any principle in the law excusing a "technical" violation of § 1001. In any event, King admitted that Shin "understood that he should not have lied," and that "he knew it was wrong." *Id.* at 1791.

Similarly, Shin testified that he did not think that what he was doing was illegal because he had not intended to steal from the Government:

> Q: Eventually you're told the government was going to charge you with a 1001 false statement charge. What were you told about back then what the elements to the false statement offense was? What were you told, let's start first by Mr. King, before you accepted the plea agreement?
>
> A: Yes, I mean I was -- I had no idea I mean what was going on. And what *I knew -- know -- knew was I was -- I was wrong about how I changed the numbers*. So when FBI raided, I told them everything because I -- because I know that it was broken vehicle and I -- *there was no intent to, like, steal money or anything to evil mind of trying to make more money*. There's absolute[ly] nothing to do with it. So I told the FBI everything.
>
> . . . .
>
> Q: Now, did you eventually make a decision with that in mind, did you make a -- what did you decide to do with regards to the plea agreement?
>
> A: Well, I decide[d] to plead guilty.

> Q: Okay. Now, was -- how did you feel about the decision that you had to do that?
>
> A: It was painful because how can the -- how can the guy that I had to lose everything and my intent was broken government system and trying to make it work for them, you know, and -- and they just put the fingers on me that because I altered the document you got to plead guilty and you got to have a felony record . . . . It's just not right. *I mean government initiated, they knew, and the government went to the process, they knew*. And then when it comes to me, they were dealing with my JHL manager and then when it comes to me, all I tried to do was make it work. . . .
>
> Q: Okay.
>
> A: And then -- and then -- then they only want to – accusing me of what I did and want to send me to jail. It was tough, it's not easy.
>
> Q: Did you believe that what you were doing was illegal?
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> A: No, of course not. I mean, you know, and it's the – that's the line that -- that I wanted to make sure that you guys understand that ***I'm wrong, but I never had the evil intent and to trying to steal the money***. *It was just reaction of what government put me into the position to be fail.*

Id. at 1842-47 (emphases added).

Shin repeatedly admitted that he knew what he did was wrong. *See id.* at 1850 ("I did the wrong. I mean I change the number. It's wrong. "); *id.* at 1859 ("I'm not saying I did anything right. I mean, changing the number is wrong, but why .

. . cannot he see it, what the government did wrong, right?"); *see also id.* at 1901-03.

In rejecting testimony by King and Shin, this court is not finding that either was being deliberately untruthful. In particular, King is an experienced attorney who, in this court's view, did not seek to mislead the court. But credibility may be an issue even without active lying. Testimony based on a misunderstanding can be unpersuasive because of the misunderstanding. In addition, Shin was so driven during the evidentiary hearing to justify his actions that he appeared to repeatedly shape his testimony toward that end, further making portions of his account unbelievable to this court.

III. ANALYSIS.

A. Writ of Coram Nobis.

The 1946 amendments to Federal Rule of Civil Procedure 60(b) expressly abolished several common law writs, including the writ of coram nobis. In *United States v. Morgan*, 346 U.S. 502, 511 (1954), the Supreme Court held that district courts still retain limited authority to issue common law writs such as writs of coram nobis and audita querela in collateral criminal proceedings.

These 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). Such writs are not available when the claims raised would be cognizable in petitions under 28 U.S.C. § 2255.

A 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). It is distinguishable from the ancient writ of habeas corpus, available only to convicted defendants in "custody." *See Hensley v. Municipal Court*, 411 U.S. 345, 349 (1973); *Jones v. Cunningham*, 371 U.S. 236, 243 (1963). The statutory remedy in 28 U.S.C. § 2255 similarly applies only to those in custody. A writ of coram nobis, by contrast, allows a petitioner to attack a conviction when the petitioner has already finished his sentence and is no longer in custody. *See McKinney v. United States*, 71 F.3d 779, 781 (9th Cir. 1995).

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 having attacked the conviction earlier; (3) there are adverse consequences 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). "Because these requirements are

conjunctive, failure to meet any one of them is fatal." *Matus-Leva v. United States*, 287 F.3d 758, 760 (9th Cir. 2002).

The Government concedes that Shin has satisfied the first and third requirements because he has no other remedy available to him and because, under Ninth Circuit law, "there is an 'irrefutable presumption' that 'collateral consequences result from an criminal conviction.'" ECF No. 179, PageID # 1479 (quoting *Chaker v. Crogan*, 428 F.3d 1215, 1219 (9th Cir. 2005)). It appears that Shin has suffered reputational and economic consequences from his conviction. Thus, only the second and fourth elements are in dispute.

B. Shin Does Not Satisfy the Fourth Factor, Requiring a Fundamental Error Rendering His Conviction Invalid.

The primary flaw in the present coram nobis petition is Shin's failure to satisfy the fourth factor, which requires a showing of error of "the most fundamental character." *Matus-Leva*, 287 F.3d at 760. A fundamental error is one that renders the underlying proceeding itself irregular and invalid. *See Morgan*, 346 U.S. at 509 n.15; *Hirabayashi*, 828 F.2d at 604; *see also United States v. George*, 676 F.3d 249, 258 (1st Cir. 2012) ("[A]n error of the most fundamental character must denote something more than an error simpliciter" (citation and internal quotations omitted)). Shin contends that such an error occurred because his guilty plea was involuntary. He maintains that at

the time of his plea, he did not know that one of the elements the Government had to prove to establish a § 1001 offense was his knowledge that his conduct was unlawful. ECF No. 172, PageID # 1389-1401. He therefore maintains that his guilty plea was "invalid." *Id.* at 1398-1401.

The Supreme Court has held that a guilty plea is not "voluntary in a constitutional sense" unless the defendant was informed, either by the court or by his attorney, of the essential elements of the charge against him. *Henderson v. Morgan*, 426 U.S. 637, 646 (1976). Neither the court nor Shin's attorney informed Shin that knowledge of unlawfulness was an element of a § 1001 charge, because, at the time of his guilty plea, the Ninth Circuit had not yet decided *Ajoku II*. Thus, Shin's guilty plea was involuntary.[10]

But to establish fundamental error, Shin must also demonstrate that he suffered prejudice. *Greer v. United States*, 141 S. Ct. 2090, 2097 (2021). He must show that "but for the . . . error during the plea colloquy, there is a reasonable probability that he would have gone to trial rather than plead guilty."[11] *Id.* That inquiry, which "focuses on a defendant's

[10] The Government does not dispute that knowledge of unlawfulness is an element of an 18 U.S.C. § 1001 offense and that Shin was not aware of this element at the time of his guilty plea.

[11] At times, the Government raises arguments that address other issues. For instance, the Government asserts that there was no

decisionmaking," requires a "case-by-case examination of the totality of the evidence." *Lee v. United States*, 137 S. Ct. 1958, 1966 (2017) (internal quotation marks omitted).[12]

The issue of whether that test involves objective or subjective considerations has divided courts. *Heard v. Addison*, 728 F.3d 1170, 1184 (10th Cir. 2013) (noting that this issue has "caused some confusion among the circuits"). The Supreme Court has held that "a petitioner must convince the court that a decision to reject [or accept] the plea bargain would have been rational under the circumstances." *Padilla*, 559 U.S. at 372; *see also Lee*, 137 S. Ct. at 1968 (discussing whether it would have been rational for the defendant to reject a plea).

Several circuits have concluded that the Supreme Court's focus on what would have been rational for someone in

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fundamental error because, during Shin's plea colloquy, he admitted that he knew that what he did was illegal. *See, e.g.*, ECF No. 179, PageID # 1491-93. Shin's argument is that he made no such admission. In any event, the essential issue before this court is whether, if informed that the Government would have had to prove that he knew his conduct was illegal, there is a reasonable probability that Shin would not have entered a guilty plea.

[12] In *Greer*, the defendant argued that "the District Court failed to advise him" of one of the elements of the offense "during the plea colloquy," 141 S. Ct. at 2096, while in *Lee*, the defendant argued that his plea was involuntary because his attorney was ineffective. *Lee*, 137 S. Ct. at 1964. In both situations, however, the test is the same: whether there was a "reasonable probability that . . . [the defendant] would not have pleaded guilty and would have insisted on going to trial." *Lee*, 137 S. Ct. at 1965; *see also Greer*, 141 S. Ct. at 2098; *Hill v. Lockhart*, 474 U.S. 52, 56 (1985).

the defendant's circumstances makes the test an objective one. *See United States v. Akinsade*, 686 F.3d 248, 261 (4th Cir. 2012) ("[T]his is an objective test."); *Pilla v. United States*, 668 F.3d 368, 373 (6th Cir. 2012) ("The test is objective, not subjective."); *see also Dupree v. Warden*, 2008 WL 1944144, at *11 (C.D. Cal. Apr. 30, 2008) ("This analysis does not turn on Petitioner's subjective state of mind but on objective considerations."); *cf. Sanchez v. United States*, 50 F.3d 1448, 1454 (9th Cir. 1995) ("[T]he issue in a case involving a guilty plea is whether there is a reasonable probability that but for the failure to disclose the *Brady* material, the defendant would have refused to plead and would have gone to trial . . . . [T]he test for whether the defendant would have chosen to go to trial is an objective one.").

Other circuits have disagreed. The Tenth Circuit, for instance, has interpreted the requirement that a defendant convince the court that a decision to change his plea would have been rational as setting an "objective *floor*, somewhere below [the] more demanding requirement that the defendant show a *reasonable probability* that he would have gone to trial absent counsel's errors." *Heard*, 728 F.3d at 1184 (emphases in original) (internal brackets and quotation marks omitted). However, once a defendant overcomes that "objective floor," the Tenth Circuit conducts a subjective inquiry into "whether *the*

defendant would have changed his plea." *Id.* (emphasis in original); *see also United States v. Chan*, 732 F. App'x 501, 503 (9th Cir. 2018) (remanding a coram nobis case to the district court to determine whether a defendant's statement that she actually would have changed her plea was credible); *accord Lozano v. United States*, 802 F. App'x 651, 654 (2d Cir. 2020) ("[T]he Supreme Court requires a district court to apply a subjective standard and determine whether there is a reasonable probability that the particular complaining defendant would not have pleaded guilty had he known of his plea's deportation consequences."). That inquiry turns in large part on objective factors, such as the strength of the prosecution's case, *see Lee*, 137 S. Ct. at 1966, but the defendant ultimately must make a credible showing that he himself would have changed his plea.

In *Lee*, the most recent Supreme Court decision on this issue, the Supreme Court analyzed whether the defendant, who had initially accepted a plea offer, could have rationally rejected the plea and taken his chances at trial. 137 S. Ct. at 1968-69. But the Court also "ask[ed] what [the] individual defendant *would have done*," 137 S. Ct. at 1966-68 (emphasis added), an inquiry that suggests that the Court also required the defendant to show that he actually would have changed his mind and gone to trial. *See also id.* at 1966 (stating that the inquiry "focuses on a defendant's decisionmaking"). The Tenth Circuit's approach

in *Heard*, which requires a defendant to show that it would have been rational for the defendant to change his mind *and* that he would have done so, best captures that analysis. In an unpublished opinion, the Ninth Circuit has similarly suggested that a defendant's credibility was part of the analysis, remanding the case to the district court. *Chan*, 732 F. App'x at 503. There would have been no reason for the Ninth Circuit to remand to the district court to make a credibility determination under a completely objective test. *See id.*

In any event, Shin cannot prevail under either interpretation of the test. First, given how unlikely an acquittal would have been based on the knowledge-of-unlawfulness element, Shin cannot establish that it would have been rational for him to reject the Government's proposed plea deal. *See generally Lee*, 137 S. Ct. at 1966 ("Where a defendant has no plausible chance of an acquittal at trial, it is highly likely that he will accept a plea if the Government offers one."); *Hill v. Lockhart*, 474 U.S. 52, 59 (1985) ("[W]here the alleged error of counsel is a failure to advise the defendant of a potential affirmative defense to the crime charged, the resolution of the 'prejudice' inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial.").

At trial, the Government would have had to prove that Shin "acted with knowledge that his conduct was unlawful."

Bryan, 524 U.S. at 193. In other words, the Government would not have had to prove that Shin intended to harm or defraud the Government. The Government would have had to prove that, as a general matter, Shin knew that he was breaking the law. *See Dixon v. United States*, 548 U.S. 1, 5-6 (2006) (holding that to prove willfulness, "the Government bore the burden of proving beyond a reasonable doubt that petitioner knew she was making false statements in connection with the acquisition of firearms and that she knew she was breaking the law when she acquired a firearm while under indictment").

In trying to meet its burden, the Government would have appealed to common sense. A jury would have been unsurprised to be told that it is illegal to attempt to deceive the Government by submitting forged or altered documents. Shin himself admitted that he was an experienced federal contractor who understood the process of applying for and securing federal contracts. ECF No. 209, PageID # 1869. In light of his background, the jury could have inferred that Shin knew that it was illegal to lie and to submit forged or altered documents during the bidding process. A reasonable jury would not have been likely to believe Shin if he had said otherwise on the witness stand. Indeed, Shin has explicitly admitted that he knew he had to be truthful and honest in his dealings with the

Navy, and that he had to provide the Navy with accurate information. *Id.* at 1869.

Moreover, the very nature of the contracting process makes it obvious that what Shin did was illegal. The Navy was asking Shin for estimates so that *the Navy* could determine what Shin was entitled to earn on the contract. By lying to the Navy, Shin effectively *decided for himself* what a reasonable profit was. And if Shin could do that, there would have been no reason for the Government to review estimates in the first place.

Several pieces of circumstantial evidence lend additional weight to the inference that Shin knew he was breaking the law. Shin's own actions demonstrate a consciousness of guilt. To create the altered HSI estimate, Shin spent 20 minutes carefully altering the document by removing the "1" digit from the second subcontractor's estimate and replacing it with a "3." *See* ECF No. 209, PageID # 1887-1894. Shin took those steps to conceal his alteration of the document, which indicates that he knew that he was doing something that he was not allowed to do.

When Shin approached one of his subcontractors with this proposal, the subcontractor immediately called the FBI. In other words, it was obvious to the subcontractor, based on the subcontractor's experience, that Shin was asking him to do

something illegal. Why Shin would not have been equally aware of the illegality is unclear.

Shin has also repeatedly admitted that what he did was "wrong." In his conversations with the FBI and an Assistant United States Attorney, he acknowledged that what he had done was "absolutely wrong," and that there was no excuse for his conduct. Government's Exs. 6, 7, 10. At the plea hearing, he similarly admitted that "I know what *I did* was wrong and it is wrong what *I did*." ECF No. 179-1, PageID # 1525 (emphasis added). Shin's references to what he "did" suggest that he was referring to the wrongfulness of his conduct.

In telling the FBI or a federal prosecutor that what he did was "wrong," Shin knew that he was speaking with individuals whose jobs were focused on investigating and prosecuting crimes. FBI agents and federal prosecutors are not searching to convict people who have committed sins or immoral acts that may be frowned on by one's religion or by family and friends but that are not prohibited by criminal statutes. Shin knew he was not confessing to a priest. Similarly, when Shin told this court that what he did was wrong, he did so in the context of pleading guilty to the crime he was charged with. In other words, saying that something was "wrong" in the context of an FBI investigation or a guilty plea colloquy is difficult to interpret as anything other than an admission of knowledge of

illegality. This court assumes that, had he testified at trial, Shin would not have committed perjury. Thus, his own testimony also would have incriminated him.[13]

Finally, this court notes that Shin benefitted from accepting the plea agreement. If a defendant is likely to receive a significantly harsher sentence if he rejects the plea, it becomes less reasonable to risk a conviction at trial, particularly if the defendant is almost certain to be convicted. *See Lee*, 137 S. Ct. at 1967 ("The decision to plead guilty also involves assessing the respective consequences of a conviction after trial and by the plea."). In this case, it appears that the deal the Government offered Shin was a favorable one. By pleading guilty, Shin earned credit for acceptance of responsibility in his guidelines calculation. Thus, the plea made it much more likely that Shin would receive a reduced sentence on the false statement charge, and, indeed, Shin was sentenced to three years of probation, with only twelve days of intermittent confinement, and a $100,000 fine. ECF No. 62.

The Government also agreed not to "bring any other criminal charges" against Shin. ECF No. 8, PageID # 1007. Had the Government not bound itself through the plea agreement, it

[13] Of course, Shin might not have testified. But without his testimony, the jury would have been limited to the Government's evidence, including evidence that an experienced contractor would have known that it was illegal to submit false documents to the Government.

certainly could have charged Shin with making a second false statement in violation of 18 U.S.C. § 1001(a)(3). That charge would have been based on Shin's submission of an estimate from Conhagen, another contractor, that Shin knew was falsely inflated.

The Government also could have charged Shin with wire fraud and major fraud. ECF No. 203, PageID # 1672. At the coram nobis evidentiary hearing, Shin's attorney argued that Shin would not have been afraid of a fraud charge, because, under *United States v. Miller*, 953 F.3d 1095 (9th Cir. 2020), the Government would have had to prove that Shin intended to "cheat" the Government. That is, the Government would have had to prove that Shin intended to deprive the Navy of something of value. *Id.* at 1102. Shin's counsel maintained that because this court found at sentencing that there was no intended loss to the Government, Shin also would have prevailed at trial if the Government had charged him with fraud.

That does not mean that Shin would have had no reason to be worried that the Government would bring fraud charges if he rejected the Government's plea offer. The Government disagreed with this court's sentencing decision on intended loss and clearly believed it could establish that Shin intended to deprive the Navy of money, even if that money was only to cover JHL's overhead and reasonable profit. Plea negotiations

obviously had to occur before sentencing, and it was not until sentencing that the Government, to its great dismay, was faced with this court's "no intended loss" guideline determination. Before then, the Government would have been confident that it could prove an intent to cheat the Government had it brought a fraud charge, which carries with it no requirement that the Government establish a defendant's knowledge of illegality. *See Miller*, 953 F.3d at 1101-03; *United States v. Holden*, 908 F.3d 395, 399 (9th Cir. 2018); *see also* Ninth Circuit Model Criminal Jury Instruction 8.124 (stating that the elements of wire fraud are (1) knowing participation in a plan to defraud, (2) materiality, (3) intent to defraud, and (4) use of a wire communication).

Moreover, at sentencing, this court remarked that the intended loss issue presented a "close call," ECF No. 99, PageID # 352. Notwithstanding the heavier burden of proof at trial, Shin could not have been sure that a jury considering guilt would engage in the kind of analysis involved in the court's guideline decision. He therefore would have had to consider the possibility that if he rejected the plea deal and went to trial, he might have ultimately been convicted of submitting false statements *and* of fraud.

In sum, by agreeing to the plea deal, Shin was able to reduce his legal exposure. In light of the risk of conviction

and the clear benefits Shin obtained from the plea deal, it would have been irrational for Shin to reject the deal and to go to trial.

Shin's assertions that he did not have an "evil intent" because he did not mean to harm the Government do not change that conclusion. Shin appears to believe that because he did not intend to receive more than he thinks he was entitled to, he could not have intended to break the law. The two concepts are not the same. Even if Shin did not intend to steal, the issue on the present motion is the Government's obligation to prove that Shin acted willfully in that he knew that the law *prohibited what he did*. *Dixon*, 548 U.S. at 5. Shin cannot evade that requirement by stating that he was not seeking more than fair payment.

Shin has never professed shock that there was a law that prohibited altering documents and submitting them to the Government. Instead, he has consistently said that he did what he did because he was put in a bad position. That is, he is saying that because the Government used an improper contracting vehicle, he felt compelled to lie to the Government and submit a falsified quote.[14] He is saying that his actions were justified.

[14] At the coram nobis evidentiary hearing, Shin and his attorney repeatedly claimed that several of the top Pearl Harbor officials were "with him." While those officials may have sympathized with Shin's intent, they also made it clear that he

The distinction between knowing an act is illegal and thinking it is justified is easiest to illustrate with an example. Consider a woman who discovers that her husband is embezzling money from the federal government. Horrified, she convinces him to return the money before anyone notices that it is missing. If the FBI later questions the woman about the situation, she may think that she is justified in lying to protect her husband, because he has already returned the money. She may even think that she is benefitting the Government by saving it from the time and expense of a trial when there has been no actual loss. But even if she thinks that she has a good reason to lie, that does not erase her knowledge that, by lying to the FBI, she is breaking the law.

The same is true here. Shin's very actions demonstrated his knowledge of illegality. He initially covered up his wrongdoing, using paper to alter a document in what he hoped was an imperceptible manner. He then admitted wrongdoing to law enforcement. He is arguing here that his actions were justified and that he was trying to make the best of a bad situation, but such reasons do not constitute a defense under

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acted improperly. *See, e.g.*, ECF No. 48-2, PageID # 1259-61; ECF No. 48-3, PageID # 1263; ECF No. 48-4, PageID # 1268. The briefs and the rulings relating to Shin's first coram nobis petition focused on the effect of certain particularly sympathetic comments (including post-sentencing comments) on the materiality of Shin's false statements.

§ 1001. *See Dixon*, 548 U.S. at 5. It would not have been rational for Shin to proceed to trial when the only defense he has identified by no means ensured an acquittal. That defense is based on a fundamental misunderstanding of what the law requires.

For the same reasons, this court finds that Shin has not met his burden of proving that, subjectively, there was a reasonable probability that he would have rejected the Government's proposed plea deal if he had known about the knowledge-of-unlawfulness element. Of course, at the coram nobis evidentiary hearing, both Shin and his former attorney, Samuel King Jr., testified that if Shin had known about that element, he would have proceeded to trial. That testimony does not win the day for Shin because both Shin and King mistakenly assumed that a lack of proof of an intent to "hurt the Government" or to "steal" would have defeated the § 1001 charge at trial. *See, e.g.*, ECF No. 209, PageID # 1740-42, 1842-47. That understanding was incorrect. Before Shin rejected the plea deal, any competent attorney would have explained to Shin the risk that he could be convicted even if he had not intended to hurt the Government or to steal, as long as he knew that he was breaking the law. Shin has failed to offer persuasive evidence that meets his burden of showing that he would have rejected the plea deal if he had known *that*.

At the coram nobis evidentiary hearing, Shin displayed and expressed his frustration. He said multiple times that he had only been trying to help the Government, but nevertheless is the only one involved with the contract who ended up with a felony conviction. This court understands Shin's frustration. However, in our system of justice, there are two distinct phases. The first is the guilt phase, in which the defendant either pleads guilty or is tried before a jury. During that phase, the only question is whether the Government proves (or the defendant admits) that the defendant in fact committed the charged offense. Shin admitted his guilt. The second phase is the penalty phase. During sentencing, a court can consider a defendant's justification for his conduct as mitigation in fashioning a sentence.

That is exactly what happened here. Shin entered a guilty plea. Even under the law as it now stands, Shin remains in fact guilty, because, as he has acknowledged, he knew that it was wrong to lie to the Government. As explained in this order, that knowledge of wrongdoing equates to knowledge of illegality under the circumstances of this case. However, this court could and did consider Shin's intent during the penalty phase, when it issued a sentence that included only 12 days of intermittent confinement. Shin was able to raise the arguments he is now making during sentencing, and this court took those arguments

into account. There was no error of the most fundamental character that justifies vacating Shin's conviction.

C. Shin Does Not Satisfy the Second Requirement for the Issuance of a Writ of Coram Nobis.

Even if Shin could be said to have shown a fundamental error warranting coram nobis relief, his present petition would be denied because he does not meet his burden on the second coram nobis requirement. Under the second requirement, Shin must "'provide valid or sound reasons explaining why [he] did not attack [his conviction] earlier.'" *United States v. Kroytor*, 977 F.3d 957, 961 (9th Cir. 2020) (quoting *United States v. Kwan*, 407 F.3d 1005, 1012 (9th Cir. 2005)). "[W]hether a petitioner can *reasonably* raise a claim is determinative of whether delay is justified." *Id.* (emphasis in original). "That is, where petitioners reasonably could have asserted the basis for their coram nobis petition earlier, they have no valid justification for delaying pursuit of that claim." *Id.* "If, however, petitioners did not have a reasonable chance to pursue their claim earlier due to the specific circumstances they faced, delay during the time when such circumstances existed may be justified." *Id.* Thus, Shin must demonstrate that he could not have reasonably advanced his claim that his guilty plea was involuntary in earlier proceedings, including on direct appeal or as a part of an earlier postconviction

petition. *See United States v. Riedl*, 496 F.3d 1003, 1006 (9th Cir. 2007) (holding that the petitioner could not satisfy the second requirement because she conceded she could have asserted her claims on direct appeal or in a 28 U.S.C. § 2255 motion). Shin had the opportunity years ago to advance the claims he now raises in the motion filed in 2020. He therefore cannot justify his failure to raise the arguments in his present coram nobis petition earlier.

1. Shin Possibly Could Have Raised His Knowledge-of-Illegality Argument on Direct Appeal, But this Court Declines to Rule on that Ground, Given Shin's Ineffective Assistance of Counsel Claim.

Shin first contends that he could not have argued that his guilty plea was involuntary on direct appeal because the law did not support his present claim until well after the deadline for bringing a direct appeal had passed. This court entered judgment against Shin on March 9, 2006, more than fifteen years ago. ECF No. 62. According to Shin, he did not have a viable claim that knowledge of unlawfulness was an element of a § 1001 claim until at least 2014 (when the Ninth Circuit decided *Ajoku II* and when the model jury instructions were updated). *See* ECF No. 172, PageID # 1402-03.

The Supreme Court addressed a similar argument in *Bousley v. United States*, 523 U.S. 614 (1998). In *Bousley*, the defendant had entered a guilty plea to having used a firearm in

violation of 18 U.S.C. § 924(c)(1). *Id.* at 616. Five years after his conviction, the Supreme Court held that the "use" prong of § 924(c)(1) required the Government to show "active employment of the firearm." *Id.* The defendant challenged his conviction under 28 U.S.C. § 2255. As in this case, the defendant argued that his guilty plea had been involuntary because, at the time of his guilty plea, he was not aware of one of the elements of the charged offense. *See id.* at 617-19.

In reviewing that challenge, the Supreme Court held that, even though the law had changed, a guilty plea could only be collaterally attacked under certain circumstances:

> We have strictly limited the circumstances under which a guilty plea may be attacked on collateral review. It is well settled that a voluntary and intelligent plea of guilty made by an accused person, who has been advised by competent counsel, may not be collaterally attacked. And *even the voluntariness and intelligence of a guilty plea can be attacked on collateral review only if first challenged on direct review.* Habeas review is an extraordinary remedy and will not be allowed to do service for an appeal. Indeed, the concern with finality served by the limitation on collateral attack has special force with respect to convictions based on guilty pleas. In this case, petitioner contested his sentence on appeal, but did not challenge the validity of his plea. *In failing to do so, petitioner procedurally defaulted the claim he now presses on us.*
>
> . . . .

> Where a defendant has procedurally defaulted a claim by failing to raise it on direct review, the claim may be raised in habeas only if the defendant can first demonstrate either "cause" and actual "prejudice" or that he is "actually innocent."
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> . . . .
>
> Petitioner offers two explanations for his default in an attempt to demonstrate cause. First, he argues that "the legal basis for his claim was not reasonably available to counsel" at the time his plea was entered. This argument is without merit. *While we have held that a claim that is so novel that its legal basis is not reasonably available to counsel may constitute cause for a procedural default, petitioner's claim does not qualify as such. The argument that it was error for the District Court to misinform petitioner as to the statutory elements of § 924(c)(1) was most surely not a novel one.* Indeed, at the time of petitioner's plea, the Federal Reporters were replete with cases involving challenges to the notion that "use" is synonymous with mere "possession." Petitioner also contends that his default should be excused because, before *Bailey*, any attempt to attack [his] guilty plea would have been futile. This argument, too, is unavailing. As we clearly stated in *Engle v. Isaac*, 456 U.S. 107 (1982), "futility cannot constitute cause if it means simply that a claim was 'unacceptable to that particular court at that particular time.'" Therefore, petitioner is unable to establish cause for his default.

Id. at 621-23 (emphases added) (internal citations and quotation marks omitted).

In other words, in *Bousley*, the Supreme Court held that a defendant can attack a guilty plea on collateral review

only if (1) he raised the same challenge on direct appeal; (2) he can demonstrate cause (by, for instance, showing that the "legal basis for his claim was not reasonably available to counsel") and prejudice; or (3) he demonstrates innocence. *Id.*

As an initial matter, *Bousley*, a § 2255 decision, also applies to coram nobis petitions. The Supreme Court's statement that a defendant cannot collaterally attack a conviction without first raising the same arguments in a direct appeal was not limited to any particular type of collateral challenge. Nor is there any reason to limit *Bousley* to § 2255 petitions. To the contrary, "the logic of the procedural default rule applies with even greater force in the context of coram nobis, because coram nobis is a more limited remedy." *United States v. Lynch*, 807 F. Supp. 2d 224, 229–30 (E.D. Pa. 2011); *see also United States v. Pearl*, 288 F. App'x 651, 655 (11th Cir. 2008) ("While coram nobis relief is available in some circumstances to those who have pleaded guilty, it is not available to challenge the knowledge and voluntariness of the plea itself when that issue has not been raised in an earlier proceeding."); *Senyszyn v. United States*, 2016 WL 6662692, at *2 (D.N.J. Nov. 10, 2016).

Shin might be unable to satisfy any of *Bousley*'s three prongs. He did not raise his present arguments on a direct appeal. Of course, he did not take an appeal at all, having entered a guilty plea and having received a lenient sentence.

In any event, as in *Bousley*, the basis for the arguments that Shin is now making were hardly hidden in 2006. *Bryan*, the Supreme Court decision that eventually caused the Ninth Circuit to reverse itself, was decided in 1998. Moreover, it appears that, in 2006, no Ninth Circuit decision had specifically held that the court's 1981 *Carrier* decision survived *Bryan*. Thus, at the time of any hypothetical appeal, the argument that § 1001's willfulness element required knowledge of unlawfulness certainly would have been available to Shin's attorney. In short, Shin might have procedurally defaulted on the arguments in his present petition.

Nor can Shin establish actual innocence. As discussed in greater detail earlier in this order, Shin argues that a fundamental error marred his conviction because, if he had known that knowledge of unlawfulness was an element under § 1001, he would not have entered a guilty plea. A crucial part of that argument is that the reason he would not have entered a guilty plea would have been because he was innocent. For the reasons discussed earlier, Shin has not established that he was innocent. Under *Bousley*, Shin's failure to raise these claims on direct appeal therefore might arguably prevent him from raising them in his present coram nobis petition.

However, this court, recognizing that Shin is asserting ineffective assistance of counsel, does not base its

denial of coram nobis relief on Shin's failure to make his knowledge-of-illegality argument on direct appeal. Ineffective assistance of counsel may establish cause for a procedural default. *See generally Murray v. Carrier*, 477 U.S. 478, 488 (1986). Given the court's discussion of Shin's delay even after *Ajoku II* was decided, this court need not and does not rule on whether Shin should have raised his present argument before the 2014 *Ajoku II* decision.

2. Shin Fails to Satisfy the Second Coram Nobis Requirement Because He did not Raise His Claims Within a Reasonable Time After *Ajoku II* was Decided in 2014.

The Ninth Circuit decided *Ajoku II* in 2014. The model jury instruction on § 1001 charges was amended to reflect the change in the law in June 2014. Shin waited until 2020 to raise his knowledge-of-illegality argument in his second coram nobis motion.

Highlighting the unreasonableness of his six-year delay is Shin's filing of a first coram nobis petition in 2015. In addressing his delay, Shin points to his reliance on his attorneys to discover *Ajoku II* and the changes to the model jury instruction, and to include a discussion of *Ajoku II* in a timely filing. ECF No. 172, PageID # 1402-04. Faced with the absence of any discussion of *Ajoku II* in his first coram nobis petition,

Shin contends that his attorneys' failure to discover *Ajoku II* should not be imputed to him.

Two Ninth Circuit decisions are particularly instructive: *Kwan* and *Kroytor*. In *Kwan*, the defendant admitted to having committed bank fraud in 1996. 407 F.3d at 1008. Before pleading guilty, the defendant asked his attorney whether a guilty plea would cause him to be deported. *Id.* His attorney assured him that deportation "was not a serious possibility." *Id.*

In 1997, however, the Immigration and Naturalization Service concluded that Kwan had been convicted of an aggravated felony and moved to deport him. *Id.* at 1009. Kwan retained a different attorney, who advised him that it was unlikely that the Government would succeed in arguing that he had been convicted of an aggravated felony. *Id.* at 1013-14. At least initially, his attorney proved correct. An immigration judge ruled that Kwan's conviction was not an aggravated felony. *Id.* at 1009. In 2000, however, the Government filed a second motion to deport Kwan based on a different subsection of the statute defining the term "aggravated felony." *Id.* This time, the immigration judge agreed with the Government. *Id.* After that ruling, Kwan filed a coram nobis motion. *Id.* Because Kwan had not filed the petition in 1997, when the INS first moved to

deport him, the district court ruled that Kwan's petition was untimely. *Id.* at 1013.

The Ninth Circuit disagreed. It held that Kwan's decision not to challenge his underlying conviction in 1997 was reasonable because trial counsel had told him that there was little chance that his conviction would result in deportation, and his immigration attorney had reinforced that advice by (wrongly) advising him to focus on challenging the INS's deportation motion. *Id.* at 1013-14. "Only after the INS re-initiated removal proceedings . . . did Kwan have reason to conclude that his criminal defense counsel had in fact erred and affirmatively misled him[.]" *Id.* *Kwan* therefore held that good-faith reliance on an attorney's advice is a valid reason for not having filed a coram nobis petition earlier.

The second Ninth Circuit decision, *Kroytor*, limited *Kwan*'s reach. The defendant in *Kroytor*, like the defendant in *Kwan*, entered a plea of guilty to an offense that subjected him to deportation after his attorney failed to advise him of that collateral consequence. 977 F.3d at 958-59. In 2014, after learning that he was likely to be deported, Kroytor retained an immigration attorney (having had several earlier immigration attorneys who had failed to act) to investigate whether he had grounds to challenge his conviction. *Id.* at 960. This attorney apparently recognized that a prior attorney's ineffective

assistance could provide a basis for vacating Kroytor's conviction. There was then a delay. Kroytor did not file a coram nobis petition until two years after learning that "his only chance to avoid removal was to vacate his conviction." *Id.* The attorney who filed the petition explained that he did not file it immediately because "he was uncertain about whether [a controlling Ninth Circuit decision] applied retroactively." *Id.* Once the Ninth Circuit held that the decision was indeed retroactive, Kroytor's counsel waited ten months before filing a coram nobis petition. *Id.* The district court ruled that Kroytor should have filed his petition earlier. *Id.* at 961.

This time, the Ninth Circuit affirmed. It first reaffirmed its conclusion in *Kwan*: a delay is justified if "a petitioner delayed taking action due to misadvice from his attorney that he had no reason to know was erroneous." *Id.* at 962. The Ninth Circuit also appeared to recognize that Kroytor's purported delay was actually his attorney's fault, not his own. The court stated that his second attorney "did not act with the necessary expediency." *Id.* at 963. Nevertheless, the Ninth Circuit held that Kroytor's petition was untimely because "a lack of clarity in the law is not itself a valid reason to delay filing a coram nobis petition." *Id.* at 962.

Kroytor appears to hold that, while counsel's "affirmative misadvice" justifies a petitioner's delay,

counsel's failure to "act with the necessary expediency" does not.[15] Shin's case cannot be characterized as one that involves affirmative misadvice. Shin has not identified a specific piece of bad information that he received from his attorney. Instead, what happened here is straightforward: Shin's attorney failed to find *Ajoku II* and raise it in a timely manner. Even though the model jury instructions were amended in June 2014 and the Ninth Circuit decided *Ajoku II* soon after that amendment, Shin did not raise his present arguments until he filed the present coram nobis petition in *2020*. Shin's attorneys failed to act with the necessary expediency. And under *Kroytor*, that failure by counsel does not provide a valid reason for a six-year delay.[16] 977 U.S. at 963. The delay is particularly unwarranted given Shin's intervening first coram nobis petition, which was silent on the knowledge-of-illegality issue embodied in the *Ajoku II*

[15] In a footnote, the Ninth Circuit noted that "Kroytor's coram nobis petition is based on a claim of ineffectiveness of the defense attorney who represented him at his sentencing. We express no opinion about whether he could seek relief based on the representation he received from any other attorney." 977 F.3d at 963 n.3. It is not clear whether that footnote is meant to indicate that the Ninth Circuit did not consider the effectiveness of postconviction counsel, who failed to act with the necessary expediency.

[16] A defendant who establishes actual innocence may stand in different shoes from other defendants in terms of what constitutes a valid reason for delay. *See generally McQuiggin v. Perkins*, 569 U.S. 383, 392 (2013) (noting that claims of actual innocence allow defendants to "overcome various procedural defaults"). Shin has not demonstrated his innocence.

decision issued in 2014, the year before Shin filed his first coram nobis petition.

In concluding that Shin has not satisfied the second coram nobis requirement that he show that he had valid reasons for not having attacked his conviction earlier, this court is very much focused on the clear Ninth Circuit holding that "the burden of proof is on the petitioner to offer valid reasons for the delay." *Riedl*, 496 F.3d at 1008. That is, Shin had the affirmative obligation to establish his valid reasons for not having raised his knowledge-of-illegality argument until he filed his second coram nobis motion in 2020. The *Bryan* case was decided by the Supreme Court in 1998. Even if Shin could be excused for having waited until the Ninth Circuit ruled in *Ajoku II* in 2014, he still does not explain why he waited six years from then to raise his present argument.

In the course of extensive briefing and supplemental briefing, lengthy oral arguments, and an evidentiary hearing that spanned two days, Shin offered no reason for the extensive delay, which was his burden to explain. This court has no idea, for example, what prompted him to seek out and retain his present attorney to determine whether he had grounds for a second coram nobis petition, or when that first occurred. The court cannot even tell when Shin or any of Shin's attorneys first recognized that *Ajoku II* required proof of a defendant's

knowledge of illegality. What is clear is that the time between when *Ajoku II* was decided in 2014 and the present coram nobis petition was filed far exceeds the ten-month delay that the Ninth Circuit in *Kroytor* deemed fatal because it lacked "the necessary expediency."

The Ninth Circuit has described this court's role as a "gatekeeping" one in the context of coram nobis proceedings; courts should not "open the door to inexcusably late claims." *Riedl*, 496 F.3d at 1007. While ineffective assistance of counsel can extend the period in which courts will allow coram nobis proceedings, it cannot be the case that a party can endlessly cite ineffective assistance of counsel to justify delay without providing further detail. Otherwise, a party could cite ineffective assistance of counsel many decades later in bringing what is actually an inexcusably late claim. As understandably distressed as a party may be that an attorney failed to make a timely argument, the Ninth Circuit has limited the circumstances in which a party may avoid the consequences of a delay, whether by a party or by the party's attorney.

In the context of coram nobis petitions, the Ninth Circuit has found delays reasonable when the applicable law has recently changed, when new evidence has been discovered, and when a petitioner was improperly advised by counsel not to pursue habeas relief. *Id.* With respect to a change in the law,

the change typically must be recent. *See United States v. Walgren*, 885 F.2d 1417, 1520-21 (9th Cir. 1989); *see also Riedl*, 496 F.3d at 1007 ("we have considered delay to be reasonable when the applicable law was *recently* changed and made retroactive" (emphasis added)). Here, the change was hardly recent, and Shin has not met his burden of showing that his delay was reasonable.

To provide further context for this court's determination that Shin fails to justify his delay between 2014 and 2020, the court notes that, quite apart from the fatal delay from 2014 to 2016 in *Kroytor*, the Ninth Circuit found unjustified the six-year delay between a conviction in November 1999 and a coram nobis filing in January 2006 in *Riedl*. The movant in that case had been incarcerated, then deported to Austria during that period, and claimed diminished capacity and the forfeiture of some of her properties, circumstances that the Ninth Circuit ruled failed to show justified her delay or were overstated. *Riedl*, 496 F.3d at 1005. Shin has not asserted, much less established, greater difficulties.[17]

In *Riedl*, the Ninth Circuit "denied coram nobis relief for unjustified delay where the grounds on which the petitioner sought relief could have been asserted in earlier proceedings."

[17] Shin, unlike the petitioner in *Riedl*, is a naturalized United States citizen. ECF No. 64, at 2.

Kroytor, 977 F.3d at 961-62. It is difficult to see why Shin's delay should be found justified when the delays by Riedl and Kroytor were not. There may be valid reasons for Shin's delay, but, if there are, it was Shin's burden to show that. Shin has failed in that regard.

IV. CONCLUSION.

Shin's petition for a writ of coram nobis is denied. The Clerk is directed to enter judgment for the Government and to close this case.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, October 22, 2021.

/s/ Susan Oki Mollway

Susan Oki Mollway
United States District Judge

Patrick Shin v. United States of America, CRIM. NO. 04-00150 SOM, CIV. NO. 20-00390 SOM-KJM; ORDER DENYING DEFENDANT'S SECOND CORAM NOBIS PETITION

NOT FOR PUBLICATION

FILED

MAR 15 2023

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PATRICK SHIN, Petitioner-Appellant, v. UNITED STATES OF AMERICA, Respondent-Appellee.	No. 21-16833 D.C. Nos. 1:20-cv-00390-SOM-KJM 1:04-cr-00150-SOM-1 MEMORANDUM[*]

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

Submitted February 16, 2023[**]
Honolulu, Hawaii

Before: BEA, COLLINS, and LEE, Circuit Judges.
Concurrence by Judge COLLINS.

Petitioner-Appellant Patrick Shin appeals a district court order denying his second petition for a writ of coram nobis. Shin's second petition requests that the district court vacate the judgment entering a conviction against him for violating 18

[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

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

U.S.C. § 1001(a)(3), which judgment was entered after he pleaded guilty to having willfully made a false statement to the United States Navy in connection with a proposal for the completion of a naval contract. Shin believes that he merits this unusual remedy because he contends that his guilty plea was made involuntarily; namely, he argues that he would have chosen not to plead guilty and instead would have gone to trial had he been properly informed of the correct mens rea standard required for a conviction under 18 U.S.C. § 1001(a)(3). The parties are familiar with the facts of this case, so we do not recite them here. We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1291. We affirm the district court's order denying Shin's petition for a second writ of coram nobis.

1. We review the district court's denial of a writ of coram nobis de novo. *United States v. Riedl*, 496 F.3d 1003, 1005 (9th Cir. 2007). But any factual findings underlying the district court's decision are reviewed for clear error. *Hirabayashi v. United States*, 828 F.2d 591, 594 (9th Cir. 1987). Namely, "we will affirm a district court's factual finding unless that finding is illogical, implausible, or without support in inferences that may be drawn from the record." *United States v. Hinkson*, 585 F.3d 1247, 1263 (9th Cir. 2009) (en banc).

2. For Shin to be entitled to coram nobis relief, he must show that "(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*, 828 F.2d at 603. We agree with the district court that Shin has failed to demonstrate that there was an "error of the most fundamental character" in the judgment entering a conviction against him in light of his guilty plea.[1] *Id.* While Shin is correct to identify caselaw showing that a guilty plea made based on a misunderstanding of the applicable legal standard can be deemed involuntary and therefore constitute a fundamental error, *United States v. Kwan*, 407 F.3d 1005, 1014–18 (9th Cir. 2005) *abrogated on other grounds by Padilla v. Kentucky*, 559 U.S. 356, 370 (2010), Shin has failed to demonstrate that he was prejudiced by his not being made aware of the proper mens rea standard under 18 U.S.C. § 1001(a)(3). Namely, Shin has failed to show that there was "a reasonable probability that he would have proceeded to trial had he been properly informed of the elements of the offense." *United States v. Werle*, 35 F.4th 1195, 1202 (9th Cir. 2022). Simply, because the question of reasonable probability "is a factual question" and because Shin has failed to explain why the district court's factual findings were clearly erroneous, there was no prejudice that rendered Shin's guilty plea involuntary. *Id.*

[1] Although the district court also found that Shin had failed to explain why he had waited so long to raise this challenge to his conviction, which holding the government defends on appeal, we decline to evaluate the issue considering Shin fails to satisfy his burden on the fundamental error prong of the coram nobis analysis.

3. Shin is correct that the governing body of law interpreting 18 U.S.C. § 1001(a)(3) at the time of his guilty plea in 2004 applied the incorrect mens rea standard. The caselaw required the government to prove only that the defendant made the false statement "deliberately and with knowledge," *United States v. Carrier*, 654 F.2d 559, 561 (9th Cir. 1981), despite the fact that willfulness, as subsequently interpreted by the Supreme Court and recognized by this Circuit, requires the government to prove that a defendant "acted with *knowledge that his conduct was unlawful*." *United States v. Ajoku*, 584 F. App'x 824 (9th Cir. 2014) (emphasis added) (quoting *Bryan v. United States*, 524 U.S. 184, 191–92 (1998)).

4. But as the district court ably pointed out, Shin's own colloquy with the sentencing court reveals that he was fully aware that his conduct was unlawful. Shin repeatedly reiterated his understanding that his submission of inflated subcontractor bid prices was "wrong." And he admitted that his submission of false subcontractor bid prices was done with the intention of benefiting his company by permitting it to make a profit on the contract. While an individual can view something as morally wrong without believing that there is illegal activity afoot, the district court was correct to note that Shin made these concessions about his own wrongdoing in the presence of "FBI agents and federal prosecutors [who] are not searching to convict people who have committed sins or immoral acts." These observations all support the district court's sensible conclusion that Shin's repeated admission of wrongdoing

in the presence of governmental investigators evinced his knowledge that he had engaged in illegal activity when submitting a proposal containing inflated subcontractor bid prices.

5. Even if we were to set aside Shin's colloquy during the sentencing hearing, the district court identified other facts in the record that strongly support its conclusion that Shin knew his behavior was illegal. Shin acknowledged that he was an experienced contractor and understood the contracting process well. As a result, the district court plausibly concluded that the jury would have balked at Shin's current argument that despite his extensive federal contracting background, he was unaware of the (rather self-evident) illegality of submitting forged documents or false information to the government. And this inference is further substantiated by the fact that Shin readily admitted that he spent nearly 20 minutes with a copier to create the inflated bid price by papering over the "1" digit with a "3" to hide any evidence of his alterations from a casual observer. That alteration resulted in a demand for an additional $200,000 to be paid under the now-altered contract. An individual that takes great pains to conceal the fact that the document that he is submitting to the government was altered for the express purpose of requesting more money for a contract—especially one who has ample experience as a federal contractor and knows that he is obligated to tell the truth—is clearly aware that the submission of false subcontractor bid prices is both wrong *and illegal*.

6. Shin's only argument to the contrary that he could not have known he was engaged in illegal activity because he never intended to bilk the government of more money than he believed that he was owed is simply unpersuasive.

First, whether a government official viewed the proposed (but inflated) price of the contract to be fair speaks to the *materiality* element of the crime,[2] not to Shin's knowledge of wrongdoing. *Cf. United States v. Lindsey*, 850 F.3d 1009, 1013–14 (9th Cir. 2017) (reviewing whether the government actually relied on a false statement under the materiality prong of a wire fraud statute).

Second, Shin misunderstands the mens rea standard when he contends that the government was required to prove that he intended to cheat the government out of money and that a "white lie" that allows the contract to be completed before the end of the fiscal year somehow shields him from criminal liability. Quite simply, one can have knowledge of being engaged in illegal behavior while still believing that the reasons for knowingly engaging in that illegal activity are honorable: Robin Hood is often celebrated as a noble hero for helping the poor, even though he knowingly engaged in theft and grand larceny in the process. *See Dixon v. United States*, 548 U.S. 1, 5–7 (2006) (explaining that an individual can willfully lie to

[2] Whether there was a fundamental error in Shin's guilty plea as it relates to the materiality element of his crime is a challenge that is now foreclosed by this Court's affirmance of a district court's order denying Shin's first petition for a writ of coram nobis. *Shin v. United States*, 782 F. App'x 595 (9th Cir. 2019).

obtain a firearm even if her "will was overborne by the threats made against her and her daughters, [because] she still *knew* that she was making false statements and *knew* that she was breaking the law by buying a firearm"). Thus, Shin's repeated assertion that his reasons for lying were admirable—to ensure that the government's contract could be completed before its funding lapsed—does not negate his satisfying the mens rea of knowingly engaging in illegal activity. Namely, his motives do not undermine the strong inferences drawn from the other evidence in the record, which inferences evince Shin's knowledge that he had engaged in illegal activity: his clandestine behavior, his consistent refrain to investigators and the court that his falsifying the subcontractors' bid prices was wrong, and his acknowledgement that as a long-time federal contractor, he understood the contracting process and knew that he was required to be truthful in all submissions made to the government.[3]

[3] In light of Shin's misunderstanding of the mens rea standard required under 18 U.S.C. § 1001(a)(3), we see no reason to upset the district court's conclusion that the testimony from Shin and his attorney are not persuasive even though the court did not find that they were deliberately untruthful. As the Supreme Court recently explained,

> credibility and persuasiveness are closely bound concepts, [and] sometimes treated interchangeably . . . . [But i]t's easy enough to imagine that a factfinder might not describe the plaintiff as lacking credibility—in the sense that she was lying or not "worthy of belief," Black's Law Dictionary 448 (10th ed. 2014) (defining "credibility")—yet [still] find that her testimony on a key fact was outweighed by other

7. Because the district court's factual findings regarding Shin's knowledge that his wrongdoing was both morally wrong *and illegal* are well-supported by inferences drawn from the record, we conclude that Shin has failed to demonstrate that there was a reasonable probability that he would not have entered a guilty plea had he been informed that 18 U.S.C. § 1001(a)(3) required the government to prove that he knew that his falsifying of the subcontractor bid prices was illegal. Namely, Shin's own repeated admission of wrongdoing, which evinced his knowledge of illegality, forecloses any probability that Shin would have chosen not to plead guilty had his attorney or the court properly instructed him on the correct mens rea standard. *United States v. Pollard*, 20 F.4th 1252, 1257 (9th Cir. 2021) (rejecting defendant's "bare assertion on collateral review that he would not have pled guilty"

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evidence and thus unpersuasive or insufficient.

Garland v. Dai, 141 S. Ct. 1669, 1680–81 (2021). Just so here: while Shin and his attorney might not lack credibility in asserting that Shin would have wanted to go to trial had the government been required to prove that Shin had a nefarious intent to cheat the Navy of money, their mistaken impression of the proper mens rea standard under 18 U.S.C. § 1001(a)(3) undermines their testimony's persuasiveness regarding the contention that Shin would not have entered a guilty plea had he been told that willfulness required knowledge of illegality. Considering the rest of the record uniformly suggests that Shin knew that his falsifying of the subcontractor bid prices was illegal, the district court did not clearly err in rejecting the testimony from Shin and his attorney as unpersuasive—their testimony carries little probative value in light of the contrary inferences drawn from the rest of the record. *Hinkson*, 585 F.3d at 1263. Thus, we conclude that the district court's holding that the failure to inform Shin of the proper mens rea standard for a conviction under 18 U.S.C. § 1001(a)(3) was harmless is well-reasoned and supported by the record.

after reviewing testimony from the defendant's original plea colloquy and concluding that the "writing [was] on the wall"). Shin therefore suffered no prejudice from the legal mistake, which means that his guilty plea was voluntary. And as his guilty plea was voluntary, Shin has failed to demonstrate that there was a fundamental error in the judgment entering his conviction for violation of 18 U.S.C. § 1001(a)(3).

Thus, Shin is not entitled to relief and the district court correctly denied his second petition for a writ of coram nobis.

AFFIRMED

Shin v. United States, No. 21-16833

COLLINS, Circuit Judge, concurring in the judgment:

I concur in the majority's judgment affirming the denial of Shin's second petition for a writ of coram nobis. But I do so on the alternative ground that the district court correctly concluded that Shin has failed to establish that "valid reasons exist for not attacking the conviction earlier." *Hirabayashi v. United States*, 828 F.2d 591, 603 (9th Cir. 1987).

Shin filed his first coram nobis petition, which raised a *Brady* issue, in September 2015. The district court denied that petition in June 2017, and we affirmed that dismissal in July 2019. *See Shin v. United States*, 782 F. App'x. 595, 596–97 (9th Cir. 2019). The Supreme Court denied review in February 2020. *See Shin v. United States*, 140 S. Ct. 1123 (2020). Shin filed the instant petition on September 11, 2020—some 16 years after his guilty plea and nearly five years after filing his first petition. In this new petition, Shin asserted for the first time that his 2004 guilty plea to a violation of 18 U.S.C. § 1001 was involuntary because he had not been informed that one of the elements of that offense is that he knew that his conduct was unlawful.

In justifying his delay in filing this second petition, Shin provided two reasons, but neither suffices.

First, Shin argued that courts in the Ninth Circuit had been slow to recognize

that, under *Bryan v. United States*, 524 U.S. 184 (1998), the scienter required to establish a violation of 18 U.S.C. § 1001 assertedly requires a showing that the defendant was aware that his conduct was unlawful. "The Ninth Circuit did not change course," he argued, until its pattern jury instructions were amended in 2016 to formally reflect that requirement. This argument fails both factually and legally. As the district court noted, the pattern instruction had actually been changed in this respect in 2014, not 2016. And as we have held, "a lack of clarity in the law is not itself a valid reason to delay filing a coram nobis petition." *United States v. Kroytor*, 977 F.3d 957, 962 (9th Cir. 2020). "If there is a reasonable basis in existing law for a claim"—even one that involves "extending, modifying, or reversing existing law or . . . establishing new law"—the "petitioner should raise it." *Id*. (emphasis omitted) (citation omitted). The legal materials cited in Shin's own petition make overwhelmingly clear that there was ample "reasonable basis" for asserting this claim long before September 2020.

Second, Shin contended that his postconviction counsel who filed his first coram nobis petition—who had also acted as his defense counsel in connection with his 2004 guilty plea—was ineffective for failing to raise the issue earlier. But as the Supreme Court recently reiterated, a petitioner seeking postconviction relief "bears the risk" for all errors made by his attorney, who is his agent, unless that assistance is *constitutionally* ineffective." *Shinn v. Ramirez*, 142 S. Ct. 1718, 1735

(2022) (emphasis added) (citations omitted). And "because there is no constitutional right to counsel in state [or federal] postconviction proceedings," that means that a petitioner "ordinarily must bear responsibility for all attorney errors during those proceedings." *Id*.

Although *Shinn* involved a habeas petition filed by a state prisoner, its reasoning reflects not just state-federal comity concerns, but also important interests in "finality" and "the orderly administration of justice." 142 S. Ct. at 1733; *see also id*. at 1739 ("Serial relitigation of final convictions undermines the finality that 'is essential to both the retributive and deterrent functions of criminal law.'" (citation omitted)). As such, *Shinn*'s reasoning necessarily extends to all "postconviction proceedings," including coram nobis petitions. *See also Chaidez v. United States*, 568 U.S. 342, 348 (2013) (holding that the nonretroactivity rule of *Teague v. Lane*, 489 U.S. 288 (1989), applies to a "habeas or similar proceeding," including coram nobis); *United States v. Denedo*, 556 U.S. 904, 916 (2009) (stating that "judgment finality is not to be lightly cast aside; and courts must be cautious so that the extraordinary remedy of *coram nobis* issues only in extreme cases"). Accordingly, to the extent that our decision in *United States v. Kwan*, 407 F.3d 1005 (9th Cir. 2005), might be read to suggest that mistakes by *postconviction* counsel may justify the delayed filing of a coram nobis petition, it has been abrogated by *Shinn*. *See Miller v. Gammie*, 335 F.3d 889, 899–900 (9th Cir. 2003

(en banc). Moreover, we squarely held in *Kroytor* that the petitioner's coram nobis petition was unjustifiably delayed despite the fact that, when the petitioner hired counsel to inquire about challenging his conviction, "his post-conviction attorney did not act with the necessary expediency" because counsel was "uncertain" about the state of the law upon which the challenge would be based. 977 F.3d at 960, 963. As the district court here correctly observed, "[i]t is difficult to see why Shin's delay should be found justified when the delay[] by . . . Kroytor w[as] not."

I would therefore affirm the district court's denial of Shin's second coram nobis petition on the ground that Shin unjustifiably delayed in raising the claim that petition asserts. On that basis, I concur in the judgment.

Case: 21-16833, 04/21/2023, ID: 12700199, DktEntry: 36, Page 1 of 1

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

APR 21 2023

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

PATRICK SHIN, Petitioner-Appellant, v. UNITED STATES OF AMERICA, Respondent-Appellee.	No. 21-16833 D.C. Nos. 1:20-cv-00390-SOM-KJM 1:04-cr-00150-SOM-1 District of Hawaii, Honolulu ORDER

Before: BEA, COLLINS, and LEE, Circuit Judges.

Judges Bea recommends denial of the petition for rehearing en banc. Judges Collins and Lee vote to deny the petition for rehearing en banc. 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. Fed. R. App. P. 35.

The petition for rehearing en banc, filed March 29, 2023, [Dkt. No. 35] is **DENIED**.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

UNITED STATES OF AMERICA, Plaintiff, vs. (01) PATRICK SHIN, (02) JHL CONSTRUCTION, INC., Defendants.	CRIMINAL NO. 04-00150SOM Honolulu, Hawaii April 21, 2004 INITIAL APPEARANCE; WAIVER OF INDICTMENT; ARRAIGNMENT & PLEA OF GUILTY TO THE FELONY INFORMATION

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE KEVIN S. C. CHANG
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For the Government:	J. MICHAEL SEABRIGHT Office of the United States Attorney PJKK Federal Building 300 Ala Moana Blvd., Suite 6100 Honolulu, Hawaii 96850
For Defendant Shin:	SAMUEL P. KING, JR., ESQ. King & King, Attorneys At-Law 735 Bishop Street, Suite 304 Honolulu, Hawaii 96813
For Defendant JHL Construction:	RUSTAM BARBEE, ESQ. Law Office of Rustam A. Barbee 1188 Bishop Street, Suite 2606 Honolulu, Hawaii 96813
Official Court Transcriber:	Cynthia Fazio, RMR, CRR, CRC United States District Court 300 Ala Moana Blvd., C-270 Honolulu, Hawaii 96850

Proceedings recorded by electronic sound recording, transcript produced with computer-aided transcription (CAT).

WEDNESDAY, APRIL 21, 2004 11:35 A.M.

THE COURTROOM MANAGER: Criminal Number 04-150SOM, United States of America versus defendant one, Patrick Shin; defendant two, JHL Construction.

This hearing has been called for an initial appearance, waiver of indictment, and plea to the felony information as to defendants 1 and 2.

MR. SEABRIGHT: Good morning, Your Honor. Michael Seabright for the United States with FBI Special Agent (indiscernible).

THE COURT: Good morning.

MR. KING: Morning, Your Honor. Sam King present with Patrick Shin.

THE COURT: Good morning.

MR. BARBEE: Good morning, Your Honor. Rustam Barbee appearing on behalf of JHL Incorporated present with its authorized agent James Lee.

THE COURT: Mr. Lee, before we go any further, would you tell me your capacity in connection with the JHL?

MR. LEE: I'm the president (indiscernible).

THE COURT: Are you also a director?

MR. LEE: Yes.

THE COURT: Are you also a shareholder?

MR. LEE: Yes.

THE COURT: Thank you.

MR. SEABRIGHT: Your Honor, we do have attached as Exhibit B to the plea agreement what Mr. -- for JHL Construction, Inc. the board of directors' authorization Mr. Lee (indiscernible).

THE COURT: All right. Mr. --

MR. KING: Judge, I think what we planned here is -- I don't think anybody has an objection if you want to do both pleas at the same time (indiscernible) split it up it takes twice as long. We have no objection to that.

THE COURT: Mr. Barbee?

MR. BARBEE: No objection, Your Honor.

THE COURT: Mr. Seabright?

MR. SEABRIGHT: That's fine, Your Honor.

THE COURT: All right. Okay.

MR. KING: There are a few differences, but (indiscernible).

THE COURT: Thank you.

MR. KING: For example, the punishment for the corporation is slightly different, but other than that, it's the same plea agreement.

THE COURT: All right. So then Mr. Shin, is it your intention this morning to plead guilty to the criminal charge found in the information?

DEFENDANT SHIN: Yes, sir.

THE COURT: And on behalf of JHL, is it your intention

to plead guilty on behalf of JHL, Mr. Lee, to the criminal charge set out in the information?

MR. LEE: Yes, sir.

THE COURT: Before I can accept the guilty pleas, I must know that each of you understand what you are doing, that each of you is pleading guilty freely and voluntarily, that there is a factual basis for your change of plea, and that the ends of justice would be met to allow each of you to change your pleas or to enter pleas of guilty in this case. To make sure that each of you understand, I will ask you questions. If either of you does not understand any of the questions or words, will you please say so? Mr. Shin?

DEFENDANT SHIN: Yes, sir.

THE COURT: Mr. Lee?

MR. LEE: Yes, sir.

THE COURT: All right. Would you administer the oath to the individuals.

(Defendant Shin and Mr. Lee were sworn to answer truthfully.)

THE COURT: Mr. Shin, what is your full name?

DEFENDANT SHIN: Patrick Shin.

THE COURT: And how old are you?

DEFENDANT SHIN: 39.

THE COURT: And how far did you go in school?

DEFENDANT SHIN: College.

THE COURT: Have you taken any medication, alcohol or

drugs of any kind today?

DEFENDANT SHIN: No.

THE COURT: Do you feel well and alert today?

DEFENDANT SHIN: (Unintelligible).

THE COURT: Do you understand what is going on?

DEFENDANT SHIN: Yes.

THE COURT: Have you been treated recently for any mental illness or addiction to narcotic drugs of any kind?

DEFENDANT SHIN: No.

THE COURT: Mr. King, to the best of your knowledge is the defendant Mr. Shin fully competent to enter a valid plea today?

MR. KING: Yes, Your Honor.

THE COURT: Mr. Lee, what is your full name?

MR. LEE: James H. Lee.

THE COURT: And how old are you?

MR. LEE: 32.

THE COURT: And how far did you go in school?

MR. LEE: College.

THE COURT: Have you taken any medication, alcohol or drugs of any kind today?

MR. LEE: No, sir.

THE COURT: Do you feel well and alert today?

MR. LEE: Yes, sir.

THE COURT: And do you understand what is going on?

MR. LEE: Yes.

THE COURT: Have you been treated recently for any mental illness or addiction to narcotic drugs of any kind?

MR. LEE: No, sir.

THE COURT: Mr. Barbee, to the best of your knowledge is Mr. Lee fully competent and able to enter a valid plea today on behalf of defendant JHL?

MR. BARBEE: Yes, Your Honor, he is.

THE COURT: The Court finds that Mr. Lee is fully competent and capable and further authorized to enter a plea on behalf of defendant JHL in this case.

Mr. Shin, Mr. Lee, if either of you chooses to enter a guilty plea in this case, each of you has the right to enter that plea before a United States district judge. If each of you consents, however, you may enter your guilty pleas before me, a United States magistrate judge. If you enter a guilty plea here today, Judge Mollway will impose sentence at a later hearing. Do you understand this, Mr. Shin?

DEFENDANT SHIN: Yes.

THE COURT: Mr. Lee?

MR. LEE: Yes, sir.

THE COURT: I have before me a document entitled Consent to Rule 11 Plea in a Felony Case Before a United States Magistrate Judge. Mr. Shin, did you sign this document?

DEFENDANT SHIN: Yes, I did.

THE COURT: Is it your wish to consent to enter your plea before me, a magistrate judge, and to give up or waive your right to enter that plea before a United States district judge?

DEFENDANT SHIN: Yes.

THE COURT: Mr. King, have you discussed the consent form with your client?

MR. KING: Yes, Your Honor.

THE COURT: And are you satisfied that he understands it?

MR. KING: Yes.

THE COURT: Have you also signed the document?

MR. KING: Yes.

THE COURT: Mr. Lee, I have before me a document entitled Consent to Rule 11 Plea in a Felony Case Before a United States Magistrate Judge. Did you sign this document?

MR. LEE: Yes, sir.

THE COURT: And you signed it on behalf of defendant JHL?

MR. LEE: Yes, sir.

THE COURT: Is it your wish to consent to enter the plea before a magistrate judge and to give up or waive your right to enter that plea before a United States district judge?

MR. LEE: Yes, sir.

THE COURT: Mr. Barbee, have you discussed the consent

form with Mr. Lee?

MR. BARBEE: I have, Your Honor.

THE COURT: And are you satisfied that he understands it?

MR. BARBEE: Yes, Your Honor.

THE COURT: Have you also signed the document?

MR. BARBEE: Yes, Your Honor, I did sign it.

THE COURT: The Court finds that the defendant Shin and defendant JHL has -- have both consented to enter their respective pleas before a United States magistrate judge.

Mr. Shin, Mr. Lee, have each of you received copies of the information pending against each of you, that is the written charge made against each of you in this case?

DEFENDANT SHIN: Yes.

THE COURT: Mr. Lee?

MR. LEE: Yes, sir.

THE COURT: Have each of you fully discussed the charge and all of the facts surrounding the charges with your respective counsel, Mr. Shin?

DEFENDANT SHIN: Yes.

THE COURT: Mr. Lee?

MR. LEE: Yes.

THE COURT: Mr. Shin, are you fully satisfied with the representation that you've received from Mr. King, your attorney in this case?

DEFENDANT SHIN: Yes.

THE COURT: Mr. Lee, are you fully satisfied with the representation that you've received from Mr. Barbee, your attorney in this case?

MR. LEE: Yes, sir.

THE COURT: Mr. King, is the defendant Shin's plea before the Court today pursuant to your advice and recommendation?

MR. KING: Yes, Your Honor.

THE COURT: Mr. Barbee, is defendant JHL's plea before the Court today pursuant to your advice or recommendation?

MR. BARBEE: Yes, Your Honor.

THE COURT: Each of you has a constitutional right to require that a grand -- a group of citizens called a grand jury review the case and determine whether the United States presents sufficient evidence to bring charges against you. If the grand jury finds the evidence sufficient, it returns charges in the form of an indictment. If the grand jurors do not find probable cause to believe you committed the crime with which you are charged, you would not be indicted.

If you waive indictment by the grand jury, the case will proceed against each of you on the United States Attorney's information just as though you had been indicted. Do each of you understand your right to grand jury review of the case? Mr. Shin?

DEFENDANT SHIN: Yes.
THE COURT: Mr. Lee?
MR. LEE: Yes, sir.
THE COURT: I have before me a document entitled Waiver of Indictment. Mr. Shin, did you sign this document?
DEFENDANT SHIN: Yes, I did.
THE COURT: Do you wish to waive your right to indictment and agree to proceed on the charge as stated in the information?
DEFENDANT SHIN: Yes.
THE COURT: Mr. Lee, I have before me a document entitled Waiver of Indictment. Is it your -- did you sign this document?
MR. LEE: Yes, sir.
THE COURT: Is it your wish to waive JHL's right to indictment and agree to proceed on the charge as stated in the information?
MR. LEE: Yes.
THE COURT: Mr. King, did you go over the waiver of indictment form with your client?
MR. KING: Yes, Your Honor.
THE COURT: And are you satisfied that Mr. Shin understands it?
MR. KING: Yes.
THE COURT: Have you also signed the waiver of

indictment form?

MR. KING: Yes.

THE COURT: Mr. Barbee, have you discussed the waiver of indictment form with your client Mr. Lee?

MR. BARBEE: Yes, Your Honor.

THE COURT: Are you satisfied that he understands it?

MR. BARBEE: He does, Your Honor.

THE COURT: And have you also signed the waiver of indictment form?

MR. BARBEE: Yes, Your Honor.

THE COURT: The Court finds that defendant Shin and defendant JHL have both knowingly and voluntarily waived their right to grand jury review and indictment in this case, and the Court will execute the waiver of indictment forms.

Mr. Shin, the Court's been furnished with a written plea agreement. Is this your signature on the last page?

DEFENDANT SHIN: Yes.

THE COURT: Did you have an opportunity to read and discuss the plea agreement with your lawyer before you signed it?

DEFENDANT SHIN: Yes, I did.

THE COURT: Do you understand the terms of the plea agreement?

DEFENDANT SHIN: Yes.

THE COURT: Does the plea agreement represent in its

entirety any understanding that you have with the government?

DEFENDANT SHIN: Can you repeat that again?

THE COURT: Does the plea agreement represent in its entirety any understanding that you have with the government?

DEFENDANT SHIN: Yes.

THE COURT: Has anyone made any other or different promise or assurance of any kind to you in an effort to induce you to plead guilty?

DEFENDANT SHIN: No.

THE COURT: Has anyone attempted in any way to force you to plead guilty or to pressure you or threaten you in any way?

DEFENDANT SHIN: No.

THE COURT: Mr. Lee, I have before me a written plea agreement. Is this your signature on behalf of defendant JHL?

MR. LEE: Yes, sir.

THE COURT: Did you have an opportunity to read and discuss the plea agreement with your lawyer before you signed it?

MR. LEE: Yes, sir.

THE COURT: Do you understand the terms of the plea agreement?

MR. LEE: Yes, sir.

THE COURT: Does the plea agreement represent in its entirety any understanding which you have with the government?

MR. LEE: Yes, sir.

THE COURT: Has anyone made any other or different promise or assurance of any kind to you in an effort to induce you to plead guilt -- or to induce JHL to plead guilty?

MR. LEE: No, sir.

THE COURT: Has anyone attempted in any way to force you or JHL to plead guilty or to pressure you or threaten you in any way?

MR. LEE: No, sir.

THE COURT: Mr. Seabright, would you summarize the major terms of the plea agreements?

MR. SEABRIGHT: Yes, Your Honor. As to Mr. Shin first. Mr. Shin is agreeing to enter a plea of guilty to the one-count information. In return for that plea the United States Attorney's Office for the District of Hawaii agrees not to bring other criminal charges of which it is aware as of today against Mr. Shin relating to his negotiations with the Navy for work performed on Pump 2, Drydock Number 4 located at Pearl Harbor.

Mr. Shin understands and agrees that the plea agreement does not limit the United States or its agencies, including any military branch or any other governmental entity or subdivision within the United States from bringing any administrative, civil or other similar action against him.

The parties stipulate to the facts set forth in

Paragraph 8 of the plea agreement. The United States agrees that Mr. Shin's agreement to enter the plea as of this time constitutes timely notice of his intent to enter a plea and the United States did not have to prepare for trial. Accordingly, if it is -- if Mr. Shin is eligible and the United States does anticipate moving for a one-level reduction pursuant to guideline Section 3E1.1(b) (2).

The defendant understands that we can argue to the contrary and that if we get new information or if asked by the Court or probation officer to provide (indiscernible).

The parties stipulate for the purpose of dispute -- I'm sorry, for the purposes of sentencing two matters. One, the amount of loss for guideline purposes. And two, this ties in to that first issue, facts relating to the defendant's submission of a second sub contractor quote to the Navy. At the time that Mr. Shin provided a false letter to the Navy, he also provided a second subcontractor quote. The United States contends those facts relating to the second quote satisfy the elements of 1001, in other words, they're also (indiscernible).

Mr. Shin through Mr. King's contention has been that they do not satisfy 1001.

The parties agree that if the Court agrees with the United States, that is 1001 violation is satisfied, is met, then that second submission would constitute relevant conduct. And the converse is true. If it does not (indiscernible) 1001,

then it would not constitute relevant conduct. So that's laid out (indiscernible) guidance for the Court really as to where we were in our negotiations and how we view that issue.

Also he is aware -- Mr. Shin is aware he has a right to appeal. He waives his right to a direct appeal except under two circumstances. One, if the Court determines -- if the Court (indiscernible) determination of loss under the guidelines Section 2B1.1(b) (1), and second, if the Court departs upward any applicable guideline range, he can appeal that upward departure portion of his sentence.

He also waives his right to collaterally attack his sentence except for a claim of ineffective assistance and, again, the upward departure portion of any upward (indiscernible) Judge Mollway may give.

The United States retains its right to appeal the sentence in this -- in this case.

Those are the essential terms as to Mr. Shin.

Can we move to the JHL?

THE COURT: Yes.

MR. SEABRIGHT: As to JHL, the JHL through Mr. Lee's agreement enter a plea of guilty to the information and the same terms regarding the United States Attorney's Office agreeing not to charge him for other conduct known as of today relating to Pump 2, Drydock 4 at Pearl Harbor would apply (indiscernible) Mr. Shin. And likewise, JHL understands and

agrees that the plea agreement does not limit the United States or its agencies, including any military branch or other governmental entities or subdivisions of the United States from bringing any civil or administrative or similar action against him or against JHL.

The parties again stipulate to the facts set forth in Paragraph 8 of the plea agreement. And likewise, the United States agrees that the timing of the plea is such, unless we're asked to provide information or learn something different, that JHL would get a (unintelligible) for acceptance. The reason that's important, Judge, is the guideline fine may change depending on the guideline level.

The parties also again dispute the amount of loss for guideline purposes and JHL is appealing -- is, I'm sorry, waiving its rights in the exact same manner as Mr. Shin. No difference in the appeal waiver provision. So they do retain the right to appeal the Court's determination of loss pursuant to 2B1.1(b)(1). Otherwise the waivers are the same.

Also, Mr. Lee by signing the plea agreement on behalf of JHL, agrees that he's a representative of JHL and warrants that he is duly authorized to do so. And that he duly executed a resolution of the board of directors of JHL approving this plea agreement which is attached as Exhibit B to the plea agreement.

THE COURT: Mr. Shin, does that accurately state your

agreement with the government?

DEFENDANT SHIN: (Indiscernible).

THE COURT: Yes. Does that accurately state your agreement with the government, what Mr. Seabright has set out today?

DEFENDANT SHIN: Yes, it is.

THE COURT: Mr. Lee, does that accurately state JHL's agreement with the government?

MR. LEE: Yes, sir.

THE COURT: Mr. Shin, do you understand that you are waiving or giving up your right to appeal except for under two situations: One, in the event Judge Mollway departs upward from or above the sentencing guidelines; and secondly, in the event of ineffective assistance of counsel?

DEFENDANT SHIN: Yes.

THE COURT: Mr. Lee, do you understand that JHL is waiving or giving up its rights to appeal except for under two situations: One, if Judge Mollway departs upward from or above the sentencing guidelines; and secondly, in the event of ineffective assistance of counsel?

MR. LEE: Yes, sir.

MR. SEABRIGHT: Judge, there is that third -- third section, too, which is the guideline loss (indiscernible).

THE COURT: That's correct. As corrected by the -- as corrected by counsel this morning.

Mr. Shin, do you fully understand the charge covered by the plea agreement in this case?

DEFENDANT SHIN: Yes, I do.

THE COURT: Mr. Lee?

MR. LEE: Yes, sir.

THE COURT: What are the maximum possible penalties, Mr. Seabright, which would apply to Mr. Shin and would apply to the corporation?

MR. SEABRIGHT: Yes, Your Honor. As to Mr. Shin, the five years imprisonment, a fine of up to $250,000, plus a term of supervised release of not more than three years. There is no restitution. There is a mandatory $100 special assessment.

As to JHL Construction, Inc., a fine of up to $500,000; a term of probation of not less than one year, no more than five years. There is no restitution. And a mandatory special assessment of $400.

THE COURT: Mr. King, do you agree with that summary as to the possible penalties which may apply to your client?

MR. KING: Yes, Your Honor.

THE COURT: Mr. Barbee, do you agree with that summary as to the possible penalties as to your client?

MR. BARBEE: I do, Your Honor.

THE COURT: Mr. Shin, do you understand that these are the possible penalties which would apply if you enter a guilty plea to the charge in this case?

DEFENDANT SHIN: Yes.

THE COURT: Mr. Lee, do you understand that these are the possible penalties which would apply if JHL enters a guilty plea to the charge in this case?

MR. LEE: Yes, sir.

THE COURT: During a period of supervised release, Mr. Shin, you must comply with a set of conditions which will be explained to you by a probation officer. Those conditions will include requirements that you obey the law, that you report as required to a probation officer, and other conditions. If a court finds that you violated any of those conditions you could be required to serve additional prison time. Do you understand that?

DEFENDANT SHIN: Yes, sir.

THE COURT: Mr. Shin, are you presently on probation, parole or supervised release from any other case?

DEFENDANT SHIN: No.

THE COURT: Mr. Lee, is the defendant JHL on probation, parole or involved in any other criminal case?

MR. LEE: No, sir.

THE COURT: Mr. Seabright, does the United States contend that any felony offense to which the defendant is today entering a guilty plea occurred while either defendant was released or on bond in relation to some other federal criminal charge?

MR. SEABRIGHT: No, Your Honor.

THE COURT: Mr. Shin, if you're convicted of the charge in this case you will lose valuable civil rights, including the right to vote, the right to hold public office, the right to serve on a jury, and the right to possess any kind of a firearm. Do you understand that?

DEFENDANT SHIN: Yes, sir.

THE COURT: The United States Sentencing Commission has issued guidelines for judges to use in determining the sentence in a criminal case. Mr. Shin, have you and your attorney talked about how those guidelines might apply in your case?

DEFENDANT SHIN: Yes.

THE COURT: Mr. Lee, have you and Mr. Barbee discussed how those guidelines might apply to JHL in this case?

MR. LEE: Yes, sir.

THE COURT: Do each of you understand that the Court will not be able to determine the guideline sentence for your respective case until after the presentence report has been completed and each of you and the government have had an opportunity to challenge the reported facts and the application of the guidelines recommended by the probation officer, and that the sentence imposed may be different from any estimate your attorney may have given you? Mr. Shin?

DEFENDANT SHIN: Yes.

THE COURT: Mr. Lee?
MR. LEE: Yes, sir.
THE COURT: Do each of you also understand that after -- after your guideline range has been determined, the Court has the authority in some circumstances to depart from the guidelines and to impose a sentence that is more severe or less severe than the sentence called for by the guidelines? Mr. Shin?
DEFENDANT SHIN: Yes.
THE COURT: Mr. Lee?
MR. LEE: Yes, sir.
THE COURT: If the sentence is more severe than you expected, each of you will still be bound by your plea. Even if you do not like the sentence imposed by the court you will not be able to withdraw your plea. The time to make that decision is now. Do you understand that? Mr. Shin?
DEFENDANT SHIN: Yes.
THE COURT: Mr. Lee?
MR. LEE: Yes, sir.
THE COURT: Parole has been abolished. If you are sentenced to prison, Mr. Shin, you will not be released early on parole. Do you understand that?
DEFENDANT SHIN: Yes.
THE COURT: Each of you has a right to plead not guilty to any offense charged against you and to persist in

that plea. You would then have a right to trial by jury. During that trial each of you would have the right to assistance of counsel for your defense, the right to see and hear all the witnesses and to have your attorney cross-examine them, the right to testify yourself or to decline to testify and remain silent, and the right to have the Court issue subpoenas for any witnesses each of you wishes to call in your respective defense.

At the trial each of you would be presumed to be innocent and the United States would have the burden of proving that you are guilty beyond a reasonable doubt. Before you can be convicted, all 12 jurors must be convinced that the United States has met that burden. If you are found guilty after a trial you would have the right to appeal that conviction to a higher court and if each of you could not afford to pay the cost of an appeal, the government would pay those costs for you. Do you understand that? Mr. Shin?

DEFENDANT SHIN: Yes.

THE COURT: Mr. Lee?

MR. LEE: Yes, sir.

THE COURT: If you plead guilty, however, and if the Court accepts that plea, there will be no trial. Each of you will be waiving or giving up your right to a trial and all of the other rights I described. Do you understand that? Mr. Shin?

DEFENDANT SHIN: Yes.

THE COURT: Mr. Lee?

MR. LEE: Yes, sir.

THE COURT: Also, so long as each of you pleads not guilty you have the right to remain silent, but if you plead guilty you are waiving that right and I will ask each of you some questions about what occurred and each of you must answer those questions truthfully under oath even if your answers establish that you committed a crime. Do you understand that? Mr. Shin?

DEFENDANT SHIN: Yes.

THE COURT: Mr. Lee?

MR. LEE: Yes, sir.

THE COURT: Mr. Seabright, would you summarize for the Court and the defendant the essential elements which the United States would be required to prove if there were a trial on the charge?

MR. SEABRIGHT: Yes, Your Honor. As to both Mr. Shin and JHL Construction the government would have to prove, first, that the defendants knowingly and willfully made and used a false writing or document in a manner within the jurisdiction of the executive branch of the United States government, that is the United States Navy.

Second, the defendants acted knowingly and willfully, that is deliberately and with knowledge that the statement in

the document was untrue, that is, the document contained a material false, fictitious and fraudulently -- and fraudulent entry.

And third, the statement was material to the U.S. Navy's activities or decisions.

As to JHL Construction, Inc., there would be a fourth requirement that Mr. Shin was acting on behalf of the corporation or was authorized to act in behalf of the corporation.

THE COURT: Mr. King, do you disagree in any respect to that summary as it applies to your client?

MR. KING: That's correct, Your Honor.

THE COURT: Mr. Barbee, do you disagree in any respect to that summary as it applies to defendant JHL?

MR. BARBEE: No, Your Honor.

THE COURT: Mr. Shin, do you fully understand that if there were a trial on the charge, the United States would be required to present evidence sufficient to prove each of these essential elements beyond a reasonable doubt?

DEFENDANT SHIN: Yes.

THE COURT: Mr. Lee, do you understand that if there were a trial on the charge, the United States would be required to present evidence sufficient to prove each of the essential elements stated by Mr. Seabright beyond a reasonable doubt?

MR. LEE: Yes, sir.

THE COURT: Mr. Shin, the plea agreement includes a written summary of the facts upon which the plea is based, specifically at Paragraph 8 beginning on Page 3 and continuing on to Page 6. Have you read carefully through that statement of facts?

DEFENDANT SHIN: Yes, I did.

THE COURT: Are those facts all true in every respect?

DEFENDANT SHIN: It is.

THE COURT: Mr. Lee, the plea agreement includes a written summary of the facts upon which the plea is based. Have you read carefully through that statement of facts set out at Paragraph 8 beginning on Page 3 and continuing on to Page 6?

MR. LEE: Yes, sir.

THE COURT: Are those facts all true in every respect?

MR. LEE: Yes, sir.

THE COURT: Mr. Shin, would you tell me in your own words what you did that constitutes the crime charged?

DEFENDANT SHIN: At the time I didn't believe what the subcontractor can do for that price, so I -- I wrongfully changed the number and submit to the government what I thought the price reflect, the work that they can do. And that's what I do wrong.

THE COURT: First, the government entity that you were dealing with was the United States Navy?

DEFENDANT SHIN: Yes.

THE COURT: When you -- did you -- Mr. Seabright, what's the government's proffer?

MR. SEABRIGHT: Yes, Your Honor. Let me go through the proffer. Right now I think that Mr. Shin's statement is not sufficient --

THE COURT: Yes.

MR. SEABRIGHT: -- (indiscernible). First of all, Mr. Lee is Mr. Shin's nephew. And so there's a relationship between the two of them obviously. And JHL had what's called a ongoing contract, I believe it's called a job order contract with the United States Navy that allowed JHL to enter into negotiations for certain contracts with the Navy outside the normal bidding process. And during the month of August of 2003, the Navy approached JHL and asked JHL to provide a proposal to overhaul Pump 2 located at drydock four at Pearl Harbor. These are the pumps that pump the water out at the drydock and back in.

Earlier JHL, under -- under a similar contract, had entered into a contract with the Navy to overhaul Pump 1 located at drydock four. The specifications of the two pumps were essentially identical. And the Navy was aware, of course, at the time that it asked for the proposal on Pump 2 that JHL had a contract with Pump 1 and was using subcontractors.

So JHL did provide several proposals to the Navy for the work on Pump 2. The proposals did not contain any

specifications as to subcontractor pricing and the Navy then requested JHL to support the proposals JHL's making to provide subcontractor pricing, the actual pricing of subcontractors.

One subcontractor, referred to as HSIE, had entered into an agreement with JHL to what's called rewind the motor of Pump 1 for a cost of $114,000. So as to the earlier first contract. And HSIE had provided their proposal to JHL, which they accepted, dated July 10th, 2003, setting forth that proposal and the price of $114,733. That letter stated in part Drydock 4, Pump Motor Number 1 rewind $114,733.

Shortly prior to September 8th and after the Navy had requested subcontractor prices, Mr. Shin altered a copy of this HSIE July 10th, 2003, proposal by using white out and changing the figure 114,733 to 314,733. In other words, the price was increased by $200,000. And that happened shortly prior to September 8th.

On September 8th, 2003, in response to the request for the subcontractor pricing, Mr. Shin on behalf of JHL provided the Navy the altered July 10th, 2003, HSIE letter. And it was provided in order to justify the proposal submitted by JHL to the Navy. Mr. Shin knew the document was altered and he provided it to them knowingly and willfully. And he did it with the intent to benefit JHL.

THE COURT: Mr. Shin, did you hear what Mr. Seabright just told me?

DEFENDANT SHIN: Yes, I did.
THE COURT: Is everything that he told me true and correct?
DEFENDANT SHIN: Yes, it is.
THE COURT: Are you satisfied with regards to Mr. Shin?
MR. SEABRIGHT: I am, Your Honor. I'm concerned, I'm not sure what he said earlier. I think he tried to minimize what he was trying to do.
MR. KING: What he said earlier was he changed the document and that is what he's charged with.
MR. SEABRIGHT: As long as he's saying that I have no problem.
DEFENDANT SHIN: Well, I change the document, I know that it's wrong, but I have every right to believe that the subcontractor price is not -- is not what taken to the (indiscernible). I have to -- I have to have a contract with them and -- and if they don't perform, then it's my responsibility to deliver the good to the government. So I have every right to believe that the number doesn't reflect what they can do. That's -- but -- but what I did is wrong. I really -- way I -- way I present the price is wrong and it is wrong.
THE COURT: Mr. Shin, let me ask you the question directly. When you changed the number on the HISE document

from 114,000 to 314,000, you knew that was wrong? You knew that was incorrect?

DEFENDANT SHIN: Well, it is wrong to -- to -- to -- to -- it is wrong to change the document, yes, it is wrong.

THE COURT: All right. And you did that for the purpose or with the intent to benefit JHL?

DEFENDANT SHIN: Of course it is to benefit the JHL, but it benefits the government, too, by -- by protects the project.

MR. SEABRIGHT: Your Honor, so at this point I don't think the Court should accept the plea. If he's saying he did this to benefit the government, the Court should not accept his plea.

MR. KING: Judge, this is an 18 U.S.C. 1001. The only requirement is that he made -- that he altered the document and that it was a material altered -- alteration to the government.

What he's saying is that the reason he did it was because he thought that the price reflect -- the bid submitted was a more realistic bid. However, it was -- it was certainly a violation of 18 U.S.C. 1001 to do it the way he did it. Now, that's exactly the dispute we've got, which is (indiscernible) out in the plea agreement as to Paragraph 12 (b). That's exactly the dispute that we're going to be arguing about in front of Judge Mollway as to whether or not the other subcontract bid which -- which was not altered by my client,

although it was increased by the subcontractor, whether that's a violation of 18 U.S.C. 1001. That's the argument that we're going to have before Judge Mollway.

THE COURT: And I can understand that you're going to have that argument, but for purposes of the change of plea I'm not convinced based on what I have before me that this defendant admitted that he knowingly used a false writing, knowing that it was material to the government, to benefit JHL. And it's the materiality issue that comes into play here.

I mean he can, with all due respect, he can have his view with regards to perhaps motivation, but as to whether or not it was material and him knowing why it was material to the government, that becomes an issue.

DEFENDANT SHIN: I --

MR. KING: (Indiscernible).

DEFENDANT SHIN: Your Honor, I -- I know what I did was wrong and it is wrong what I did.

MR. KING: He knows the (indiscernible) to the government, that's why he's pleading to this charge.

THE COURT: Well, what materiality also implies reliance by the government.

MR. KING: He understands that and admits that.

THE COURT: Mr. Seabright?

MR. SEABRIGHT: Your Honor, I think what he has to admit is that he -- what he was doing was trying to convince

the government that that price was $200,000. He unilaterally increased by 200,000. He unilaterally made that decision. He didn't go back to his company and say how much would it cost.

In fact, Judge, there's tape-recordings, a tape-recording with him and the owner of HSIE where there's an actual discussion about he asking HSIE to increase the price, but that never happened, he did it himself instead, or it did happen, but it came too late, he did it himself. And -- and HSIE was prepared to do it for the same cost.

Mr. Shin is saying in his own mind he believed HSIE had underbid the appropriate cost. As you said, his motivation may not be material to entering the plea, but I think the Court has it exactly right as far as the legal issue here, which is when he says I think this benefited the government, it sounds like he's not thinking it's material.

DEFENDANT SHIN: No, no, no, that -- that's not true. I -- what I submit the government, it is wrong and it is material.

MR. SEABRIGHT: Was it a material false statement?

DEFENDANT SHIN: It is. It is material false statement, of course, because I change the number and -- and it (indiscernible) the different company name. It is.

MR. SEABRIGHT: Judge, if I may ask a question?

THE COURT: Sure.

MR. SEABRIGHT: And -- and it was done to justify the

proposal that JHL submitted to the Navy?
DEFENDANT SHIN: Yes, it is. Yes, it is.
THE COURT: I think with that (indiscernible).
MR. SEABRIGHT: I -- I agree.
THE COURT: Mr. Seabright?
MR. SEABRIGHT: I agree.
THE COURT: Mr. Lee, on behalf of JHL can you tell me -- or tell me in your own words what JHL did that constitutes the crime charged.
MR. LEE: On behalf of JHL Construction, did authorize Mr. Patrick Shin, the agents for JHL Construction, regarding that proposal.
MR. SEABRIGHT: I think, you know, he did not have -- Mr. Lee, we don't have evidence that he had personal knowledge as to what Mr. Shin was doing at the time. So I think with that statement and him agreeing to what Mr. Shin has said as accurate based on his review of what happened as president of JHL, then that's sufficient (indiscernible).
THE COURT: Mr. Lee, did you hear what Mr. Shin told the Court this morning?
MR. LEE: Yes, sir.
THE COURT: Is everything what he told me true and correct?
MR. LEE: Yes, sir.
THE COURT: Are you satisfied, Mr. Seabright?

MR. SEABRIGHT: Yes, Your Honor.

THE COURT: Mr. Shin, if you plead guilty or, Mr. Lee, if you plead guilty on behalf of JHL, the Court will order presentence reports be prepared and the judge will decide whether to accept the plea agreements based in part on the contents of the presentence report. If the Court decides or rejects the plea agreement, each of you would then have an opportunity to withdraw your plea and change it to not guilty. Do you understand that? Mr. Shin?

DEFENDANT SHIN: Yes, sir.

THE COURT: Mr. Lee?

MR. LEE: Yes, sir.

THE COURT: All right. Then, Mr. Shin, how do you now plead to the charge in the information filed on April 9th, 2004, guilty or not guilty?

DEFENDANT SHIN: Guilty.

THE COURT: Mr. Lee, on behalf of defendant JHL corporation, how do you now plead to the charge in the information filed on April 9th, 2004, guilty or not guilty?

MR. LEE: JHL Construction, Inc. pleads guilty.

THE COURT: Mr. King, are you aware of any reason why the Court should not accept defendant Shin's guilty plea?

MR. KING: No, Your Honor.

THE COURT: Mr. Barbee, are you aware of any reason why the Court should not accept defendant JHL's guilty plea?

MR. BARBEE: No, Your Honor.

THE COURT: The Court finds that defendant Shin and defendant JHL are fully competent and capable of entering an informed plea. That the pleas of guilty on behalf of each defendant -- made by each defendant are knowing and voluntary and supported by an independent basis in fact containing each of the essential elements of the offense charged in the information. I'm therefore signing the Report and Recommendation Concerning Plea of Guilty subject to the Court's consideration of the plea agreements pursuant to Rule 11 (indiscernible) of the Federal Rules of Criminal Procedure. I recommend that each defendant be adjudged guilty and have sentence imposed. Objections to this report or to these reports and recommendations are waived unless filed and served within ten days.

Mr. Shin, I'm ordering our probation department to prepare a presentence report in this case about you.

Mr. Lee I'm ordering our probation department to prepare a presentence report in this case with regards to defendant JHL.

These reports are documents about each of you and about the case which will assist the judge in sentencing you. The probation officer will interview each of you. If each of you wishes, your respective attorneys may be present at that interview.

You and your attorney will have the opportunity to read the report before sentencing and to file any written objections to its contents. You and your attorney will have the opportunity to address the judge at the hearing before the judge imposes sentence.

Date and time.

THE COURTROOM MANAGER: Sentencing to Count 1 of the felony information as to both defendants 1 and 2 is set for October 4, 2004, 3 p.m., Judge Mollway.

THE COURT: Mr. Seabright, I have a report from Pretrial Services regarding Mr. Shin.

MR. SEABRIGHT: Yes, Your Honor. I've reviewed it. We have no objections to the recommendations of the report. I do note it says that he will contribute to the costs (indiscernible) do so. I think that's pretty clear. So that's probably (indiscernible).

THE COURT: Mr. King?

MR. KING: No problem, Judge.

THE COURT: The Court taking judicial notice of the information and documents on file in this criminal number and the report prepared by Pretrial Services, and having considered the comments of counsel, the Court finds that there are conditions which exist which will reasonably assure the appearance of the defendant and the safety of any other person in the community and therefore will allow the defendant Patrick

Shin to be released on the following terms and conditions:

First, that he post an unsecured bond in the amount of $50,000.

Next, the defendant must comply with Pretrial Services supervision and abide by all conditions of release as directed by Pretrial Services.

He must surrender any passport and all travel documents to the United States District Court Clerk's Office. He's not to apply for or to obtain a passport. He must surrender that passport and any travel documents no later than close of business today.

The defendant's travel is restricted to the state of Hawaii.

And any -- and he is further prohibited from owning, possessing or controlling any firearm or ammunition. He must immediately surrender all firearms and ammunition to an agent approved by Pretrial Services.

He must contribute for the cost of the services required by the bond, to the extent that he is financially able to do so as determined by Pretrial Services.

The defendant must provide Pretrial Services with any and all requested financial information regarding his financial status, including but not limited to employment and all sources of income, bank accounts, assets and liabilities and investments.

The defendant is required to sign and execute an authorization to release financial information as requested by Pretrial Services.

Pretrial Services is authorized to run credit reports on a random and as-needed basis during the course of supervision to ensure compliance with pretrial release conditions.

The defendant is further required to sign and execute any necessary release forms, including but not limited to authorizations to release financial information as requested by Pretrial Services.

The defendant shall further not commit any offense in violation of federal, state or local law while on release in this case.

And he shall appear at all proceedings as required and surrender for service of any sentence imposed as directed.

Mr. Shin, do you understand that you must follow and comply with each and every one of the foregoing conditions?

DEFENDANT SHIN: Yes, I do.

THE COURT: And that violation of any one condition may result in the termination of your presentence release status and will expose you to sanctions in a separate criminal charge?

DEFENDANT SHIN: I do.

THE COURT: And then each of the defendants, Mr. Shin

and Mr. Lee, are directed to the probation department for processing of documents, marshal's office --

MR. SEABRIGHT: I don't think Mr. Lee has to go to the marshal's office.

Oh, Mr. Shin (indiscernible).

THE COURT: Mr. Lee or Mr. Shin?

MR. SEABRIGHT: I'm sorry, Mr. Shin. Mr. Lee does not have to be processed.

MR. BARBEE: JHL, Mr. Lee will go to the probation office.

THE COURT: Right. Anything else, Mr. Seabright?

MR. SEABRIGHT: No, Your Honor. Thank you.

THE COURT: Mr. King?

Mr. Barbee?

MR. BARBEE: No, Your Honor.

THE COURT: Thank you very much. We'll be in recess.

(The proceedings concluded at 12:16 p.m., April 21, 2004.)

TRANSCRIBER'S CERTIFICATE

I, CYNTHIA FAZIO, Court-Authorized Transcriber, United States District Court, District of Hawaii, Honolulu, Hawaii, do hereby certify that pursuant to 28 U.S.C. §753 the foregoing is a true, complete and correct transcript from the electronic sound recording of the proceedings had in connection with the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

DATED at Honolulu, Hawaii, October 8, 2020.

/s/ Cynthia Fazio
CYNTHIA FAZIO, RMR, CRR, CRC