No. 23-7752

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

MARK EDMOND BROWN JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

Respectfully submitted,

Mark Edmond Brown, Jr.
Appellant *Pro Se*
1834 Linton Road
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QUESTIONS PRESENTED

I. The Sixth Circuit violated Mr. Brown's due process rights by concluding that his right to file a *coram nobis* petition fell within the scope of his appeal waiver and that he was barred from filing his petition.

II. The Sixth Circuit erred by holding that Mr. Brown's petition did not fall with the miscarriage of justice exception.

III. It is of enormous importance to the bar and the judiciary for this court to answer whether a waiver entered by a defendant contemporaneously with a guilty plea, absent explicit language, includes the defendant's right to file a *coram nobis* petition following full service of his sentence.

PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page. There are no other proceedings in state or federal trial or appellate courts, or in this court, directly related to this case.

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IN THE

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PETITION FOR WRIT OF CERTIORARI

Petitioner Mark Edmond Brown Jr. respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit appears at Appendix A to the petition and is unpublished.

The opinion of the United States District Court for the Eastern District of Kentucky appears at Appendix B to the petition and is also unpublished.

JURISDICTION

The Sixth Circuit decided Mr. Brown's appeal on November 27, 2023. Mr. Brown did not file a petition for rehearing.

The jurisdiction of the court is invoked under 28 U.S.C. § 1254 (1).

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STATEMENT OF THE CASE

In 2013, as part of a plea deal, Mr. Brown pled guilty to conspiracy to distribute 500 grams or more of cocaine. The agreement was conditioned on Mr. Brown waiving his right to appeal "and the right to collaterally attack the guilty plea, conviction, and sentence." The district court sentenced him to serve 108 months in the Bureau of Prisons. He did not, however, pursue a direct appeal to the Sixth Circuit.

In 2014, Mr. Brown filed a motion to vacate and set aside his sentence pursuant to 28 U.S.C. § 2255. The district court denied the motion. Mr. Brown then filed a timely notice of appeal and unsuccessfully sought a certificate of appealability from the Sixth Circuit.

After his release, Mr. Brown filed his first *coram nobis* petition in April 2020. Upon review, the district court invoked the appellate waiver *sua sponte* and held that he had waived his right to collaterally attack his conviction. [Appendix B] (District Court's Order and Opinion). The Sixth Circuit also relied on the waiver to affirm the district court's decision. *Id.* (*Brown v. United States,* No. 21-5046 (6th Cir. Mar. 29, 2022)). He did not file a petition for a writ of certiorari with this court.

Mr. Brown filed his second *coram nobis* petition on August 30, 2022.

The district court explained the basis for the second petition:

> Now, Brown petitions this Court again for a writ of *coram*

> nobis, apparently challenging the validity of the waiver provision found in his plea agreement. He argues that "the plea agreement itself was a product of ineffective assistance of counsel" because his lawyer advised him to admit to the "uncharged" allegation of crack cocaine possession, failed to address statute of limitations issues during his plea negotiations, and failed to raise due process challenges. Separately, Brown also claims that this Court lacked personal and territorial jurisdiction over his proceedings.
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> In the affidavit filed alongside his petition, Brown states: "*Coram nobis* relief is necessary to remedy the continuing disability associated with my conviction, the realistic threat of future sentencing hearings treating me as a recidivist offender, and reputational harm." He concludes: "I do not want to face the remainder of my life branded as a criminal, and a conviction of a felony imposes a status upon me which not only makes me vulnerable to future sanctions through new civil disability statutes, but also seriously affects my reputational and economic opportunities."

[Appendix B] (*United States v. Brown,* No. 5:12-79-KKC, at *2 (E.D. Ky. Oct. 17, 2022) (record citations omitted)). Sidestepping Mr. Brown's arguments concerning the unenforceability of the collateral-review waiver, the district court instead focused on the first requirement that only an ongoing civil disability warrants *coram nobis* relief. *Id.* at *2. On that basis, the court denied the second petition.

Mr. Brown then moved the district court to reconsider its opinion and order, arguing that (i) the court erred in adjudicating the petition prior to receiving a response from the government, (ii) he is suffering the

present and continuing harm of his inability to own or possess a firearm following his conviction, and (iii) his conviction itself constitutes a sufficient disability. The district court denied reconsideration.

On appeal, the Sixth Circuit affirmed the district court's denial of *coram nobis* relief. The court stated that it had "already decided" in the first *coram nobis* appeal that the waiver "was enforceable." [Appendix, at 3] Ignoring Mr. Brown's right-to-bear arms argument under the Second Amendment–which arose *after* he had served his 108-month sentence and could not have been raised in any of the trial proceedings–the Sixth Circuit concluded that "[n]othing in Brown's petition gives us reason to reconsider our prior conclusion that he knowingly and voluntarily waived his right to collaterally attack his conviction, which in turn bars his other claims." [Appendix A, at 3]

REASONS FOR GRANTING THE PETITION

The primary issues are: (i) whether the district court may consider the petition, because, Mr. Brown in his plea colloquy to plead guilty to conspiracy to distribute 500 grams or more of cocaine, waived his collateral-attack rights under 28 U.S.C. § 2255; and (ii) whether Mr. Brown is entitled to a writ of *coram nobis,* because his federal conviction would be unlawful today.

Mr. Brown argues that: (i) his collateral-attack waiver does not bar the Court from considering his petition, because the waiver does not mention expressly *coram nobis* relief, and because enforcing his collateral-attack waiver would result in a miscarriage of justice; and (ii) he is entitled to a writ of *coram nobis* because there is factual error in his federal felony conviction and Mr. Brown was duly diligent in bringing his petition.

FACTUAL BACKGROUND

Entered on April 5, 2013, Mr. Brown's plea agreement was conditioned on his waiving his right to appeal "and the right to collaterally attack the guilty plea, conviction, and sentence." The district court sentenced Mr. Brown to serve 108 months in the Bureau of Prison (BOP), which the district court later reduced to 87 months on motion of Mr.

Brown. Neither judgment was appealed to the Sixth Circuit, and on September 1, 2017, the BOP released him from custody. Mr. Brown subsequently filed a motion to vacate and set aside his sentence pursuant to 28 U.S.C. § 2255 and requested an evidentiary hearing. The district court denied the motion and the hearing, and the Sixth Circuit affirmed

the lower court's order of dismissal.

PROCEDURAL BACKGROUND

Mr. Brown contends that he was convicted unlawfully on the basis of an uncharged allegation of crack cocaine possession that provided the

basis for the mandatory minimum penalty in his conviction of conspiracy to distribute more than 500 grams of cocaine and that the United States did not prove the uncharged allegation. He, therefore, asks the Court to vacate his 2013 conspiracy-to-distribute conviction.

LAW REGARDING *CORAM NOBIS*

The writ of *coram nobis* "was available at common law to correct errors of fact." *United States v. Morgan*, 346 U.S.502, 507 (1954). Today, the All Writs Act, 28 U.S.C. § 1651, provides federal courts jurisdiction to grant relief in the form of a writ of error *coram nobis. Id.* at 507. A writ of error *coram nobis* affords a petitioner a remedy to attack a conviction when the petitioner has served his sentence and is no longer in custody. *Coram nobis* is an "extraordinary remedy" available "only under circumstances compelling such action to achieve justice." *Morgan,* 346 U.S. at 511.

The standard for granting *coram nobis* relief varies among the Courts of Appeal, but generally before a court may grant a writ of *coram nobis*: (i) a petitioner must satisfy his burden of demonstrating that he was duly diligent in bringing a claim; (ii) all other remedies and forms of relief, including post-conviction relief under 28 U.S.C. § 2255, are unavailable or inadequate; and (iii) the requested writ either must correct errors resulting in a complete miscarriage of justice or be under

circumstances compelling such action to achieve justice. *See generally Embrey v. United States*, 240 Fed.Appx.791, 793 (10th Cir. 2007) (unpublished).

To show due diligence in bringing a claim, a *coram nobis* petitioner must provide sound reasons explaining why he did not attack his sentences or convictions earlier. *See Morgan*, 346 U.S. at 512. With the exception of actual innocence,[1] courts have not elaborated on what constitutes "sound" or "valid" reasons for delay, although courts have described circumstances that provide valid reasons for delay.[2]

Courts have denied relief where the petitioner has delayed for no reason whatsoever, where the respondent demonstrates prejudice, or where the petitioner appears to be abusing the writ.[3] Additionally, where

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[1] *Restrepo v. United States*, CIV 12-3517 JBS, 2012 WL 5471151, at *9 (D.N.J. Nov. 8, 2012)(Simandle J.)("[actual innocence constitutes] an extraordinary case that [can] negate . . . procedural default [of *coram nobis* petition].").

[2] *See, e.g., United States v. Gonzalez*, CR-03-201236, 2016 WL2989146 (D. Kan. May 24, 2016)(Vratil J.)(holding that the "defendant's lack of diligence in pursing his claim does not bar the present motion for a writ of *coram nobis*"); *United States v. Peter*, 310 F.3d 712, 713 (11th Cir. 2002)(explaining that a "writ of error *coram nobis* acts as assurance that deserved relief will not be denied because of technical limitations of other post-conviction remedies").

[3] *See Martinez v. United States*, 90 F.Supp.2d 1072,1075-77 (D. Haw. 2000)(Kay J.)(denying relief where the petitioner attacked a six-year-old conviction on grounds of speedy trial violations, failed to collaterally challenge the conviction while in custody and until six years after receiving an enhanced sentence for a subsequent conviction); *Klein v. United States*, 880 F.2d at 254 (denying relief where the petitioner delayed seeking *coram nobis* relief for seven years without an explanation, the delay caused prejudice to the government because a key witness died, and the petitioner was raising claims that had already been litigated); *United States v. Correa-De Jesus*, 708 F.2d 1283, 1286 (7th Cir. 1983)(denying relief where the petitioner waited sixteen years to re-litigate claim that he had raised and then dropped on direct appeal).

petitioners reasonably could have asserted the basis for their *coram nobis* petition earlier, they have no valid justification for delaying pursuit of that claim.[4] If a petitioner did not have a reasonable chance to pursue his claim earlier because of the specific circumstances he faced, delay during the time when such circumstances existed may be justified.

Nevertheless, that a *coram nobis* petitioner could have raised a claim while in custody does not bar the petitioner from *coram nobis* eligibility.[5] *See Morgan*, 346 U.S. at 512 (concluding that the petitioner met the threshold requirement for *coram nobis* relief even though the petitioner could have raised denial of counsel claim by filing a § 2255 motion while incarcerated). Additionally, a petitioner cannot use *coram nobis* to reach issues that he could have raised on direct appeal or to litigate issues already litigated.[6]

Finally, "the burden is on the petitioner to demonstrate that the asserted error is jurisdictional or constitutional and results in a complete miscarriage of justice." *See Morgan*, 346 U.S. at 511 ("This extraordinary remedy [should] only be under circumstances compelling such action to achieve justice."). Generally, courts will issue writs of

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[4] *See United States v. Ballard,* 317 F. Appx. 719, 722 (10th Cir. 2008)(unpublished).

[5] *See Morgan*, 346 U.S. at 512 (concluding that the petitioner met the threshold requirement for *coram nobis* relief even though the petitioner could have raised denial of counsel claim by filing a § 2255 motion while incarcerated).

[6] *See Barnickel v. United States*; 113 F.3d 704, 706 (7th Cir. 1997); *Klein*, 880 F.2d at 254.

coram nobis only to correct "errors of fact" that, through no negligence on the defendant's part, were not part of the original record and that "would have prevented rendition of the judgment questioned." *United States v. Lowe*, 6 Fed.Appx. 832, 834 (10th Cir.2001) (unpublished) (quoting *Black's Law Dictionary* 304-05 (5th Ed. 1979).

LAW REGARDING HABEAS PETITIONS UNDER 28 U.S.C. 2254

Section 2254 provides: "a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." When a state prisoner challenges his custody and by way of relief seeks to vacate his sentence, and obtain immediate or speedy release, his sole federal remedy is a writ of habeas corpus. *See Preiser v. Rodriguez*, 411 U.S.471, 500 (1973). Under 28 U.S.C. § 2244 (b)(1), a court shall dismiss a claim that the movant presents in a second or successive habeas corpus application under § 28 U.S.C. § 2254. A court also shall dismiss a new claim that the movant has not presented in a prior application unless a petitioner shows either: (i) that the claim relies on a new rule of constitutional law that was previously unavailable and that the Supreme Court of the United States made retroactive to cases on collateral review; or (ii) that the factual predicate for the claim was previously unavailable and would be sufficient to establish by clear-and-

convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense. *See* 28 U.S.C. § 2244(b)(2). To proceed on a second or successive habeas corpus petition, a petitioner must establish one of two bases. The petitioner must show that he is relying on new constitutional law that was previously unavailable and that the Supreme Court made retroactive on collateral review. *See* 28 U.S.C. § 2244 (b)(2)(A). Alternatively, the petitioner must argue or rely on a factual predicate that could not have been discovered previously through the exercise of due diligence, and is sufficient to establish by clear-and-convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense. *See* 28 U.S.C. § 2244(b)(2)(B). Further, before the petitioner files a second or successive petition in the district court, the petitioner must move the Court of Appeals for an order authorizing the district court to consider the application. *See* 28 U.S.C. § 2244 (b)(3)(A). When a petitioner files a second or successive § 2254 claim in the district court without the Court of Appeals' authorization, the district court may transfer the matter to the Court of Appeals if it determines it is in the interest of justice to transfer under 28 U.S.C. 1631, or it may dismiss the petition for lack of jurisdiction. When a petitioner files a motion under Rule 60(b), the Court must determine whether the motion is a true Rule 60 (b) motion, or, instead, a second or

successive petition under § 2254. A 60(b) argument should not be treated as a second or successive § 2254 claim if it "challenges a defect in the integrity of the federal habeas proceedings, " and "does not itself lead inextricably to a merits-based attack on the disposition of the prior habeas petition." *Spitznas v. Boone*, 464 F.3d 1216. A Rule 60(b) motion should, instead, be treated as a second or successive § 2254 petition "if it in substance or effect asserts or reasserts a federal basis for relief from the petitioner's underlying conviction." *Id.*

LAW REGARDING 28 U.S.C. 2255

Section 2255 provides:

> A prisoner in custody under a sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence

28 U.S.C. § 2255 (a). The petitioner is to file the initial motion under 28 U.S.C. § 2255 (a) with the court that imposed the sentence for that court's consideration. *See also* Rule 4(b) of the Rules Governing Section 2255 Proceedings. The judge who receives the motion must promptly examine it. If it plainly appears from the motion, any attached exhibits, and the record of prior proceedings that the moving party is not entitled to relief, the judge must dismiss the motion and direct the clerk to notify

the moving party. Rules Governing Habeas Proceedings 4(b).

Section 2255 provides that a United States Court of Appeals panel must certify a second or successive motion in accordance with § 2244 to contain: (i) newly discovered evidence that would be sufficient to establish by clear-and-convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or (ii) a new rule of constitutional law that was previously unavailable and the Supreme Court made retroactive to cases on collateral review. *See* 28 U.S.C. § 2255 (h). Section 2244 requires that, before a second or successive application is filed in the district court, the applicant shall move the appropriate court of appeals for an order authorizing the district court to consider the application. *See* 28 U.S.C. § 2244 (b)(3)(A). A district court lacks jurisdiction to consider a second or successive motion absent the requisite authorization. *See* 28 U.S.C. § 2244 (b).

ANALYSIS

The Sixth Circuit should have considered Mr. Brown's petition, because he did not waive expressly his right to attack collaterally his conviction through a *coram nobis* petition, and, because, if Mr. Brown is correct that his sentence is unlawful, enforcing his collateral-attack waiver would result in a miscarriage of justice. Second, Mr. Brown is entitled to a writ of *coram nobis*, because there is factual error in his 2013 conviction for conspiracy to distribute cocaine. He was diligent in

bringing his petition and is actually innocent. Because Mr. Brown *asserts* factual error, he is entitled to a writ of *coram nobis*. Writs of *coram nobis*, unlike writs of *audita querela*, are for granting relief for factual errors in the original conviction. *See Klein,* 880 F.2d at 853

The Sixth Circuit should have considered Mr. Brown's petition because he did not waive his *coram nobis* rights and because enforcing his collateral-attack waiver results in a miscarriage of justice. The collateral-attack waiver does not bar the Court from considering his petition, because it does not expressly mention the right to file a petition for a writ of *coram nobis* and, even if it covers *coram nobis*, it falls within a recognized exception within which a waiver is unenforceable. He argues that his collateral-attack waiver cannot be enforced because his conviction is illegal.

Collateral-attack waivers are "generally enforceable where the waiver is expressly stated in the plea agreement and where both the plea and the waiver were knowingly and voluntarily made." *United States v. Cockerham*, 237 F.3d 1179, 1183 (10th Cir. 2001). The same exceptions to appeal waivers apply to collateral-attack waivers. As a result, collateral-attack waivers preclude collateral attack when: (i) the dispute falls within the collateral-attack waiver's scope; (ii) the defendant knowingly and voluntarily waived his collateral-attack rights; and (iii)

enforcing the waiver would not result in a miscarriage of justice. A miscarriage of justice occurs when: (i) the district court relied on an impermissible factor, such as race; (ii) ineffective assistance of counsel in connection with the negotiation of the waiver renders the waiver invalid; (iii) the sentence exceeds the statutory maximum; or (iv) the waiver is otherwise unlawful.

Mr. Brown's collateral-attack waiver does not bar his *coram nobis* petition for two reasons. First, the collateral-attack waiver does not expressly include *coram nobis*. Mr. Brown brings his *coram nobis* petition under the All Writs Act, 28 U.S.C. §1651, and not under 28 U.S.C. § 2255. Moreover, courts must "indulge every reasonable presumption against waiver" of constitutional rights. *Johnson v. Zerbst*, 304 U.S. 458,, 464 (1938). Second, even if Mr. Brown's collateral-attack waiver includes *coram nobis*, enforcing it would result in a miscarriage of justice. In effect, he argues that he was tried, convicted and sentenced on the basis of uncharged conduct. Convicting someone for something that the law does not make criminal "inherently results in a complete miscarriage of justice" and "present[s] exceptional circumstances" that justify collateral relief.

Davis *v. United States*, 417 U.S. at 346. Federal courts' finality interests are "at their weakest" when a "conviction or sentence is in fact not authorized by substantive law." *Welch v. United States*, 578 U.S. 131

(2016). Moreover, *coram nobis* relief is available only when there has been a "complete miscarriage of justice." *Klein,* 880 F.2d at 253. Barring Mr. Brown from asserting that there was a complete miscarriage of justice would affect seriously the judicial proceedings' fairness, integrity, and public reputation. The collateral-attack waiver in his Plea Agreement, therefore, does not bar the *coram nobis* petition.

II. MR. BROWN IS ENTITLED TO A WRIT OF *CORAM NOBIS*

Mr. Brown argues that he is entitled to *coram nobis* relief, because the increase in his sentence on his conspiracy-to-distribute conviction, based on uncharged and unproven allegations, runs afoul of *United States v. Fanfan,* 542 U.S. 956 (2004), and *United States v. Booker,* 543 U.S.220 (2005). This to a fundamental error. A petitioner is entitled to *coram nobis* relief if he or she demonstrates: (i) a factual error in his original conviction; (ii) that was unknown at the time of trial; (iii) of a fundamentally unjust character which would have altered the outcome of the challenged proceeding had it been known; and (iv) that he was duly diligent in bringing his claim. *See Klein,* 880 F.2d at 253.

In his petition, Mr. Brown demonstrated both that this error is a fact issue in his conviction and sentence and that it was unknown to him at the time by reason of his lawyer's incompetence. These factual issues are directly relevant to the question whether to grant him a writ of *coram nobis*.

Mr. Brown was diligent in bringing his petition. To be entitled to the writ, he must demonstrate that he was duly diligent in bringing his claim. *See Morgan*, 346 U.S. at 512. Neither the Sixth Circuit nor the district court made any findings that he was duly diligent or was not duly diligent.

Actual innocence constitutes a valid reason for delay, if any unduly existed. *See Bousley v. United States*, 523 U.S. at 623 (noting that courts can review procedurally defaulted claims in collateral proceedings on actual innocence showings). An assertion of actual innocence overcomes otherwise procedurally defaulted collateral attacks. *Id.*

Mr. Brown recognizes that legal errors do not amount to actual innocence. *See United States v. Barajas-Diaz*, 313 F.3d 1242, 1248 (10th Cir. 2002). In *Barajas-Diaz*, 313 F.3d at 1245, the Tenth Circuit considered whether the defendant was entitled to a writ of habeas corpus under section 2255, because of the Supreme Court's subsequent decision in *United States v. Richardson*, 526 U.S. 813 (1999), where the Supreme

Court concluded that, to convict someone of a continuing criminal enterprise under 21 U.S.C. 848 (C), a jury "must unanimously agree not only that the defendant committed some 'continuing series of violations' but also that the defendant committed each of the individual 'violations' necessary to make up that 'continuing series.'" *United States v. Richardson*, 526 U.S. at 815. The defendant in *United States v. Barajas-Diaz* argued that *Richardson* was available to him on collateral attack and that he was actually innocent. *Id.* at 1248. The Tenth Circuit noted that, "[t]o the extent that a petitioner argues that his particular jury failed to find unanimously each of the predicate violations, his argument is for legal rather than actual or factual innocence, " but that, "[t]o the extent, however, that he argues that no reasonable jury could have found him guilty unanimously of three predicate violations on the evidence presented, he has advanced a claim of actual innocence."

CONCLUSION

Here, Mr. Brown asserts that he is actually innocent of possession of crack cocaine. Although *coram nobis* is an "extraordinary remedy" meant to correct errors of fact "only under circumstances compelling such action to achieve justice," *Morgan*, 346 U.S. at 511, it should be used in this case because its limited use is for correcting "extraordinary" "errors 'of the most fundamental character.'"

DATED: May 11, 2024

Mark Brown W.O.P

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