

24-6191

ORIGINAL

No. _____

In the
Supreme Court of the United States

FILED

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

DAVID GODWIN FRANK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

*On Petition for A Writ of Certiorari to the United
States Court of Appeals for the Tenth Circuit*

PETITION FOR A WRIT OF CERTIORARI

DAVID GODWIN FRANK

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QUESTION PRESENTED

Whether the Tenth Circuit's ruling, affirming the district court's decision denying Mr. Frank's petition for writ of error *coram nobis* on the ground that the delay in presenting his claim was not excused by his reasonable reliance on the misadvice of counsel – arguably rising to the level of ineffective assistance, as argued in the lower court – and instead constituted a lack of diligence, is irreconcilable with controlling precedent, and none of the alternative bases for affirmance were sufficient, such that this Court should remand to the United States Court of Appeals for the Tenth Circuit with instructions to reverse the denial of *coram nobis* relief?

PARTIES TO THE PROCEEDINGS

There are no parties to the proceeding other than those listed in the style of the case.

RELATED CASES

- *United States v. David Godwin Frank*, No. 2:08-cr-822, U.S. District Court for the District of Utah. Amended Criminal Judgment entered July 9, 2012. Judgment Denying *Coram Nobis* Relief entered Jan. 22, 2024.
- *David Godwin Frank v. United States*, No. 2:11-cv-334, U.S. District Court for the District of Utah. Order and Memorandum Decision entered Apr. 15, 2011.
- *David Godwin Frank v. United States*, No. 2:17-cv-598, U.S. District Court for the District of Utah. Order and Memorandum Decision entered May 25, 2017.
- *United States v. David Godwin Frank*, No. 24-4021, U.S. Court of Appeals for the Tenth Circuit. Order and Judgment Affirming Denial of *Coram Nobis* Relief entered Sept. 12, 2024.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED.....	i
PARTIES TO THE PROCEEDINGS	ii
RELATED CASES.....	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	2
CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED.....	3
STATEMENT OF THE CASE	4
A. Legal Background.....	4
B. Factual and Procedural Background.....	6
REASONS FOR GRANTING THE WRIT	9
CONCLUSION	14

INDEX OF APPENDICES

Appendix - A: Judgment of the United States Court of Appeals for the Tenth Circuit Affirming Denial of *Coram Nobis* Relief. Dated: Sept. 12, 2024 A1

Appendix - B: Order of the United States District Court for the District of Utah. Dated: Jan. 19, 2024 . A12

TABLE OF AUTHORITIES

CASES	Page(s)
<i>Carlisle v. United States</i> , 517 U.S. 416 (1996)	4
<i>Chaidez v. United States</i> , 568 U.S. 342 (2013)	5
<i>Gibson v. Klinger</i> , 232 F.3d 799 (10th Cir.2000)	12
<i>Klein v. United States</i> , 880 F.2d 250 (10th Cir.1989) . . .	9
<i>Leavitt v. Jane L.</i> , 518 U.S. 137 (1996)	13
<i>Maryland v. Dyson</i> , 527 U.S. 465 (1999)	13
<i>Murray v. Carrier</i> , 477 U.S. 478 (1986)	11
<i>Musacchio v. United States</i> , 577 U.S. 237 (2016)	12
<i>Rogers v. United States</i> , 91 F.3d 1388(10th Cir.1996)	11
<i>Schweiker v. Hansen</i> , 450 U.S. 785 (1981)	13
<i>United States v. Bass</i> , 536 U.S. 862 (2002)	13
<i>United States v. Cooper</i> , 956 F.2d 960(10th Cir.1992) .	12
<i>United States v. Denedo</i> , 556 U.S. 904 (2009)	4
<i>United States v. George</i> , 676 F.3d 249 (1st Cir.2012) . .	4

<i>United States v. Hirabayashi</i> , 828 F.2d 591 (9th Cir.1987)	11
<i>United States v. Kwan</i> , 407 F.3d 1005 (9th Cir.2005)	9, 10, 11
<i>United States v. Mayer</i> , 235 U.S. 55 (1914)	4
<i>United States v. Morgan</i> , 346 U.S. 502 (1954)	5, 6
<i>United States v. Riedl</i> , 496 F.3d 1003 (9th Cir.2007) .	10
<i>United States v. Sawyer</i> , 239 F.3d 31(1st Cir.2001)	4, 5
<i>Yang v. Archuleta</i> , 525 F.3d 925 (10th Cir.2008)	12

STATUTES AND OTHER AUTHORITIES

18 U.S.C. § 1001	6
18 U.S.C. § 1349	6
28 U.S.C. § 1254	2
28 U.S.C. § 1651	3, 6
28 U.S.C. § 2106	13
28 U.S.C. § 2255	5, 7, 8, 11, 12

OPINIONS BELOW

The Judgment of the United States Court of Appeals for the Tenth Circuit affirming denial of *coram nobis* relief is unpublished and may be found at USCA Case No. 24-4021; *United States of America v. David Godwin Frank* (Sept. 12, 2024) (*Appendix - A1*).

The Order of the United States District Court for the District of Utah denying *coram nobis* relief is unpublished and may be found at USDC Case No. 2:08-cr-822; *United States of America v. David Godwin Frank* (Jan. 22, 2024) (*Appendix - A12*).

STATEMENT OF JURISDICTION

The judgment affirming denial of *coram nobis* relief was issued on September 12, 2024. This petition is timely filed pursuant to Sup. Ct. R. 13. This Court's jurisdiction rests on 28 U.S.C. §1254(1).

**CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED**

This case involves a federal criminal defendant's constitutional rights under the Fifth and Sixth Amendments, which provide in pertinent part:

No person shall be ☐ deprived of life, liberty, or property, without due process of law...

In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense.

This case also involves the application of 28 U.S.C. § 1651 which provides:

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

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

STATEMENT OF THE CASE

A. Legal Background

Coram nobis has a long history as a remedy of last resort to correct errors and achieve justice, “tracing its roots to sixteenth century English common law.” *United States v. George*, 676 F.3d 249, 253 (1st Cir. 2012). “In American jurisprudence the precise contours of *coram nobis* have not been well defined,” but “[i]n English practice the office of the writ was to foster respect for judicial rulings by enabling the same court where the action was commenced and where the judgment was rendered to avoid the rigid strictures of judgment finality by correcting technical errors.” *United States v. Denedo*, 556 U.S. 904, 910 (2009) (internal quotation marks omitted).

“[I]n its modern iteration *coram nobis* is broader than its common-law predecessor.” *Id.* at 911. Like *habeas corpus*, the writ of error *coram nobis* was originally confined to cases where the tribunal lacked jurisdiction or where other errors rendered the proceeding invalid. *See United States v. Sawyer*, 239 F.3d 31, 37 (1st Cir. 2001). *Coram nobis* was available to correct “errors in matters of fact which [] were material to the validity and regularity of the legal proceeding itself; as where the defendant, being under age, appeared by attorney, or the plaintiff or defendant was a married woman at the time of commencing the suit, or died before verdict or interlocutory judgment.” *United States v. Mayer*, 235 U.S. 55, 68 (1914); *see also Carlisle v. United*

States, 517 U.S. 416, 429 (1996). But the scope of *coram nobis*—like that of *habeas corpus*—has been expanded to provide a remedy for a variety of constitutional errors or otherwise unjust verdicts. See *United States v. Morgan*, 346 U.S. 502, 507-08 (1954). *Coram nobis* can now be used to remedy “fundamental errors” in addition to “technical” ones. *Denedo*, 556 U.S. at 911.

Moreover, “[u]nlike a writ of *habeas corpus*, a writ of *coram nobis* is issued once the petitioner is no longer in custody.” *Sawyer*, 239 F.3d at 37. *Coram nobis* fills a narrow gap in federal criminal procedure. A convicted defendant “in custody” has a statutory right to petition to have a sentence or conviction vacated, set aside, or corrected. 28 U.S.C. § 2255. However, if the defendant has already served his sentence, there is no statutory basis to remedy the unlawful conviction. See *Chaidez v. United States*, 568 U.S. 342, 345 n.1 (2013). Recognizing this statutory gap, this Court held in *United States v. Morgan* that the common law writ of error *coram nobis* is available in such situations. See *Morgan*, 346 U.S. at 506-507.

The defendant in *Morgan* had previously pleaded guilty to a federal charge and was sentenced to a term of four years, which he served. 346 U.S. at 503-504. After his release from federal custody, he was convicted on a state charge and given an enhanced sentence as a second offender. *Id.* at 504. He then petitioned for a writ of error *coram nobis* to set aside the federal conviction on the ground that he had not been given access to a lawyer, in violation of his constitutional rights. *Id.* This Court held that the district court had the power, pursuant to the All

Writs Act, 28 U.S.C. § 1651(a), to consider and (if appropriate) grant the petition. *Morgan*, 346 U.S. at 506-07; see also *id.* at 512 (“As the power to remedy an invalid sentence exists, we think, respondent is entitled to an opportunity to attempt to show that his conviction was invalid.”).

Morgan thus confirmed that, even after a defendant’s sentence has been fully served, “federal courts should act in doing justice if the record makes plain a right to relief.” *Id.* at 505. As the Court explained: “Although the term has been served, the results of the conviction may persist. Subsequent convictions may carry heavier penalties, civil rights may be affected.” *Id.* at 512. “Continuation of litigation after final judgment” therefore “should be allowed through this extraordinary remedy,” where “circumstances compel[] such action to achieve justice.” *Id.* at 511.

B. Factual and Procedural Background

On December 11, 2008, Mr. Frank was charged with three counts of Bank Fraud in violation of 18 U.S.C. § 1344. [*Docket Entry (“DE”) #1* - *DE* refers to entries to the criminal docket in Case #2:08-cr-822 in the United States District Court for the District of Utah]. A superseding felony information, filed on January 27, 2010, charged Mr. Frank with one count of False Statement in violation of 18 U.S.C. § 1001. [*DE #28*]. Pursuant to a plea agreement, Mr. Frank pled guilty to Count One of the Information that same day. [*DE #29*]. On April 12, 2010, the district court sentenced Mr. Frank to four months in

the custody of the Federal Bureau of Prisons to be "completed in a work release program." [DE #35]. On June 27, 2011, Mr. Frank admitted to violations of supervised release, for which the district court sentenced him to six months imprisonment and 24 months supervised release. [DE #75, #76]. On August 3, 2011, the court denied Mr. Frank's motion to be released from custody and resentenced to home confinement. [DE #81].

On May 18, 2017, Mr. Frank filed a motion for relief from judgment based on similar statute of limitations and ineffective assistance of counsel claims as to those presented in his Petition for Writ of Error *Coram Nobis*. [DE #112]. On May 25, 2017, the district court construed Mr. Frank's motion for relief as a motion to vacate under 28 U.S.C. § 2255 and denied it for lack of jurisdiction, due to Mr. Frank no longer being a federal prisoner and due to untimeliness under the AEDPA. [DE #113].

On October 5, 2023, Mr. Frank filed a petition for writ of error *coram nobis* with supporting papers in the district court. [DE #115]. Mr. Frank argued that he had suffered a complete miscarriage of justice, and was deprived of both the effective assistance of counsel and due process warranting issuance of a writ of error *coram nobis*. *Id.* In support of his request for the writ, Mr. Frank showed that he had been allowed to enter a plea of guilty to an information that charged an offense outside the applicable statute of limitations. *Id.* Mr. Frank explained that such plea could not be considered knowing, intelligent or voluntary, and the advice of counsel to enter such plea constituted ineffective assistance of counsel in

violation of the Sixth Amendment. *Id.* Finally, Mr. Frank demonstrated that the plea and the resultant conviction and sentence constituted a complete miscarriage of justice and fundamental deprivation of his right to due process in violation of the Fifth Amendment. *Id.* Mr. Frank specifically requested that the district court grant the writ and set aside and vacate the conviction and sentence. *Id.*

On October 26, 2023, the United States filed its response in opposition, and on November 6, 2023, Mr. Frank's reply was docketed at the district court. [*DE* #117, #118].

On January 22, 2024, the district court denied Mr. Frank's petition for writ of error *coram nobis*, holding "Mr. Frank's substantial unjustified delay in bringing his petition constitutes a lack of due diligence and, therefore, disqualifies him from obtaining *coram nobis* relief. Accordingly, the district court DENIES Mr. Frank's petition for writ of error *coram nobis*." *Pet. App. A15*.

The Tenth Circuit affirmed the denial of Mr. Frank *coram nobis* petition based on unjustified delay. [*App. A, A1*]. They faulted Mr. Frank for failing to fully brief his former counsel's ineffective assistance and briefly discussed other bases upon which they believed Mr. Frank's petition could be denied, including procedural default, their view that relief could have been sought under Section 2255, and their assessment that Mr. Frank had failed to demonstrate a fundamental error warranting *coram nobis* relief. *Id.*, pp. 4-11.

REASONS FOR GRANTING THE WRIT

This Court should grant the writ of *certiorari*. At a minimum, this Court should order summary reversal because in affirming the lower court, the Tenth Circuit has so far departed from the accepted and usual course of judicial proceedings and sanctioned such a departure by the district court, as to call for an exercise of this Court's supervisory power. This is true because the district court abused its discretion in denying Mr. Frank's petition for writ of error *coram nobis* on grounds of delay and none of the alternative grounds offered by the Tenth Circuit provide a valid basis to affirm the district court's ruling.

Specifically, the lower court abused its discretion in holding that "Mr. Frank's substantial unjustified delay in bringing his petition constitutes a lack of due diligence and, therefore, disqualifies him from obtaining *coram nobis* relief." Although it is true that to be entitled to *coram nobis* relief, a petitioner must have exercised due diligence in seeking the writ, *Klein v. United States*, 880 F.2d 250, 254 (10th Cir. 1989), courts recognize that a petitioner's reasonable reliance on his prior counsel constitutes a valid reason for any delay in filing for *coram nobis* relief. See *United States v. Kwan*, 407 F.3d 1005, 1014 (9th Cir. 2005).

The record in the district court demonstrated that Mr. Frank's prior counsel in this case neglected to advise Mr. Frank of: 1) the availability and benefits of pursuing a statute of limitations defense to the information filed in this matter; 2) the possibility of filing a direct appeal on

grounds that the information was filed outside the statute of limitations; and 3) the reason for the statute of limitations, which is to protect a defendant's ability to adequately defend against charges which relate to alleged crimes which are remote in time. [DE #155, pp. 6-8]. Mr. Frank argued in the lower court that these omissions of counsel constituted ineffective assistance of counsel, and justified the many years delay in bringing a writ proceeding. *Id.* Further demonstrating Mr. Frank's diligence in pursuing relief on the underlying constitutional violations is the reality, also raised in the lower court, that when Mr. Frank learned of the statute of limitations defense, he unsuccessfully attempted to raise the issue with the district court, via a motion for relief from judgment. *Id.*

In *United States v. Kwan*, 407 F.3d 1005, 1014 (9th Cir. 2005), the petitioner delayed filing a *coram nobis* petition due to reliance upon the erroneous advice of his criminal defense counsel that there was "no serious possibility" that his conviction would cause him to be deported. The record here showed that the omission of Mr. Frank's counsel, in failing to provide his client with notice of the statute of limitations defense is the functional equivalent of the affirmative misadvice provide Mr. Kwan. Thus, the *Kwan* decision supported that Mr. Frank's delay in filing a *coram nobis* petition should have been excused by the district court and the decision to instead deny relief based on the delay constituted an abuse of discretion. See *United States v. Riedl*, 496 F.3d 1003, 1007 (9th Cir. 2007).

This Honorable Court should grant cert and affirm that the law does not require a petitioner to challenge his conviction at the earliest opportunity; it only requires him to have sound reasons for not doing so to be entitled to *coram nobis* relief. *See Kwan* at 1012-1013, *also United States v. Hirabayashi*, 828 F.2d 591, 605 (9th Cir. 1987).

This Honorable Court should not be dissuaded from acting in this matter by the various alternative grounds the Tenth Circuit suggested warranted affirming the district court's denial of *coram nobis* relief: that Mr. Frank procedurally defaulted the claim, that relief under §2255 was adequate and available to Mr. Frank, and that Mr. Frank failed to show a fundamental error resulting in a complete miscarriage of justice.

The record supports this Court rejecting each of the alternative grounds, none of which were cited in the district court's ruling. First, any procedural default which may have occurred is excused by Mr. Frank's showing of ineffective assistance of counsel. This Court has held that ineffective assistance of counsel within the meaning of the Sixth Amendment, as demonstrated by Mr. Frank in this case, constitutes an excuse for any procedural default. *See Murray v. Carrier*, 477 U.S. 478, 488, 106 S. Ct. 2639, 2645, 91 L. Ed. 2d 397 (1986); *see also Rogers v. United States*, 91 F.3d 1388, 1391 (10th Cir. 1996) ("An attorney's error provides cause to excuse a procedural default.").

Second, Mr. Frank never had an actual opportunity to pursue relief on his claim of ineffective assistance of counsel, via a timely motion to vacate under 28 U.S.C.

§2255, as he did not become aware of the basis for the claim until the statute of limitations to file a 28 U.S.C. § 2255 had run. Courts have consistently held that ignorance of the law – in this case the applicable statute of limitation for the underlying offense of conviction – does not provide a basis for equitable tolling of the one-year statute of limitations to file a motion under § 2255. *See Gibson v. Klinger*, 232 F.3d 799, 808 (10th Cir.2000); *Yang v. Archuleta*, 525 F.3d 925, 929–30 (10th Cir.2008). Thus, Mr. Frank did not have a reasonable opportunity to pursue the claim of ineffective assistance of counsel under § 2255.

Finally, pleading guilty to an offense where the statute of limitations has run, due to the ineffective assistance of counsel constitutes a complete miscarriage of justice. This is true because the ineffective assistance of counsel deprived Mr. Frank of a complete defense to the charge at the only time it constituted a complete defense; in the trial court. *Musacchio v. United States*, 577 U.S. 237 (2016); *See also United States v. Cooper*, 956 F.2d 960, 961 (10th Cir. 1992). In *Musacchio*, this Court addressed the failure to raise a statute of limitations defense in the trial court – exactly the failure which the ineffective assistance of counsel claim here is based upon – holding that "a statute-of-limitations defense becomes part of a case only if the defendant puts the defense in issue." *Id.*

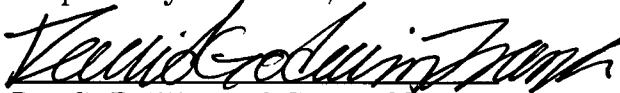
This Court has authority to "reverse any judgment" brought before it and "remand the cause and direct entry of such appropriate judgment . . . or require such further

proceedings to be had as may be just under the circumstances.” 28 U.S.C. § 2106. Summary reversals are “usually reserved by this Court for situations in which the law is well settled and stable, the facts are not in dispute, and the decision below is clearly in error.” *Schweiker v. Hansen*, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting); *see, e.g., United States v. Bass*, 536 U.S. 862, 864 (2002) (ordering summary reversal because the decision below was “contrary to” established law); *Maryland v. Dyson*, 527 U.S. 465, 467 (1999) (ordering summary reversal); *Leavitt v. Jane L.*, 518 U.S. 137, 145 (1996) (ordering summary reversal where the decision under review was “plainly wrong”). The Tenth Circuit’s affirmance of the district court’s denial of *coram nobis* relief is clearly wrong. This case warrants summary reversal.

CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of *certiorari* to the United States Court of Appeals for the Tenth Circuit, vacate the Tenth Circuit's order, and remand the case with instructions that they reverse the district court's denial of *coram nobis* relief.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "David Godwin Frank", written over a horizontal line.

Pro Se Petitioner & Secured Party

David Godwin Frank, a Living Man

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