

In the Supreme Court of the United States

DAVID GODWIN FRANK,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

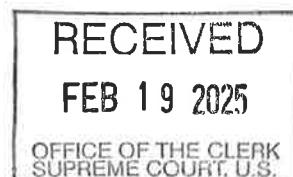
Respondent.

*Petition for Rehearing on
Writ of Certiorari to the
United States Court of
Appeals for the Tenth Circuit*

PETITION FOR REHEARING ON

WRIT OF CERTIORARI

DAVID GODWIN FRANK
Pro Se Petitioner-Appellant
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Mesa, Arizona [85204]
(801) 487-5000
Date: 2/13/2025



QUESTIONS PRESENTED

Whether a Jurisdictional defect, including a time-barred defective indictment, can be procedurally defaulted, despite the well-established principle that Jurisdictional defects may be raised at any time.

Whether the Tenth Circuit erred in affirming the district court's denial of Petitioner-Appellant's petition for a writ of error coram nobis on the grounds that his delay in filing was due to a lack of diligence, despite his reasonable reliance on misadvise of Counsel (Todd Utzinger, *Bar No.: 06047*)—potentially rising to the level of ineffective assistance as argued below—and whether this ruling conflicts with controlling precedent, warranting remand with instructions to grant coram nobis relief.

Whether the denial of Petitioner-Appellant's coram nobis petition violated fundamental constitutional protections, including his Sixth Amendment right to effective assistance of counsel, Fifth Amendment due process rights, and Fourteenth Amendment guarantee of equal protection.

Whether the circuit splits regarding the treatment of Jurisdictional defects and expired statutes of limitations warrants resolution by this Court to ensure uniform application of Federal law.

Whether the government, the Prosecutor (Lynda Rolston Krause, *Bar No.: 07433*), the district court and the Judge (Clark Waddoups, *Bar No.: 03975*) must prove that the Petitioner-Appellant intended to defraud a bank and expose it to risk of loss in every prosecution for bank fraud under 18 U.S.C. § 1344 of the Pre-Fraud Enforcement and Recovery Act (FERA) of May 20, 2009, without valid of *tolling*.

Comes now,

Petitioner-Appellant, David Godwin Frank, in good faith and not for delay respectfully moves this Honorable Court to reconsider its denial of his Petition for a Writ of Certiorari pursuant to Rule 44.2 of the Supreme Court of the United States. This request is based on jurisdictional defects, constitutional violations, and ineffective assistance of counsel, which render his conviction *void ab initio*.

Petitioner-Appellant, David Godwin Frank was indicted on December 11, 2008, for bank fraud under 18 U.S.C. § 1344, pre-Fraud Enforcement and Recovery Act (FERA) of May 20, 2009, governed by the five-year statute of limitations in 18 U.S.C. § 3282(a). The alleged offenses occurred on October 1, 2003; November 21, 2003; and December 8, 2003. The indictment was filed three (3) days after the statute of limitations expired on December 8, 2008. Petitioner-Appellant was convicted on April 12, 2010, and has since served his sentence, but collateral consequences persist.

The defective indictment, filed on December 11, 2008, was time-barred under 18 U.S.C. § 3282(a) and the pre-Fraud Enforcement and Recovery Act (FERA) of May 20, 2009, version of 18 U.S.C. § 1344. The district court and the Judge (Clark Waddoups, *Bar No.: 03975*), lacked subject-matter jurisdiction, and Petitioner-Appellant's conviction violates established legal precedent. Petitioner-Appellant filed multiple post-conviction motions,

including a writ of *coram nobis* in 2024, which the Tenth Circuit denied on September 12, 2024, citing lack of diligence and procedural default. This Court denied his petition for a writ of certiorari, prompting this petition for rehearing.

I. GROUNDS FOR REHEARING

a) Jurisdictional Defect: Time-Barred Indictment and Renders the Conviction Void

The indictment, filed on December 11, 2008, allegedly conduct occurring on October 1, 2003; November 21, 2003; and December 8, 2003. The applicable statute of limitations under pre-FERA 18 U.S.C. § 1344 of May 20, 2009, was five years, expiring in December 2008. This Court has consistently held that expired statutes of limitations deprive courts of jurisdiction (*United States v. Cotton*, 535 U.S. 625 (2002)), thus, holds that jurisdictional defects can be raised at any time, including post-conviction. As such, Petitioner-Appellant's conviction is void.

Furthermore, under *United States v. Oppenheimer*, 242 U.S. 85 (1916), a statute of limitations serves as a jurisdictional bar to prosecution. The expiration of the five-year limitations period under 18 U.S.C. § 3282(a) prior to the indictment deprived the district court of subject-matter jurisdiction, making Petitioner-Appellant's conviction void ab initio. The Supreme Court

in *Musacchio v. United States*, 577 U.S. 237 (2016), confirmed that the statute of limitations is a critical defense in criminal prosecutions.

Therefore, the pre-Fraud Enforcement and Recovery Act (FERA) of May 20, 2009, extended the limitations period to ten years but does not apply retroactively. therefore, the indictment was time-barred, and the conviction is void *ab initio* as indictment beyond the statute of limitations constitutes a fundamental jurisdictional error, justifying dismissal of the case.

b) Defective Indictment

The indictment on December 11, 2008, is facially defective because it failed to allege the intent to defraud as required under Pre-FERA of 20 May 2009. The defective indictment also lacks proof that the credit unions were Federally insured institutions. An indictment that does not allege an essential element fails to invoke Federal Jurisdiction. A valid indictment must allege every essential element of the charged offense. See *United States v. Keith*, 605 F.2d 462, 464 (9th Cir. 1979).

c) Ex Post Facto Protections (Article I, Section 9 and 10)

The retroactive application of FERA's ten-year statute of limitations violates the Ex Post Facto Clause. *Stogner v. California*, 539 U.S. 607 (2003), prohibits reviving time-barred prosecutions. The indictment was filed after the limitations period expired, and FERA's extension cannot be applied retroactively.

d) Refuting Any Statutory Basis for Tolling

The government has not established any valid tolling exceptions, such as fraudulent concealment, a continuing offense, or fugitivity. The statute of limitations expired without tolling, rendering the prosecution time barred.

e) Constitutional Violations

The prosecution of a time-barred offense violates fundamental due process rights under the Fifth and Fourteenth Amendments. Also, the ineffective assistance of counsel deprived Petitioner-Appellant of his Sixth Amendment rights as his trial counsel failed to assert the FERA's statute of limitations defense, as a jurisdictional defect that would have required dismissal under *Toussie v. United States*, 397 U.S. 112 (1970)

Counsel's failure to raise the jurisdictional defect constitutes ineffective assistance under *Strickland v. Washington*, 466 U.S. 668 (1984). Had Counsel (Todd Utzinger, Bar No.: 06047) raised this issue, the case would have been dismissed, preventing Petitioner-Appellant's wrongful conviction.

f) Ineffective Assistance of Counsel Warrants Coram Nobis Relief

Under *Strickland v. Washington*, 466 U.S. 668 (1984), Petitioner-Appellant was entitled to effective legal representation. His trial counsel's failure to assert the statute of limitations defense constitutes ineffective assistance, as no reasonable attorney would have overlooked this dispositive

argument. Failure to argue a statute of limitations defense constitutes ineffective assistance of counsel. See *O'Brien v. United States* (2023)

Ineffective assistance claims are recognized as grounds for *coram nobis* relief when the defendant is no longer in custody. See *People v. Turner*, 5 N.Y.3d 476 (2005), *People v. Syville*, 15 N.Y.3d 391 (2010). The Tenth Circuit's refusal to grant relief, despite clear evidence of a jurisdictional defect and ineffective counsel, conflicts with established precedent.

g) 42 U.S.C. § 1983 – Civil Rights Act (Section 1983)

Petitioner-Appellant's conviction, based on a time-barred indictment, violates his civil rights under 42 U.S.C. § 1983, including Fourth Amendment protections against unreasonable seizure and Fifth Amendment due process rights.

Had the Prosecutor (Lynda Rolston Krause, *Bar No.: 07433*), not been negligent to the egregious constitutional violations on the pre-indictment, there would not have been a case advancing Petitioner-Appellant's wrongful conviction under *United States v. Marion*, 404 U.S. 307 (1971).

h) Newly Discovered Information

Since the denial of certiorari, Petitioner-Appellant has obtained confirmed information and evidence that said credit unions involved were not federally insured at the time of the alleged fraud, eliminating federal

jurisdiction under 18 U.S.C. § 1344 (*United States v. Wells*, 519 U.S. 482 (1997)) a bank fraud conviction requires proof that the financial institution was Federally insured at the time of the alleged fraud.

The denial of certiorari was based on incorrect factual and legal assumptions, particularly regarding Jurisdiction and materiality of evidence in a bank fraud conviction. The government failed to provide conclusive proof of insurance for the credit unions involved. This crucial evidence further demonstrates that the conviction was obtained unlawfully.

i) Circuit Split on Procedural Default and Jurisdictional Claims

A circuit split exists regarding whether jurisdictional claims can be procedurally defaulted. The Sixth and Ninth Circuits allow jurisdictional challenges at any time, while others impose procedural bars. This inconsistency warrants resolution by this Court.

j) Manifest Error of Law and Fact in Denial of Certiorari

The denial of certiorari overlooked key jurisdictional and constitutional issues, including the time-barred indictment and ineffective assistance of counsel. Newly discovered evidence, such as the credit unions' lack of federal insurance at the time of the alleged fraud, further invalidates the conviction.

k) Coram Nobis Relief is Warranted

Petitioner-Appellant has no alternative legal recourse, making *coram nobis* relief necessary to rectify the fundamental jurisdictional error in his case. He has exhausted all available remedies, including direct appeal and *habeas corpus* relief. Since he is no longer in custody, *coram nobis* remains the sole avenue for redress.

The Supreme Court's ruling in *United States v. Morgan*, 346 U.S. 502 (1954), affirms that *coram nobis* is appropriate when a petitioner is no longer in custody and the conviction is fundamentally flawed.

Petitioner-Appellant satisfies the requirements for *coram nobis* relief, as his conviction is void due to jurisdictional defects and constitutional violations, leaving no other remedy available.

I) Fundamental Error: Jurisdictional Defect and Constitutional Violations

Petitioner-Appellant's conviction is fundamentally flawed due to the time-barred indictment, which deprived the district court of subject-matter jurisdiction. *United States v. Cotton*, 535 U.S. 625, 630 (2002) (holding that jurisdictional defects can be raised at any time).

Additionally, the prosecution violated Petitioner-Appellant's Fifth Amendment due process rights and Sixth Amendment right to effective assistance of counsel per *Strickland v. Washington*, 466 U.S. 668, 687 (1984)

The Supreme Court has consistently held that convictions obtained without jurisdiction are void *ab initio* under *United States v. Cook*, 84 U.S. 168, 178 (1872). The expiration of the statute of limitations is a jurisdictional bar, and the failure to dismiss the indictment constitutes a fundamental error under *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 134 (2008).

m) Miscarriage of Justice.

A miscarriage of justice exception exists where a person is wrongfully convicted due to an unconstitutional or jurisdictionally defective process. In *Schlup v. Delo*, 513 U.S. 298 (1995), this Court held that procedural bars must yield where a fundamental miscarriage of justice is demonstrated.

n) Sound Reasons for Delay

The delay in seeking *coram nobis* relief is excusable due to Petitioner-Appellant's reliance on the misadvice of counsel and the discovery of new evidence. *Murray v. Carrier*, 477 U.S. 478, 488 (1986) (holding that ineffective assistance of counsel can excuse procedural default). The Tenth Circuit's denial of relief based on lack of diligence ignores this principle and conflicts with Supreme Court precedent.

**II. EXCEPTIONAL CIRCUMSTANCES WARRANT SUPREME COURT
REVIEW**

Petitioner-Appellant continues to suffer collateral consequences from his wrongful conviction, including loss of employment, reputational damage, and financial harm. This Court must act to correct this miscarriage of justice. The Tenth Circuit's Ruling Conflicts with Supreme Court Precedent.

Petitioner-Appellant's attorney (Todd Utzinger, *Bar No.: 06047*) failure to raise a jurisdictional defect—a non-waivable issue—amounted to ineffective assistance. The Tenth Circuit's ruling ignores this principle, wrongly attributing the delay to lack of diligence rather than recognizing that Petitioner-Appellant was misled by ineffective counsel.

By denying relief based on an alleged lack of diligence, the Tenth Circuit failed to apply controlling precedent regarding ineffective assistance as cause to excuse procedural delay. Given that Supreme Court jurisprudence holds that:

- I. Ineffective assistance of counsel excuses procedural default (*Strickland v. Washington*);
- II. Jurisdictional defects may be raised at any time (*United States v. Cotton*, 535 U.S. 625 (2002));
- III. Petitioner-Appellant's Sixth Amendment claim has merit as he demonstrated the ineffective assistance of counsel that resulted in a fundamental injustice.
- IV. Petitioner-Appellant's Fifth Amendment lack of due process demonstrates unfairness or procedural errors in this case.

- V. Petitioner-Appellant's has shown discriminatory treatment or unfair procedural disparities under the Fourteenth Amendment equal protection claim
- VI. Petitioner-Appellant's must be awarded damages under § 1983 as wrongful conduct by government actors is demonstrated.
- VII. Petitioner-Appellant's coram nobis petition demonstrates ineffective assistance from counsel, due process violations, equal protection violations, Constitutional Violations under the First, Second, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Thirteenth, Fourteenth, Fifteenth and the Twenty-Sixth Amendments of the United States Constitution.

The denial of coram nobis relief in this case constitutes a manifest error of law and fact. This Court should vacate and reverse the denial of coram nobis relief and remand with instructions that the Tenth Circuit apply the correct legal standard, recognizing that ineffective assistance of counsel excuse any delay in seeking relief. To hold otherwise would contradict established Supreme Court precedent and result in a miscarriage of justice.

This issue warrants the Supreme Court review based on the fact that the Tenth Circuit's ruling is irreconcilable with controlling precedent on ineffective assistance and due diligence in post-conviction relief. The Court must remand with instructions to reverse since the lower court misapplied precedent.

III. RELIEF UNDER 28 U.S.C. § 1651 (THE ALL-WRITS ACT)

This Court has the authority under the All-Writs Act, 28 U.S.C. § 1651, to issue extraordinary writs to correct jurisdictional errors. A writ of *coram nobis* or mandamus is appropriate to vacate Petitioner-Appellant's void conviction. The Supreme Court in *United States v. Morgan*, 346 U.S. 502 (1954), established that *coram nobis* relief is available when a conviction is fundamentally invalid.

Writ of Mandamus – The Supreme Court has the power to direct lower Courts to vacate judgments obtained in violation of Jurisdictional limits. See *Ex parte Peru*, 318 U.S. 578 (1943). The Petitioner-Appellant respectfully requests this Court exercise its discretion under 28 U.S.C. § 1651(a) to issue an appropriate writ vacating the void conviction and restoring his constitutional rights.

IV. CONCLUSION

This Court must act to correct this miscarriage of justice and restore the Petitioner-Appellant's rights. This Court has historically granted reconsideration where collateral consequences persist from a wrongful conviction via *Gideon v. Wainwright*, 372 U.S. 335 (1963). Given the clear legal and factual errors in Petitioner's conviction, the interests of justice demand review.

Petitioner-Appellant's case presents a compelling basis for *coram nobis* relief under *United States v. Riedl*, 496 F.3d 1003 (9th Cir. 2007). The

time-barred indictment deprived the court of jurisdiction, and the prosecution violated his constitutional rights under *United States v. Marion*, 404 U.S. 307 (1971).

The Supreme Court and lower courts have consistently granted *coram nobis* relief in similar circumstances under *Alikhani v. United States*, 200 F.3d 732 (11th Cir. 2000). This Court should vacate Petitioner-Appellant's conviction and grant the requested relief under *United States v. Denedo*, 556 U.S. 904 (2009).

For the foregoing reasons, the Petitioner-Appellant's respectfully requests that this Court grant rehearing and issue a writ of certiorari to review the decision of the Tenth Circuit. Petitioner-Appellant's conviction is void due to an expired statute of limitations and ineffective assistance from the counsel. This Court's intervention is necessary to correct a fundamental miscarriage of justice and uphold the rule of law.

V. REQUEST FOR RELIEF

WHEREFORE, Petitioner-Appellant respectfully prays that this Honorable Court:

1. GRANT rehearing of the denial of the Writ of Certiorari.
2. VACATE the conviction due to jurisdictional defects, constitutional violations, and ineffective assistance of counsel.
3. DISMISS the indictment for lack of jurisdiction.
4. Issue a writ of *coram nobis* or mandamus under 28 U.S.C. § 1651.
5. GRANT such other relief as this Court deems just and proper.

VI. SUBMISSION

Petitioner-Appellant, David Godwin Frank, respectfully submits this petition for rehearing on writ of certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit, which denied his petition for a writ of certiorari on September 12, 2024.

Petitioner-Appellant asserts that his conviction for bank fraud under 18 U.S.C. § 1344 is void due to a jurisdictional defect, as the indictment was filed outside the five-year statute of limitations prescribed by 18 U.S.C. § 3282(a), prior to the pre-Fraud Enforcement and Recovery Act (pre-FERA) of May 20, 2009, which extended the limitations period but does not apply retroactively.

Additionally, ineffective assistance from the counsel resulted in the failure to raise this dispositive defense, thereby violating Petitioner-Appellant's constitutional rights. Petitioner-Appellant, David Godwin Frank, hereby certifies that this Petition for Rehearing is presented in good faith and not for delay, and is true on the foregoing.

Respectfully,



David Godwin Frank, *Pro Se Petitioner-Appellant-Lessor*
c/o 2929 East Broadway Road, No.: 93, Mesa, Arizona [85204]
(801) 487-5000 | Dated: 2/13/2025

VII. CERTIFICATE OF SERVICE

I hereby certify that on 2/13/2025, a true and correct copy of the foregoing was served upon:

The Solicitor General of the United States of America, Department of Justice,
950 Pennsylvania Ave., N.W., Room 5614, Washington, D.C. 20530;

And,

The United States of America, Office of the United States Attorney for the District of Utah, 111 South Main Street, Suite 1800, Salt Lake City, Utah 84111-2176.

Via US mail.



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