APPENDIX

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APPENDIX A

23-6528-cr
United States v. Stenger

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007 IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 28th day of June, two thousand twenty-four.

PRESENT:

JOSEPH F. BIANCO,
MYRNA PÉREZ,
ALISON J. NATHAN,
Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

v.

23-6528

WILLIAM STENGER,

Defendant-Appellant.*

FOR APPELLEE:	NICOLE P. CATE, Assistant United States Attorney (Gregory L. Waples, Assistant United States Attorney, *on the brief*), *for* Nikolas P. Kerest, United States Attorney for the District of Vermont, Burlington, Vermont.
FOR DEFENDANT-APPELLANT:	DAVID J. WILLIAMS (Brooks G. McArthur, *on the brief*), Gravel & Shea PC, Burlington, Vermont.

Appeal from an order of the United States District Court for the District of Vermont (Geoffrey W. Crawford, *Chief Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that

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* The Clerk of Court is respectfully directed to amend the caption as displayed above.

the order of the district court, entered on May 15, 2023, is **AFFIRMED**.

Defendant-Appellant William Stenger appeals from the district court's order denying his petition for a writ of *coram nobis*, which sought to strike the restitution order previously imposed in April 2022 as part of the judgment in his criminal case. We assume the parties' familiarity with the underlying facts, procedural history, and issues on appeal, to which we refer only as necessary to explain our decision to affirm.

Stenger pled guilty, pursuant to a written plea agreement, to one count of making a false statement, in violation of 18 U.S.C. § 1001. The charge arose from written materials that Stenger submitted to Vermont state regulators in January 2015 in connection with the AnC Vermont EB-5 project (the "AnC project"). Specifically, he submitted false information related to the AnC project's financial projections and an unreliable commercialization timeline that omitted the project's need to obtain approval from the United States Food and Drug Administration. The AnC project involved a plan to construct and operate a biotechnology facility in Newport, Vermont, and the government alleged that Stenger was responsible for raising over $80 million from AnC investors. The government further alleged that Stenger and his co-conspirators participated in a fraudulent scheme, in connection with the AnC project, in which they misused investor funds and lied about revenue and job creation for the project. Relevant here, the main dispute at Stenger's sentencing was the issue of restitution. After receiving detailed written submissions from the parties and conducting an evidentiary hearing, the district court ordered Stenger

to pay restitution to thirty-six investors in the amount of $250,000, for funds invested in the AnC project after the date of Stenger's false statements to the state regulators in January 2015.

Stenger did not appeal the restitution order. However, on April 13, 2023, Stenger filed a *coram nobis* petition, under 28 U.S.C. § 1651(a), seeking to vacate the restitution order. Stenger's petition argues that the proximate cause of the investor losses covered by the restitution order was not his or his co-defendants' false statements in January 2015 to state regulators, but rather an April 2015 decision by Commissioner Susan Donegan of the Vermont Department of Financial Regulation ("DFR") to lift a hold on AnC project marketing that allowed Stenger to obtain those funds from the investors.[1] Although Stenger raised this precise argument at his sentencing, he argues in his *coram nobis* petition that two internal DFR memos further support his position. These memos, written in February 2015 by Christopher Smith, DFR's Director of Capital Markets (the "Smith Memos")—which the government provided to Stenger's counsel on August 30, 2019, more than two

[1] After learning about an investigation by the United States Securities and Exchange Commission ("SEC") into the AnC project and other EB-5 investment projects in Vermont, the Vermont Agency of Commerce and Community Development placed a hold on the marketing of the AnC project while state regulators conducted their own investigation. In April 2015, after the DFR assumed control over the investigation, Commissioner Donegan lifted the hold. During the evidentiary hearing at sentencing, Commissioner Donegan testified that Stenger's false statements to state regulators regarding job creation were material to her decision to lift the hold.

years before the sentencing hearing—describe calls between DFR and SEC employees regarding suspicions of fraud surrounding EB-5 projects in Vermont, including the AnC project. Stenger claims the Smith Memos demonstrate that Commissioner Donegan knew about the concerns with the AnC project by April 2015 but lifted the hold nonetheless, and thus the proximate cause of the victims' losses was *her* decision to lift the hold, rather than Stenger's false statements to state regulators from January 2015.

The district court denied Stenger's petition, articulating the legal standard for *coram nobis* relief and explaining why Stenger had failed to meet that high standard. In particular, after conducting that analysis, the district court concluded:

> The defendant has failed to meet his burden of demonstrating extraordinary circumstances leading to a fundamental error in the prior criminal proceedings. The information on which he relies to justify the timing of his motion more than a year after the sentencing hearing has been in his attorneys' possession for more than three years. The issues which he seeks to raise were also raised at the sentencing hearing itself. For these reasons, the court denies the petition for writ of coram nobis.

Joint App'x at 814 (emphasis omitted). This appeal followed.

The All Writs Act permits federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). A district court has authority to issue a writ of *coram nobis* in

"extraordinary circumstances." *See Foont v. United States*, 93 F.3d 76, 78 (2d Cir. 1996) (internal quotation marks and citation omitted). The writ serves as a remedy of last resort, and the Supreme Court has suggested more than once that "it is difficult to conceive of a situation in a federal criminal case today where a writ of *coram nobis* would be necessary or appropriate." *E.g.*, *Carlisle v. United States*, 517 U.S. 416, 429 (1996) (alteration adopted) (citation omitted). To obtain *coram nobis* relief, a petitioner must demonstrate that "(1) there are circumstances compelling such action to achieve justice, (2) sound reasons exist for failure to seek appropriate earlier relief, and (3) the petitioner continues to suffer legal consequences from his conviction that may be remedied by granting of the writ." *United States v. Rutigliano*, 887 F.3d 98, 108 (2d Cir. 2018) (internal quotation marks and citation omitted). "[W]e review *de novo* the question of whether a district judge applied the proper legal standard, but review the judge's ultimate decision to deny the writ for abuse of discretion." *United States v. Mandanici*, 205 F.3d 519, 524 (2d Cir. 2000). "A district court has abused its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence or rendered a decision that cannot be located within the range of permissible decisions." *Sims v. Blot*, 534 F.3d 117, 132 (2d Cir. 2008) (alteration adopted) (internal quotation marks and citations omitted).

Stenger does not contend that the district court applied the incorrect legal standard for *coram nobis* relief, but rather argues that the district court abused its discretion in denying his petition because: (1) "[t]he

Smith memos detailing the SEC's specific warning to DRF [sic] officials, who reported directly to Commissioner Donegan, prove that Donegan misled the district court when she claimed that she was unaware in March 2015 that the job projections and FDA timeline submitted to state regulators in January 2015 were not reliable," Appellant's Br. at 26–27 (footnote omitted); and (2) "Commissioner Donegan's decision to lift the hold on further investment in the AnC Bio VT project was an efficient intervening cause of investor losses after April 2015," such that Stenger's false statements were not the proximate cause of those losses, *id*. at 28. We find Stenger's arguments unpersuasive.[2]

The district court did not abuse its discretion by concluding that Stenger failed to satisfy the first

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[2] In rejecting Stenger's claims on the merits, we assume, without deciding, that a writ of *coram nobis* is available to challenge a noncustodial component of a sentence, including a restitution order. Although Stenger suggests that we must decide this threshold jurisdictional issue before reaching the substance of his petition, we disagree. It is well settled that where the jurisdictional issue is statutory in nature—as it is here, under the All Writs Act—we may assume hypothetical jurisdiction and address the substance of claims that are plainly without merit. *See Springfield Hosp., Inc. v. Guzman*, 28 F.4th 403, 416 (2d Cir. 2022) ("When a jurisdictional issue is statutory in nature, we are not required to follow a strict order of operations but instead may proceed to dismiss the case on the merits rather than engage with the jurisdictional question, particularly when the jurisdictional issue is complex and the merits are straightforward."); *see also Rutigliano*, 887 F.3d at 108 ("[W]e need not decide if, or when, coram nobis might be invoked collaterally to challenge the restitution component of a criminal sentence because, even assuming [the petitioner] could do so here, her claim would necessarily fail on the merits.").

requirement for *coram nobis* relief, namely, that extraordinary circumstances require vacating the restitution order to achieve justice. *Rutigliano*, 887 F.3d at 108. Stenger's petition raises the same proximate cause argument that he made at sentencing, which the district court considered and rejected after an evidentiary hearing. *See* Joint App'x at 354 (finding, at sentencing, that "the proximate cause link is there between the . . . false statements, the false assurances in the January letter and the decision of the agency to allow the investment to come back on the . . . market").

Stenger's contention that the Smith Memos defeat proximate cause by proving that Commissioner Donegan was aware of the SEC's suspicions regarding the AnC project and thus should not have lifted the hold on additional investments after April 2015 does not warrant *coram nobis* relief. The district court already assumed at sentencing that the DFR's decision to allow the AnC project back onto the market was a proximate cause of investor losses and still rejected Stenger's argument that the DFR's actions superseded Stenger's conduct. Specifically, the district court accepted that "there were sufficient . . . red flags and warning signs that the regulatory agency and the State should not have allowed the investment to . . . be marketed again in April of 2015 and, . . . had that permission not been granted, these 36 people would not have become involved in the . . . fraudulent investment." *Id.* at 354. However, the court explained there are "multiple proximate causes" and even though DFR's lifting of the hold was a proximate cause, he was "satisfied that the proof on the proximate cause of [Stenger's] letter of January of 2015 standing alone

is . . . sufficient to support a restitution award." *Id*. at 355–56. As the district court reiterated in denying the *coram nobis* petition, "[t]here were certainly other causes for the spectacular failure of the An[C] Bio investments, including the misuse of investor funds and the absence of customers or products for the proposed research facility, but the existence of these other causes does not relieve Mr. Stenger from liability under 18 U.S.C. § 3663." *Id*. at 814.

The district court's restitution analysis at sentencing was supported by case precedent; indeed, Stenger did not appeal the imposition of the restitution order based on that legal conclusion. *See Staub v. Proctor Hosp.*, 562 U.S. 411, 420 (2011) (noting that "it is common for injuries to have multiple proximate causes"); *see also United States v. Calderon*, 944 F.3d 72, 95 (2d Cir. 2019). In short, because the district court accepted, for purposes of the argument, that DFR was aware of suspicions of fraud regarding the AnC project and that its decision to lift the hold was one of the proximate causes of the losses, Stenger failed to demonstrate that any injustice would result from the district court's denial of his *coram nobis* petition that merely presents additional information supporting DFR's awareness of the same suspicions. Therefore, the district court did not abuse its discretion in denying the petition. *See Denedo*, 556 U.S. at 916 (emphasizing that the writ of *coram nobis* should only be used in "extreme cases"); *see also Foont*, 93 F.3d at 78 (holding that the writ of *coram nobis* should be used where the errors made were so fundamental that they render "the proceeding itself irregular and invalid" (citation omitted)).

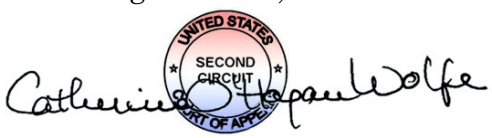
In any event, the district court did not abuse its discretion by alternatively concluding that Stenger had not demonstrated sound reasons that excused his failure to raise these arguments regarding the Smith Memos at his sentencing. A petition for *coram nobis* must be dismissed if the district court finds "that there was not sufficient justification for the petitioner's failure to seek relief at an earlier time[.]" *Foont*, 93 F.3d at 80 (alteration adopted) (quoting *Nicks v. United States*, 955 F.2d 161, 167–68 (2d Cir. 1992)). "A district court considering the timeliness of a petition for a writ of error coram nobis must decide the issue in light of the circumstances of the individual case." *Id.* at 79. Stenger chose not to appeal the restitution order and, instead, petitioned for this writ one year later. However, as the district court noted and Stenger concedes, the Smith Memos were in his attorneys' possession for more than two years before his sentencing. Thus, at the evidentiary hearing, Stenger had the opportunity to use these memos to cross-examine Commissioner Donegan regarding her testimony about lifting the hold, or otherwise bring those memos to the district court's attention. Stenger failed to do so. That Stenger may not have located the Smith Memos in the discovery in time for the evidentiary hearing is not sufficient to excuse his failure to use that evidence then. Allowing Stenger to seek *coram nobis* despite his unjustified delays would infringe upon the government's interest in the finality of convictions. *See id.* at 80. The district court, therefore, did not abuse its discretion in finding that Stenger's failure to have previously used this evidence separately precluded *coram nobis* relief.

* * *

We have considered Stenger's remaining arguments and find them to be without merit.

Accordingly, we **AFFIRM** the order of the district court.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court



APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 27th day of [September], two thousand twenty-four.

United States of America,

Appellee,

v.

William Stenger,

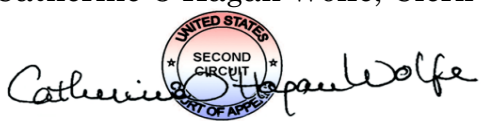
Defendant - Appellant.

ORDER
Docket No: 23-6528

Appellant William Stenger filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk



APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

UNITED STATES OF AMERICA	)	
	)	
v.	)	Case No. 5:19-cr-76-4
	)	
WILLIAM STENGER,	)	
	)	
Defendant.	)	

U.S. DISTRICT COURT
DISTRICT OF VERMONT
FILED
2023 MAY 15 PM 2:10
CLERK
BY

ORDER ON PETITION FOR WRIT OF CORAM NOBIS
(Doc. 470)

Defendant William Stenger has filed a motion under 28 U.S.C. § 1651 asking the court to grant relief under a writ of coram nobis and to strike the $250,000 restitution order imposed as part of the judgment in this case. (Doc. 470.) The Government opposes the petition (Doc. 471) and Mr. Stenger has filed a reply (Doc. 472). The court denies the petition for the reasons stated below.

Background

In May 2019, William Stenger was indicted on multiple counts of conspiracy (Count 1), wire fraud (Counts 2-7) and making a false statement (Counts 10, 13 and 14). In August 2021, Mr. Stenger pled guilty to Count 14—a charge of making a false statement in violation of 18 U.S.C. §1001. At the change-of-plea hearing, counsel for both sides requested an opportunity to present extensive evidence concerning the scope of relevant conduct at the sentencing hearing. (Tr. of 8/6/21 hr'g, Doc. 6 at 12.) The court agreed to this procedure and scheduled a two-week hearing in October 2021. (Doc. 358.) In preparation for the hearing, the Government filed a comprehensive memorandum supported by 207 exhibits drawn from the voluminous documentation of the Jay Peak/AnC Bio fraud. (Doc. 372.)

On October 4, 2021, the parties filed a "Joint Stipulation Regarding Relevant Conduct." (Doc. 384.) Both sides agreed that the evidentiary hearing was no longer necessary. The Government agreed that it would not rely on portions of its sentencing memorandum concerning conduct before 2011 and adjusted language about the absence of an audit in 2012. Mr. Stenger agreed "that he will not dispute or object to the facts set forth in the remainder of the [Government's] Brief." (Doc. 384.)

The sentencing hearing occurred on April 24, 2022. The only area of dispute between the parties (other than the length of the sentence) was the issue of restitution. Count 14 concerned a false written statement by Mr. Stenger to a state regulator concerning the generation of new jobs through the

AnC Bio project. The statement was dated January 9, 2015. The Government's claim for restitution addressed losses by 36 investors who invested in the project after the date of the false statement. Each victim has already been repaid the principal amount of their investment ($500,000) by a financial institution which provided services to Mr. Quiros and the AnC Bio entities. The remaining loss is the administrative fee of approximately $50,000 which each investor paid to AnC Bio as a condition of participating in the EB-5 program. The undisputed amount of this loss was $1,664,928. (Sentencing Tr., Doc. 445 at 14.)

At the sentencing hearing, the defense called Susan Donegan, former Commissioner of the Vermont Department of Financial Regulation ("DFR"), as a witness. Commissioner Donegan testified that in summer 2014, Secretary of Commerce and Community Development Moulton placed a hold on the sale of EB-5 investments in the AnC Bio and Burke Hotel projects while state regulators reviewed the project. DFR conducted a review during the spring of 2015. In March 2015, Commissioner Donegan attended a meeting with the governor and the principals in AnC Bio. The principals advocated for an end to the hold on the investments.

In April 2015, Commissioner Donegan lifted the hold, approving the resumption of sales of the investment subject to conditions negotiated with counsel for AnC Bio and the Burke Hotel project. DFR's investigation of potential fraud continued, leading to the drafting of a civil enforcement complaint in June 2015. The complaint was never filed, and sales of the Anc Bio investment continued until the

SEC filed a civil complaint in 2016. On cross-examination Commissioner Donegan testified that Mr. Stenger's statement to her about future job creation—the false statement alleged in Count 14 of the indictment—was material to her decision to release the hold on the AnC Bio investment. (Doc. 445 at 68–69.)[1]

At the sentencing hearing, defense counsel denied that Mr. Stenger's statement in January 2015 was a proximate cause of the investors' loss. The defense argued that the state regulators' decision to reopen the marketing of the AnC Bio private placement investments in spring 2015 was the only proximate cause of the loss. The defense sought to pin responsibility for the investor's loss on the actions of the state regulators. "[The defense] position is that the Count 14 statements made in January of 2015 . . . are not the proximate cause of [the victims'] loss, and it is a technical legal issue." (Doc. 445 at 16.) The Government disagreed, stating:

> Our position is that the [pre-sentence report] makes clear that Mr. Stenger's misrepresentations in January were related to job creation and that whatever the [Department of Financial Regulation] or the State's concerns about where the money was going, a totally independent reason that this project got approved was the defendant's misstatements to the

[1] The details of the false employment projections go back to false job figures originally developed by Mr. Stenger in 2012 that were supplied to the Agency of Commerce and Community Development in a consultant's report in 2014 and endorsed by Mr. Stenger in a letter to Ms. Donegan in January 2015. (Doc.

> regulators to get the PPM, the Private Placement Memorandum, approved and that was based on these lies.

(Doc. 445 at 20.)

On this record, the court rejected Mr. Stenger's contention that the sole proximate cause of the investors' loss was the decision by DFR to allow marketing of the AnC Bio to resume in April 2015. The court concluded that "the proximate cause link is there between the false statements, the false assurances in the January letter and the decision of the agency to allow the investment to come back on the market." (Doc. 445 at 101.) The court accepted for purposes of argument the truth of Mr. Stenger's argument that

> there were sufficient . . . red flags and warning signs that the regulatory agency and the State should not have allowed the investment to be marketed again in April of 2015 and, had that permission not been granted, these 36 people would not have become involved in the fraudulent investment.

(Doc. 445 at 101.) Relying on the principles identified in *United States v. Calderon*, 944 F.3d 72 (2d Cir. 2019), the court ruled that the false statement to which Mr. Stenger admitted at the time of his guilty plea was a sufficient proximate cause to support a restitution order even if there were other causes at play. (Doc. 445 at 103.) The court reduced the restitution amount from $1.6 million in light of Mr. Stenger's limited work capacity and health restrictions and ordered restitution in the amount of $250,000. There was no appeal.

ANALYSIS

The writ of coram nobis developed in the English common law courts of the 16th century as a means of correcting "errors of fact not appearing on the record that would have precluded the court's judgment had the court known of the error when it rendered judgment." Brendan W. Randall, *Comment: United States v. Cooper: The writ of Error Coram Nobis and the Morgan Footnote Paradox*, 74 Minn. L. Rev. 1063, 1066 (1990). The writ entered American law through operation of the all-writs section of the Judiciary Act of 1789 that continues to preserve the traditional writs in federal practice. 28 U.S.C. § 1651(a). In *United States v. Morgan*, 346 U.S. 502 (1954), the Supreme Court approved the continued viability of coram nobis in criminal cases, holding that the remedy permits the correction of fundamental errors in a criminal judgment when appeal or collateral review through 28 U.S.C. § 2255 are not available.[2]

In considering a motion for relief in the manner of coram nobis, the court presumes that the prior proceedings were correct. The defendant bears the burden of proving:

- That extraordinary circumstances are present compelling such action to correct a fundamental error; and

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[2] As noted above, there was no appeal in this case. Mr. Stenger cannot rely on § 2255 to challenge the restitution order because a collateral attack under that section is limited to a "claimed right of relief from 'custody.'" *Al-'Owhali v. United States*, 36 F.4th 461, 467 (2d Cir. 2022) (quoting *Duka v. United States*, 27 F.4th 189, 195 (3d Cir. 2022)). Relief from a restitution order cannot itself serve as a basis for collateral relief. *Id.*

- Sound reasons exists for failure to seek appropriate earlier relief.

Nicks v. United States, 955 F.2d 161 (2d Cir. 1992); *United States v. Foont*, 93 F.3d 76 (2d Cir. 1996). In this case, the claim falls short of both standards.

There is no showing of extraordinary circumstances. At the sentencing hearing, Mr. Stenger sought to demonstrate to the court that he was the unwitting victim of Mr. Quiros and the state regulators. The court disagreed with his position and included a restitution obligation in the final judgment, creating an opportunity for him to seek relief on appeal. He chose not to appeal—effectively conceding that there was no error in the sentence or at least none that he was prepared to pursue.

Mr. Stenger does not claim that he was denied any procedural rights in the course of the sentencing. He continues to take a different view of the facts than the court regarding the harm caused by the crime to which he pled guilty. At sentencing, the court was aided by the sentencing memorandum filed by the Government. Mr. Stenger stipulated that "for purposes of [Mr.] Stenger's sentencing, the Court may rely on the facts alleged in the Government's Brief Regarding William Stenger's Relevant Conduct" with exceptions not relevant here. (Doc. 384.)

The Government's memorandum devotes almost 30 pages to a searching analysis of Mr. Stenger's role in developing and forwarding false estimates of job creation based on false estimates of revenue and other indicators of future success. (Doc. 372 at 9–38.) These false estimates culminated in his January 9, 2015 letter to ACCD Commissioner Moulton. (Doc. 372-49.)

The memorandum's account of Mr. Stenger's conduct supports the court's sentencing decision that the false statement was itself a proximate cause of the investors' loss because an honest appraisal of the prospects of the AnC Bio enterprise would have shown that the enterprise was a fraud that could not generate revenue or create new jobs in the future. That the court ruled against Mr. Stenger on this issue after a contested sentencing hearing does not qualify as a fundamental error in his sentence.

There is also no showing that the late discovery of two documents concerning the DFR investigation presents issues that excuse the defendant from raising the issue previously. The coram nobis petition identifies two newly discovered documents concerning the growing concern among state regulators in 2015 that AnC Bio and related projects might be corrupt. The Government has provided a discovery log that demonstrates that the documents were turned over to the defense on three separate occasions beginning in the summer of 2019. In its reply, the defense states that although counsel received the documents, it did not appreciate their relevance. "Had they found those memos, defense counsel would have brought these memos to the attention of the Court in their Memorandum Re: Restitution, Doc. 421, and offered them as exhibits at the sentencing hearing." (Doc. 472 at 5.)

Despite overlooking the two documents, defense counsel presented the same claim at sentencing as here. In their view, the state regulators are primarily responsible for the loss of the investors' money because they allowed the sales to resume in the spring of 2016. The court did not agree with this position at

sentencing and continues to disagree today. The evidence continues to support the conclusion that Mr. Stenger made a material false statement to DFR that played a significant role in DFR's decision to permit the resumption of sales of the fraudulent investment.

Because Mr. Stenger pled guilty to the false statement count, 18 U.S.C. § 3663 governs the restitution claim. (His co-defendants were subject to the mandatory restitution requirements of § 3663A.) Section 3663(a)(2) of Title 18 defines a victim for restitution purposes as "a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered." This causation standard is the same as the standard that appears in 18 U.S.C. § 3663A(a)(2) and applied by the Second Circuit in the *Calderon* decision.

Calderon follows multiple appellate decisions in recognizing that "[t]he central goal of a proximate cause requirement is to limit the defendant's liability to the kinds of harm he risked by his conduct, the idea being that if a resulting harm was too far outside the risks his conduct created, it would be unjust or impractical to impose liability." *Id*., 944 F.3d at 95. In the area of investment loss, a restitution order is permissible at sentencing "if the risk that caused the loss was within the zone of risk concealed by the misrepresentations and omissions alleged by a disappointed investor." *United States v. Marino*, 654 F.3d 310, 321 (2d Cir. 2011). The relevant risk in this case was that the Anc Bio investments might fail to qualify for regulatory approval, thus jeopardizing the entire scheme. Mr. Stenger pled guilty to making a false statement about future job creation—a critical

requirement for the state regulators. In contrast to *Calderon*, in which the false statements had little causal connection to the loss, his statement was material to the regulators' decision to permit the sale of the investments to resume. There were certainly other causes for the spectacular failure of the Anc Bio investments, including the misuse of investor funds and the absence of customers or products for the proposed research facility, but the existence of these other causes does not relieve Mr. Stenger from liability under 18 U.S.C. § 3663.

Conclusion

The defendant has failed to meet his burden of demonstrating extraordinary circumstances leading to a fundamental error in the prior criminal proceedings. The information on which he relies to justify the timing of his motion more than a year after the sentencing hearing has been in his attorneys' possession for more than three years. The issues which he seeks to raise were also raised at the sentencing hearing itself. For these reasons, the court DENIES the petition for writ of coram nobis. (Doc. 470).

Dated at Burlington, in the District of Vermont, this 15th day of May, 2023.

Geoffrey W. Crawford, Chief Judge
United States District Court

APPENDIX D

Memorandum

From: Christopher Smith, Director of Capital Markets

To: Dave Cassetty, General Counsel

RE: Legal advice concerning AnC Bio VT discussion with SEC

Date: 2/4/2015

On February 4, Deputy Commissioner of Securities Mike Pieciak and Director of Capital Markets Christopher Smith participated in a follow-up phone call with Brian James and Trisha Sindler of the SEC regarding their investigation of the Jay Peak EB-5 projects.

Mr. James began the conversation by reiterating the importance of our confidentiality. He also expressed surprise regarding DFR's conclusion that the AnC Bio VT offering was nearly ready. The SEC attorneys acknowledged that the decision to let AnC Bio VT continue their offering was entirely up to us, but expressed their concerns about AnC Bio VT and Jay Peak EB-5 projects generally.

The SEC attorneys began with a high level overview of their investigation and the allegations. They stated that their investigation stemmed from concerns surrounding the ownership of Jay Peak Inc. and how it was acquired. Initially Jay Peak Inc. was owned by a Canadian Company. In 2007-08 Bill Stenger and

Ariel Quiros decided to purchase the company. Ariel Quiros created his company Q-Resort to purchase Jay Peak Inc. At that time Jay Peak Inc. had two EB-5 Projects going on, one of which was raising money. When Q-Resorts took over the accounts for these projects, they used the money to purchase Jay Peak Inc., rather than for the Tramhaus, the intended use of the EB-5 finds. The Jay Peak and its principles used the funds from every subsequent EB-5 project in order to back fill financial holes from that initial misappropriation of funds.

In order to cover or hide the accounting issues, Ariel Quiros opened a margin account to inflate the assets. Ultimately, Raymond James called the margin loans. Ariel Quiros used $20 million raised from the AnC Bio VT EB-5 investors to pay off the margin loans. David Gordon of Richardson Patel, counsel for Jay Peak in the SEC's investigation claims that the $20 million were fees assessed and due to Mr. Quiros based on 15% of the capital raised for AnC Bio VT.

The SEC attorneys stated that Quiros and his personal counsel Bill Kelly are the only people to know about the accounting of all Jay Peak projects. They stated that Quiros is "pulling the strings" and CFO and CEO may not even be fully aware of accounting issues.

The SEC attorneys also spoke about their concerns specific to AnC Bio VT beyond the $20 million. Their concerns were regarding the job projections, the anticipated FDA approval for medical products, the ownership of certain equipment, and the real estate deal for the land in Newport Vermont.

AnC Bio VT paid $6 million for 7 acres of land. That 7 acres was part in parcel of a 21 acre land that Ariel Quiros purchased for $3 million. Less than a year after purchasing the 21 acres, Quiros sold one third of the land to AnC Bio VT for twic the price he paid for the entire plot.

The SEC attorneys were concerned about the flow of money from EB-5 investors through the escrow accounts, and ultimately into the hands of the principles.

APPENDIX E

Memorandum

From: Christopher Smith

To: Dave Cassetty, General Counsel

RE: Legal advice concerning AnC Bio VT EB-5 project discussion with SEC

Date: 2/3/2015

On February 3, Deputy Commissioner of Securities Mike Pieciak and Director of Capital Markets Christopher Smith participated in a phone conversation with Brian James and Trisha Sindler, attorneys for the Securities Exchange Commission (SEC) regarding their investigation of the Jay Peak EB-5 projects, in particular as pertains to the AnC Bio Vermont project.

Deputy Commissioner Pieciak began the discussion by giving an overview of DFR's new role in the Vermont Regional Center and explained DFR's recent involvement with the AnC Bio project. The SEC attorneys asked what information DFR had to make us comfortable removing a hold on the AnC Bio project. The SEC attorneys seemed surprised that a revised PPM existed and that there were correspondence between AnC Bio and ACCD concerning the project.

The SEC attorneys asked if, barring any other information, if DFR was prepared to give AnC Bio the green light. Deputy Commissioner Pieciak stated that DFR's major reservation was knowledge of the SEC

investigation. The SEC attorneys were shocked to hear that Primmer counsel for AnC Bio said that the SEC's interest was a general private review of EB-5 Projects and suggested DFR talk with David Gordon of Richardson & Patel, because he is the projects litigation counsel regarding the SEC's investigation.

The SEC attorneys stated that they would get permission from their supervisor about what information they could share and schedule a follow up call. They asked for a copy of the AnC revised private placement memorandum.

APPENDIX F

ATTORNEY WILLIAMS: Oh, which ones?

THE COURT: 18 and 24.

ATTORNEY WILLIAMS: I move the admission of 18 and 24, Your Honor.

ATTORNEY VAN DE GRAAF: No objection. Sorry, Your Honor.

THE COURT: Admitted.

(Defense Exhibits A-18 and A-24 were admitted into evidence.)

ATTORNEY VAN DE GRAAF: Sorry. I was thinking of something else.

THE COURT: All right. Mr. Van de Graaf, I think it's your turn.

CROSS-EXAMINATION BY ATTORNEY VAN DE GRAAF

Q. Good morning, Ms. Donegan. I want to follow up on a couple of items that Mr. Williams asked you about. First of all, I think you told the Court that your understanding was that, between the time of Ms. Moulton's hold in mid 2014 and your release of the hold in March or April of 2015, that the principals were not taking money from AnC investors.

A. That's my understanding.

Q. And so, if Mr. Stenger was taking money from AnC investors during that time, he was violating his hold?

A. Yes.

Q. I'd like to talk a little more about this PPM issue. Is it fair to say that the PPM was getting worked on before DFR got deeply involved in the AnC project —

A. Yes.

Q. — the revised PPM?

A. The revised one, yes.

Q. And ACCD personnel were working with the Primmer firm before DFR was working with the Primmer firm?

A. Correct.

Q. And Ms. Moulton was receiving information from the principals relevant to matters that ACCD was asking about?

A. Yes, that's my understanding.

Q. And that information was passed along to your staff to assist in the final approval of the PPM?

A. Yes, and in the transition over to DFR.

Q. So, when Mr. Stenger made representations to Ms. Moulton about jobs and about revenues, that was relevant, going to be relevant to your assessment of the PPM as well?

A. Correct.

Q. Now, let's just talk a little bit more about this issue of jobs. Just to be clear to the Court, was the job analysis, the, the appropriate analysis of jobs important to an approved PPM?

A. Yes.

Q. And you needed accurate information about matters relevant to job production?

A. Correct.

Q. And, if you understood that Mr. Stenger was lying about matters relevant to job production, you would have wanted to know that?

A. Correct.

Q. And it might have affected what would be in the revised PPM?

A. It would have been.

Q. And, in fact, if you knew before March of 2015 that, in fact, AnC would not create enough jobs to satisfy USCIS to approve the project, you wouldn't have approved the PPM?

A. Correct.

Q. Now, I think I'm a little confused a little bit on the timeline, so maybe we can just clarify some things.

A. Sure.

Q. So in January, February, into March, some members of your staff are working on finalizing the PPM?

A. Correct.

Q. I think you talked about two things. There was the financial review issue and the PPM?

A. Yes.

Q. And you had some staff people working on the PPM?

A. I did.

Q. And then this question of financial review was something you got very involved in?

A. I did.

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

UNITED STATES OF AMERICA	)	
	)	
v.	)	Case No. 5:19-cr-76-4
	)	
WILLIAM STENGER,	)	
	)	
Defendant.	)	

U.S. DISTRICT COURT
DISTRICT OF VERMONT
FILED
2022 APR 15 PM 2:12
CLERK
BY

RESTITUTION ORDER

Following the sentencing hearing on April 14, 2022, the court orders as follows:

1. Defendant William Stenger shall pay restitution to the 36 crime victims previously identified with respect to Count 14 of the indictment in the amount of $250,000.

2. The court waives any payment of interest based on Mr. Stenger's limited ability to pay. Principal payments shall be a minimum of 10 percent of his gross earnings.

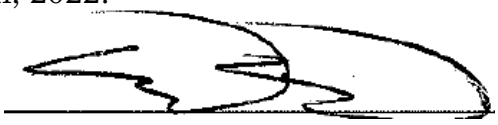
3. The restitution obligation is joint and several with any restitution entered at the time of sentencing of the two co-defendants Ariel Quiros and William Kelly.

4. The restitution amount shall be reduced by any net payments after attorney's fees and expenses received by the crime victims from third-parties.

5. Amounts paid pursuant to this order shall be paid by the court to the crime victims on a periodic basis. Payments to individual victims shall be pro rata on the basis of the amount of their individual loss.

SO ORDERED.

Dated at Burlington, in the District of Vermont, this 15th day of April, 2022.



Geoffrey W. Crawford, Chief Judge
United States District Court

APPENDIX H

Article III of the United States Constitution

Section 1:

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State,—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section 3:

Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.