
APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 24-2687

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 2nd day of June, two thousand nineteen twenty-six.

United States of America,
Appellee,

v.

ORDER

Michael G. Bouchard,
Defendant - Appellant.

Appellant, Michael G. Bouchard, 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*.

2a

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk of Court

/S/

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 24-2687

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 30th day of March, two thousand twenty-six.

PRESENT: BARRINGTON D. PARKER,
RAYMOND J. LOHIER, JR.,
SARAH A. L. MERRIAM,
Circuit Judges.

United States of America,
Appellee,

v.

SUMMARY ORDER

Michael G. Bouchard,
Defendant - Appellant.

FOR DEFENDANT-APPELLANT:

MICHAEL G. BOUCHARD, *pro se*, Latham, NY

FOR APPELLEE:

JOSHUA ROTHENBERG,

Assistant United States Attorney, *for* John A. Sarcone III, First Assistant United States Attorney for the Northern District of New York, Syracuse, NY

Appeal from an order of the United States District Court for the Northern District of New York (Anne M. Nardacci, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the order of the District Court is AFFIRMED.

Defendant Michael G. Bouchard, a former attorney representing himself, appeals from the September 26, 2024 order of the United States District Court for the Northern District of New York (Nardacci, J.) denying his petition for a writ of error coram nobis. Bouchard seeks to vacate his 2012 conviction for conspiracy to submit false statements to a financial institution, in violation of 18 U.S.C. § 371. In 2016 this Court affirmed that conviction on direct appeal. *United States v. Bouchard*, 828 F.3d 116, 128 (2d Cir. 2016). Three years later, we denied a certificate of appealability from the denial of his 28 U.S.C. § 2255 motion. *Bouchard v. United States*, No. 19-1913, 2019 WL 11689964 (2d Cir. Nov. 14, 2019). We assume the parties' familiarity with the underlying facts and

the record of prior proceedings, to which we refer only as necessary to explain our decision to affirm.

“The writ of error *coram nobis* is an extraordinary remedy that issues only in extreme cases.” *United States v. Rutigliano*, 887 F.3d 98, 108 (2d Cir. 2018) (quotation marks omitted). “We review *de novo* the legal standards that the district court has applied but review for abuse of discretion the court’s ultimate decision to deny the writ.” *Doe v. United States*, 915 F.3d 905, 909 (2d Cir. 2019). As the District Court accurately described, App’x 30, “[t]o secure *coram nobis* relief, a petitioner must show 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,” *Rutigliano*, 887 F.3d at 108 (quotation marks omitted).

The District Court correctly concluded that Bouchard failed to show that sound reasons existed for his delay in seeking *coram nobis* relief. Bouchard provides no meaningful explanation for waiting several years to file his petition despite having previously raised nearly all of the same claims on direct appeal and in his prior § 2255 motion and related motion for a certificate of appealability. These arguments are thus untimely and, insofar as they were resolved in Bouchard’s prior appeals, independently barred by the mandate rule. *See Yick Man Mui v. United States*, 614 F.3d 50, 53–54 (2d Cir. 2010); *see also Stegemann v. United States*, 132 F.4th 206, 210–

11 (2d Cir. 2025). Bouchard also raised many of these arguments in two separate civil actions. *See Bouchard v. Thomson*, No. 17-CV-1156, 2018 WL 1665213 (N.D.N.Y. Apr. 4, 2018), *aff'd sub nom. Bouchard v. Olmsted*, 775 F. App'x 701 (2d Cir. 2019) (summary order); *Bouchard v. Hartunian*, No. 14-CV-752, 2015 WL 3889721 (N.D.N.Y. June 24, 2015).

Bouchard nonetheless insists that his petition is timely because (1) he filed it within one year of the Supreme Court's decision in *Ruan v. United States*, 597 U.S. 450 (2022); (2) he filed it within 38 months following the denial of his petition for certiorari; and (3) he is "actually innocent." But none of these reasons justify the delay in filing his petition. To start, Bouchard's reliance on *Ruan* does not render his petition timely. Bouchard asserts that he could not have challenged the jury instructions concerning aiding and abetting and the underlying substantive offense until after the Supreme Court's 2022 decision in *Ruan*. In other words, Bouchard appears to argue, his challenge was not available until after *Ruan* specifically required that, as to 21 U.S.C. § 841, the Government must prove beyond a reasonable doubt that a defendant "knowingly or intentionally" acted in an unauthorized manner. *Ruan*, 595 U.S. at 454 (quotation marks omitted). The District Court did not err in rejecting this argument. Jury instruction challenges to the federal aiding and abetting statute, 18 U.S.C. § 2, were available and raised in other cases well before *Ruan*, including in cases Bouchard himself cites. *See United States v. Gabriel*, 125 F.3d 89, 99–102

(2d Cir. 1997); *United States v. Scotti*, 47 F.3d 1237, 1246–47 (2d Cir. 1995); *United States v. Osorio Estrada*, 751 F.2d 128, 132–33 (2d Cir. 1984), *on reh'g*, 757 F.2d 27 (2d Cir. 1985). Indeed, Bouchard argued pre-*Ruan* that the statutes underlying his conviction required proof of specific intent beyond a reasonable doubt. Dist. Ct. Dkt. No. 153 at 14–16. Ruan therefore did not itself create a basis for a claim that was previously unavailable. Nor does the 38-month period following the denial of certiorari supply a sound reason for delay. Bouchard was released from custody in 2018 and could have filed this petition based on the same information underlying his direct appeal and § 2255 motion, most of which originated from his 2012 trial. Apart from Bouchard's reliance on *Ruan*, he offers no further justification as to why these arguments were not previously raised. We have upheld the dismissal of untimely *coram nobis* petitions filed several years after the petitioner knew or should have known of the facts underlying the claim. *See Foont v. United States*, 93 F.3d 76, 78, 80–81 (2d Cir. 1996) (nearly five-year delay unjustified). Finally, Bouchard's assertion of “actual innocence”—which, in the context of a *coram nobis* petition, “means factual innocence, not mere legal insufficiency,” *Bousley v. United States*, 523 U.S. 614, 623 (1998)—does not excuse his delay in filing the petition. Nor can “[c]laims of new evidence . . . without constitutional or jurisdictional error in the underlying proceeding,” “support a *coram nobis* claim.” *Foont*, 93 F.3d at 80. In any event, Bouchard has not identified any new evidence in support of his claim.

To the contrary, this Court previously considered the sufficiency of the trial evidence against Bouchard and affirmed his conviction. *Bouchard*, 828 F.3d at 128. For these reasons, the District Court's decision that Bouchard lacked sound reasons for his delay in filing the petition was not erroneous. *See Rutigliano*, 887 F.3d at 108. Because we affirm the District Court's order on this basis alone, we need not reach the merits of Bouchard's *coram nobis* petition.

For the foregoing reasons, the order of the District Court is AFFIRMED.¹

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

¹ We deny Bouchard's motion for permission to file additional pages to the appendix. Bouchard has failed to demonstrate that "extraordinary circumstances" warrant the consideration of evidence from outside the district court record. See *United States v. Hage*, 74 F.4th 90, 96 (2d Cir. 2023) (quotation marks omitted); Fed. R. App. P. 10(e).

APPENDIX E

STATUTORY PROVISIONS
(Pre-2009 Congressional Amendments)

18 U.S.C. §2. Principals.

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. §20. Financial institution defined

As used in this title, the term "financial institution" means—

- (1) an insured depository institution (as defined in section 3(c)(2) of the Federal Deposit Insurance Act);
- (2) a credit union with accounts insured by the National Credit Union Share Insurance Fund;
- (3) a Federal home loan bank or a member, as defined in section 2 of the Federal Home Loan Bank Act (12 U.S.C. 1422), of the Federal home loan bank system;
- (4) a System institution of the Farm Credit System, as defined in section 5.35(3) of the Farm Credit Act of 1971;
- (5) a small business investment company, as defined in section 103 of the Small Business Investment Act of 1958 (15 U.S.C. 662);
- (6) a depository institution holding company (as defined in section 3(w)(1) of the Federal Deposit Insurance Act;
- (7) a Federal Reserve bank or a member bank of the Federal Reserve System;
- (8) an organization operating under section 25 or section 25(a) 1 of the Federal Reserve Act; or
- (9) a branch or agency of a foreign bank (as such terms are defined in paragraphs (1) and (3) of section 1(b) of the International Banking Act of 1978).

**18 U.S.C. §1014. Loan and credit applications
generally; renewals and discounts; crop insurance**

Whoever knowingly makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of the Farm Credit Administration, Federal Crop Insurance Corporation or a company the Corporation reinsures, the Secretary of Agriculture acting through the Farmers Home Administration or successor agency, the Rural Development Administration or successor agency, any Farm Credit Bank, production credit association, agricultural credit association, bank for cooperatives, or any division, officer, or employee thereof, or of any regional agricultural credit corporation established pursuant to law, or a Federal land bank, a Federal land bank association, a Federal Reserve bank, a small business investment company, as defined in section 103 of the Small Business Investment Act of 1958 (15 U.S.C. 662), or the Small Business Administration in connection with any provision of that Act, a Federal credit union, an insured State-chartered credit union, any institution the accounts of which are insured by the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, any Federal home loan bank, the Federal Housing Finance Board, the Federal Deposit Insurance Corporation, the Resolution Trust Corporation, the Farm Credit System Insurance Corporation, or the National Credit Union Administration Board, a branch or agency of

a foreign bank (as such terms are defined in paragraphs (1) and (3) of section 1(b) of the International Banking Act of 1978), or an organization operating under section 25 or section 25(a) of the Federal Reserve Act, upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan, or any change or extension of any of the same, by renewal, deferment of action or otherwise, or the acceptance, release, or substitution of security therefor, shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both. The term "State-chartered credit union" includes a credit union chartered under the laws of a State of the United States, the District of Columbia, or any commonwealth, territory, or possession of the United States.

APPENDIX F

CONSTITUTIONAL PROVISIONS

U.S. Const. art I, section 9, clause 3

No Bill of Attainder or ex post facto Law shall be passed.

U.S. Const. amend V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX J

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

MICHAEL BOUCHARD, Petitioner

v. 1:12-cr-381 (AMN)

UNITED STATES OF AMERICA, Respondent.

APPEARANCES:

MICHAEL G. BOUCHARD
595 New Loudon Road #201
Latham, New York 12110
Petitioner, pro se

CARLA B. FREEDMAN
United States Attorney for the Northern District of
New York
TAMARA B. THOMSON, ESQ.
445 Broadway Albany, NY 12207
Counsel for the Government

Hon. Anne M. Nardacci, United States District
Judge:

MEMORANDUM-DECISION AND ORDER

I. INTRODUCTION

Presently before the Court is Petitioner Michael G. Bouchard's ("Petitioner") petition for a writ of coram nobis to vacate his underlying conviction and dismiss the relevant indictment pursuant to 28 U.S.C. § 1651(a). Dkt. No. 189 ("Petition").¹ The Government opposes the Petition, Dkt. No. 194, Petitioner filed a reply, Dkt. No. 196, and the Government filed a surreply with leave of Court, Dkt. Nos. 199, 200.

¹Citations to court documents utilize the pagination generated by CM/ECF, the Court's electronic filing system. If no such pagination exists, the document's internal page number is used. Case 1:12-cr-00381-AMN Document 204 Filed

Petitioner also filed a related motion for discovery and a request for oral argument on the Petition. Dkt. No. 201 ("Discovery Motion"). The Government opposes the Discovery Motion, Dkt. No. 202, and Petitioner filed a reply, Dkt. No. 203. For the reasons that follow, the Petition and the Discovery Motion are denied.

II. BACKGROUND

On November 30, 2012, following a two-week jury trial, Petitioner was convicted on four felony offenses, including: one count of conspiring to submit false statements to a financial institution in violation of 18 U.S.C. § 371 (Count 1); two counts of bank fraud in violation of 18 U.S.C. § 1344 (Counts 7 and 19); and one count of false statements knowingly made to a financial institution in violation of 18 U.S.C. § 1014 (Count 24). Dkt. No. 38. Petitioner's conviction stems from

his role as a closing agent, between 2000 and 2007, for several mortgage lenders and the submission of HUD-1 settlement statements to lenders which falsely stated that buyers made cash down payments and contained false accounts of how mortgage proceeds were disbursed at closing. On October 12, 2014, the Court sentenced Petitioner to 48 months imprisonment on each of the four counts, to run concurrently, followed with three-years supervised release, restitution in the amount of \$1,175,565.07, and a forfeiture money judgment of \$11,500. Dkt. No. 106. The Court denied Petitioner's motions for a judgment of acquittal, Dkt. No. 35, and a new trial, Dkt. No. 36. Dkt. No. 89. Petitioner filed a timely notice of appeal on November 4, 2014. Dkt. No. 111.

On July 7, 2016, the Second Circuit affirmed Petitioner's conviction on Count 1 for conspiracy to submit false statements to a financial institution, but reversed Petitioner's convictions on Counts 7 (bank fraud), 19 (bank fraud), and 24 (false statements to a financial institution). Dkt. No. 122; *see also United States v. Bouchard*, 828 F.3d 116 (2d Cir. 2016). The Circuit concluded that one of the mortgage lenders involved in Petitioner's scheme, BNC Mortgage ("BNC"), was not a "financial institution" under the law because it was not federally insured. *Bouchard*, 828 F.3d 116. So, the Circuit held that the substantive counts for bank fraud and false statements involving BNC could not stand. *Id.* However, the Circuit found that there was sufficient evidence at trial to support Petitioner's conspiracy conviction for his

role in a real estate transaction involving a mortgage backed by Fremont Investment & Loan ("Fremont"), a federally-insured lender. *Id.* The matter was remanded for resentencing on Count 1. Dkt. No. 122 at 31.

On October 20, 2016, the Court resentenced Petitioner on Count 1 to a term of 48 months imprisonment with a term of three-years supervised release. Dkt. No. 146. Petitioner's counsel filed a timely notice of appeal of the resentencing on November 1, 2016, Dkt. No. 149, but the parties later stipulated to the withdrawal of that appeal on April 28, 2017, Dkt. No. 152.

On October 17, 2017, Petitioner filed a motion pursuant to 8 U.S.C. § 2255 ("§ 2255") to vacate his conspiracy conviction. Dkt. No. 153. While that motion was pending, and following his term of imprisonment, Petitioner was released on April 13, 2018. See Federal Bureau of Prisons, Inmate Locator (Sep. 12, 2024), <https://www.bop.gov/inmateloc/>. On November 15, 2018, Petitioner sought an order compelling the Government to disclose certain documents and other evidence that Petitioner believed would aid in his attempt to overturn his conviction. Dkt. No. 166. On May 6, 2019, the Court denied Petitioner's motion to vacate his conspiracy conviction and his accompanying motion seeking discovery. Dkt. No. 178. Specifically, the Court found that five of Petitioner's seven grounds for vacating the

conviction² were precluded by the mandate and the procedural default rule. *Id.* at 6. The Court ruled against Petitioner on the merits for the remaining two grounds for appeal. *Id.* at 8, 10. The decision denying Petitioner's motion to vacate pursuant to § 2255 was affirmed on appeal. Dkt. No. 187. The Supreme Court denied *certiorari* on April 20, 2020. Dkt. No. 189 at 19.

On June 22, 2023, Petitioner filed the instant petition for a writ of *coram nobis* to vacate his conviction on the conspiracy charge. Dkt. No. 189. On August 30, 2023, Petitioner filed a motion seeking discovery related to that petition and requesting oral argument. Dkt. No. 201.³

III. STANDARD OF REVIEW

District courts may issue writs of error *coram nobis* "pursuant to the All Writs Act, which

² The five grounds for vacating the conviction which were denied based on preclusion are the following: 1. the verdict failed to identify the basis for conviction on Count 1; 2. the verdict failed to indicate on Count 1 whether it was based on conspiracy or aiding and abetting; 3. the Ex Post Facto clause of the Constitution; 4. the jury instructions regarding conspiracy were erroneous for failing to mention elements; and 5. the conscious avoidance jury instructions were legally erroneous. The two grounds that were addressed on the merits are ineffective assistance of counsel and prejudicial spillover. *See* Dkt. No. 178.

³ This case was reassigned to the undersigned on June 27, 2023. Dkt. No. 188.

provides that "[t]he 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." *U.S. v. Mandanici*, 205 F.3d 519, 521 n.1 (2d Cir. 2000) (quoting 28 U.S.C. § 1651(a)). Such writs are "essentially a remedy of last resort for petitioners who are no longer in custody pursuant to a criminal conviction." *Fleming v. United States*, 146 F.3d 88, 89 90 (2d Cir.1998) (per curiam). *Coram nobis* is "not a substitute for appeal, and relief under the writ is strictly limited to those cases in which errors of the most fundamental character have rendered the proceeding itself irregular and invalid." *Foont v. United States*, 93 F.3d 76, 78 (2d Cir.1996) (internal quotation marks and ellipsis omitted); see *Nicks v. United States*, 955 F.2d 161, 167 (2d Cir.1992) (stating that a writ of error *coram nobis* should be granted "only where extraordinary circumstances are present"). In reviewing a petition for the writ, a court must presume that the proceedings were correct, and the burden of showing otherwise rests on the petitioner. See *Nicks*, 955 F.2d at 167. The *coram nobis* 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." *Kovacs v. United States*, 744 F.3d 44, 49 (2d Cir. 2014) (internal quotation marks omitted).

As to discovery, under Rule 6(a),⁴ “[a] judge may, for good cause, authorize a party to conduct discovery under the Federal Rules of Criminal Procedure or Civil Procedure, or in accordance with the practices and principles of law.” A petitioner has shown good cause “where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is . . . entitled to relief.” *Bracy v. Gramley*, 520 U.S. 899, 908–09 (1997) (quoting *Harris v. Nelson*, 394 U.S. 286, 300 (1969)).

IV. DISCUSSION

A. Authorization

First, the Government argues the Petition, in essence, constitutes a successive motion under § 2255, and therefore, Petitioner was required to seek the Second Circuit’s authorization pursuant to 28 U.S.C. § 2244(b)(3). Dkt. No. 194 at 16. The Government is wrong. “District courts lack jurisdiction to consider second or successive § 2255 motions unless the movant has obtained authorization from the appropriate court of appeals.” *Donato v. U.S.*, No. 14-CV-7393 (JS), 2015 WL 4656632, at *2 (E.D.N.Y. Aug. 5, 2015) (citing *Carmona v. U.S.*, 390 F.3d 200, 201–02 (2d Cir. 2004)). Despite their procedural similarities, a

⁴ The Court applies the § 2255 standard for granting discovery to these coram nobis proceedings. See *United States v. Mandanici*, 205 F.3d 519, 527 (2d Cir. 2000); *Durrani v. United States*, 294 F. Supp. 2d 204, 217 (D. Conn. 2003).

petition for a writ of *coram nobis* is not a motion pursuant to § 2255. Therefore, the rule requiring prior authorization by the Second Circuit to file a successive § 2255 motion is inapplicable. *See Brooks v. United States*, 94-CR-729 (PKC), 2023 WL 3819374, at *4 n.4 (E.D.N.Y. June 5, 2023) (assessing a *coram nobis* petition despite a lack of authorization and previous § 2255 motions).

The Government relies on a string of cases holding that petitions for writs of *coram nobis* constitute successive § 2255 motions for purposes of the authorization rule. Dkt. No. 194 at 15 (citing *U.S. v. Poindexter*, 3:94-cr-38 (EBB), 2014 WL 12829507, at *3 (D. Conn. May 9, 2014); *Millan v. United States*, No. 09 Civ. 8491(RMB)(MHD), 2011 WL 5169443, at *4-5 (S.D.N.Y. Oct. 31, 2011); *Board v. United States*, No. 10-CV-1557 (DRH), 2011 WL 13940, at *1 (E.D.N.Y. Jan. 4, 2011)). Crucially, the petitioners in each of these cases was still in custody. A writ of *coram nobis* is only available after a petitioner's release from custody. *Fleming*, 146 F.3d at 89 90. Therefore, the courts treated the petitions as successive § 2255 motions because those petitions were merely attempts to "evade the restrictions of [§ 2255] actions by seeking a writ of *coram nobis*" while still in custody. *Millan*, 2011 WL 5169443, at *4 (quoting *Mandanici*, 205 F.3d at 524). This attempted evasion of the rules governing § 2255 motions justified the application of the authorization rule of 28 U.S.C. § 2244(b)(3). However, mere similarity between a § 2255 motion and a subsequent petition for *coram nobis* relief does not justify use of the

authorization rule. See *Baldeo v. United States*, 17 Cr. 125 (PAC), 2022 WL 214385, at *4 (S.D.N.Y. Jan. 25, 2022) (applying the authorization rule should a motion be construed as a habeas petition but not if it is construed as a coram nobis petition).

Petitioner was no longer in custody when he filed the Petition, which precluded him from filing a § 2255 motion. See 28 U.S.C. § 2255(a); Dkt. No. 194 at 11. Therefore, the Petition is not precluded by the lack of authorization from the Second Circuit.

B. Continuing Legal Consequences

Having established jurisdiction to consider the Petition, the Court moves on to the factors it must consider when faced with a petition for coram nobis relief. First, Petitioner has failed to show that he “continues to suffer legal consequences from his conviction that may be remedied by granting of the writ.” *Kovacs*, 744 F.3d at 49 (internal quotation marks omitted).⁵ In his initial brief, Petitioner identifies two possible consequences: 1) being disbarred from the practice of law, and 2) being prohibited from possessing a firearm. Dkt. No. 189 at 20. On reply, Petitioner also puts forward that he is “disqualified from serving on a federal grand or petit jury.” Dkt. No. 196 at 10. None of these

⁵ In keeping with the precedent of this District, the Court first assesses whether there are continuing legal consequences before moving on to timeliness and the merits of the alleged circumstances which justify relief. See *Weichert v. U.S.*, 458 F. Supp. 2d 57 (N.D.N.Y. 2006).

consequences suffice. The requirement of continuing legal consequences stems from the Supreme Court's decision in *U.S. v. Morgan*, which expressed concern that standing convictions may lead to "heavier penalties" for subsequent convictions and may "affect[]" civil rights. 346 U.S. 502, 513 (1954). The Second Circuit has adhered closely to this original intention. In *Kyle v. United States*, the court found that the "possible deprivation" of petitioner's right to vote under the laws of New York was sufficiently serious to warrant potential coram nobis relief because the right to vote is "a substantial civil right." 288 F.2d 440 (2d Cir. 1961). Later, in *Nicks v. U.S.*, the court found that where a conviction would serve as an "aggravating factor" in a sentencing for a subsequent conviction, petitioner had satisfied the third prong for the grant of coram nobis relief. 955 F.2d 161, 167 (2d Cir. 1992). The Second Circuit has yet to expand the definition of sufficient legal consequences far beyond the original meaning suggested in *Morgan*.

However, the Second Circuit has clarified what does not constitute a sufficient legal consequence. A mere "desire to be rid of the stigma" of a conviction is insufficient to warrant relief. *United States v. Nat'l Plastikwear Fashions, Inc.*, 368 F.2d 845, 846 (2d Cir. 1966) (per curiam); see also *United States v. Osser*, 864 F.2d 1056, 1060 (3d Cir. 1988) ("Damage to reputation is not enough"). Nor can a "speculative" legal consequence justify consideration; the record must contain evidence that petitioner has concretely and

continuously suffered the consequence. See *Fleming*, 146 3d. at 91 (finding the “record contains no evidence that petitioner has sought and been denied licensure as a securities broker, that he has ever been so employed in the past, or that he could obtain such employment but for his conviction”). Relief is also precluded where “overturning [the] criminal conviction will have no effect on the [identified consequences].” *Porcelli v. U.S.*, No. CV-00-2500, 2001 WL 34894717, at *3 (E.D.N.Y. July 17, 2001), *aff’d*, 303 F.3d 452 (2d Cir. 2002) (barred from work by a separate bankruptcy decision which prohibited defendant’s employment so long as he owed money as a result of his bankruptcy); *Slaine v. United States*, No. 15-cv-9814(RJS), No. 09-cr-1222 (RJS), 2018 WL 8737886, at *6 (S.D.N.Y. Mar. 5, 2018) (barred from working as a securities broker due to concurrent rule banning convicted felons and civil settlement with the SEC). Finally, an inability to “find a job” and “lost business profits or other pecuniary interests” are insufficient. *United States v. Alcalay*, 2:87-mj-57-jmc-01, 2019 WL 2450913, at *8 (D. Vermont June 12, 2019) (citing *United States v. Liffiton*, Nos. 96-2962, 96-2994, 1998 WL 514031, at *1 (2d Cir. 1998) (unpublished table decision)).⁶ Here, Petitioner claims that disbarment is a sufficient legal

⁶ Law from the Seventh Circuit is also instructive. “[T]he Seventh Circuit has declined to grant coram nobis relief based on an attorney’s disbarment[.]” *Alcalay*, 2019 WL 2450913, at *8 (citing *U.S. v. Craig*, 907 F.2d 653, 658 (7th Cir. 1990)).

consequence warranting coram nobis relief. The Court disagrees. First, disbarment does not qualify as a “legal consequence that may be remedied by granting of the writ.” *Kovacs*, 744 F.3d at 49 (internal quotation marks omitted). To start, the Court finds persuasive Seventh Circuit precedent finding disbarment alone, without a showing of a present desire to apply or an existing application for reinstatement, is insufficient. *Craig*, 907 F.2d at 659. Indeed, putting aside Seventh Circuit law, whether disbarment would be remedied by “overturning [the] criminal conviction,” *Porcelli*, 2001 WL 34894717, at *3, is speculative at best. Petitioner was disbarred pursuant to an October 29, 2015 decision of the New York Supreme Court, Appellate Division, Third Department, which found that Petitioner should be disbarred “in light of [his] convictions of serious crimes and the underlying professional misconduct.” *Matter of Bouchard*, 132 A.D.3d 1228, 1229 (3d Dep’t October 29, 2015). The law in New York requires the immediate suspension of attorneys convicted of “serious crimes,”⁷ and a “final order of discipline” is issued once the conviction is final. See NY Jud § 90(4)(f-g). In disbarring Petitioner in its final order of discipline, the court highlighted not just Petitioner’s conviction but also his role in “the

⁷ The Third Department previously determined that Petitioner’s conviction constituted a “serious crime.” See *Matter of Bouchard*, 106 A.D.3d 1187 (2013).

submission of falsified mortgage closing documentation." *Bouchard*, 132 A.D.3d at 1129.

New York law also dictates that where a "conviction was subsequently reversed . . . the appellate division shall *have power* to vacate or modify such order or debarment." See NY Jud § 90(5)(a) (emphasis added). Crucially, the law does not *require* the court to vacate or modify the order disbaring Petitioner. Even if a writ of *coram nobis* were granted and Petitioner's conviction were vacated, it is far from certain that Petitioner would be able to practice as an attorney. Indeed, the court's determination that Petitioner's "underlying conduct" provided additional reason to disbar Petitioner weighs against the possibility of a reversal of his disbarment. *Bouchard*, 132 A.D.3d at 1129. Importantly, Petitioner's arguments fail to assert his "actual" or "factual" innocence. Dkt. No. 189 4-19; *supra* Section IV(D) (Circumstance 1). Petitioner does not provide any new proof that he did not engage in the underlying conduct identified in his indictment and which the Appellate Division relied upon in disbaring him. As such, vacating the conviction based on the Petition would not immediately alter the disbarment decision, and the Appellate Division might find sufficient reason to uphold its decision. The reversal of Petitioner's legal consequences is therefore merely "speculative" and cannot justify granting the writ of *coram nobis*. See *Fleming*, 146 3d. at 91 (noting Petitioner failed to show "he could obtain such employment but for his conviction"); see also *Craig*, 907 F.2d at 658 (finding disbarment insufficient

where petitioner's underlying conduct was implicated in the decision to disbar him).

Even ignoring the discretionary nature of New York law, the "record contains no evidence that petitioner has sought and been denied licensure as [an attorney]." *Id.* New York law provides Petitioner with the ability to request a reversal of his disbarment. *See* NY Jud § 90(5)(b) (providing opportunity to challenge disbarment seven years later). Petitioner has failed to make any indication that he has submitted such a request, or that such a request has been denied. Nor has Petitioner stated that he wishes to practice law, or that he would avail himself of the opportunity to seek reinstatement should the conviction be vacated. Therefore, his proffered continuing legal consequences are merely speculative, and not "concrete."⁸ *Shen v. United States*, 12-cr-00068 (DLI), 15-cv-05840 (DLI), 2022 WL 229371, at *4 (E.D.N.Y. Jan. 26, 2022).

Second, the prohibitions on gun ownership and serving on a federal grand or petit jury are

⁸ Petitioner's reference to a New York Law Journal article suggesting an important factor in being admitted to the bar is "acknowledgment of wrongdoing" holds no weight. Dkt. No. 196 at 10. The fact remains that Petitioner has not taken the opportunity to seek readmission to the bar despite his ability to do so. Whether Petitioner can expect that the application will be successful has no bearing on the law's requirement that the continuing legal consequence be non-speculative.

plainly insufficient. “As for [petitioner’s] assertion that he is unable to . . . possess firearms, the law is clear that such restrictions do not constitute the kind of serious harm necessary to justify a writ of *coram nobis*.” *Slaine*, 2018 WL 8737886, at *6 (internal quotations omitted). Holding otherwise “would render ‘the legal consequence test superfluous’” because a prohibition on firearm possession “appl[ies] to every convicted felon.” *Id.* (citing *Barnetson v. United States*, 12 cr-157, 2016 WL 3023156, at *3 (S.D.N.Y. May 6, 2016)). The same applies to the loss of the right to serve on a jury. *Moskowitz v. United States*, 64 F. Supp. 3d 574, 581 (S.D.N.Y. 2014) (“If loss of the right to serve on a jury constituted a civil disability for purposes of the writ, virtually all convictions would qualify, and the continuing legal consequence test would be rendered superfluous.”). Therefore, none of the identified “consequences” justify a writ of *coram nobis*. The Petition is denied on these grounds alone.

C. Timeliness

Second, for the majority of his arguments, Petitioner fails to “provide sound reasons to excuse his delay given that the argument[s] he now seeks to raise” have been available for several years. *Slaine*, 2018 WL 8737886, at *5. “[D]istrict courts must decide the issue [of delay under the second prong] in light of the circumstances of the individual case.” *Id.* at *4 (citation omitted). The key inquiry “is whether the petitioner knew or should have known earlier of facts underlying the claim for *coram nobis* relief.” *Nangia v. United*

States, No. 11-cv-6056 (RMB), 2012 WL 4513477, at *3 (S.D.N.Y. Oct. 2, 2010) (internal quotation marks omitted).

Here, each of the facts which make up the majority of Petitioner's grounds for relief have been known to him for at least several years.⁹ All but one of Petitioner's arguments rely on the conduct of his initial prosecution and trial, events which followed shortly thereafter, or the result of the initial appeal of his conviction. Dkt. No. 189 at 4-29; *id.* at 13 (arguing a government witness's recanting of testimony three months after trial and a July 2, 2013 evidentiary hearing provides grounds for relief); *id.* at 18 (arguing prejudicial spillover resulting from the July 7, 2016, Second Circuit decision). Therefore, Petitioner has been aware of the basis of these grounds for his Petition for at

⁹ Petitioner's invocation of *United States v. Lesane*, 40 F.4th 191 (4th Cir. 2022) is misguided. First, Petitioner has failed to identify any in-circuit law lowering the requirement of timeliness for requests for writs of *coram nobis* involving actual innocence. Moreover, the Fourth Circuit has not gone so far as to suggest any invocation of actual innocence warrants leniency. There, the court dealt with a petitioner whose "actual innocence" [was] clear and undisputed. *Id.* at 200. Here, Petitioner's actual innocence is vigorously disputed by the Government.

least eight years.¹⁰ Petitioner provides no explanation as to why his petition on these facts was not made sooner after his release. Therefore, the delay precludes coram nobis relief. *See United States v. Sash*, 374 F. App'x 198, 199 (2d Cir. 2010) (finding an approximately four-year delay unjustifiable); *Mastrogiacomo v. United States*, No. 90-cr-565 (KTD), 2001 WL 799741, at *2 (S.D.N.Y. July 16, 2001) (holding that a delay of three years precluded relief).

The remaining circumstance Petitioner argues justifies a writ of coram nobis is the decision in *Ruan v. United States*, 597 U.S. 450 (2022). Dkt. No. 189 at 16. The instant Petition was filed almost exactly a year after that decision was issued. *Id.* While arguably timely as to the argument regarding *Ruan*, the Court notes that Petitioner largely analogizes to *Ruan*, which is only analogous in the broadest sense possible, to reiterate arguments he has made for several years. *Supra* Section IV(D) (Circumstance 2). In sum, the Court easily finds that each portion of the Petition, except

¹⁰ To the extent Petitioner relies on alleged prosecutorial misconduct and other facts in his subsequent proceedings, including the proceedings regarding the October 17, 2017 § 2255 petition, those facts are also over three years old, and the delay precludes relief. Compare Dkt. No. 189 at 19 (noting it has been 38 months since the Supreme Court denied cert on the § 2255 petition) with *Mastrogiacomo*, 2001 WL 799741, at *2.

for the argument regarding *Ruan*, is untimely. The argument regarding *Ruan* is timely only to the extent *Ruan* provides additional, legitimate support for Petitioner's contentions rather than an empty vessel through which to recycle old arguments. Per the below, *supra* Section IV(D)(Circumstance 2), the *Ruan* argument is similarly untimely.

D. Circumstances Justifying Relief

Finally, Petitioner has not shown "circumstances compelling [a writ of coram nobis] to achieve justice." *Kovacs*, 744 F.3d at 49 (internal quotation marks omitted). Petitioner argues that eight circumstances warrant the extraordinary relief sought. Within the first circumstance, Petitioner includes over a dozen "reasons" and "examples" which allegedly support relief. Dkt. No.

189 at 4-15; Dkt. No. 196 1-9.11¹¹ None of Petitioner's arguments suffice.¹²

¹¹ In the alternative, the arguments raised for the first time in the Reply, including arguments regarding the coercion of witnesses, Dkt. No. 196 at 4 ("Actual Innocence Example 3"), a fabricated email designed to pressure Petitioner to plead guilty, *id.* at 5 ("Actual Innocence Example 4"), a witness's letter begging for leniency, *id.* at 7 ("Actual Innocence Example 5"), a witness's varying stories, *id.* at 7-8 ("Actual Innocence Example 6"), witnesses' exculpatory statements, *id.* at 8-9 ("Actual Innocence Examples 7 and 9"), a witness's "secret no-jail time deal," *id.* at 8 ("Actual Innocence Example 8"), the use of show money checks, *id.* at 9 ("Actual Innocence Example 11"), and a missing tape, *id.* ("Actual Innocence Example 12"), are deemed waived. *See Knipe v. Skinner*, 999 F.2d 708, 711 (2d Cir. 1993) ("Arguments may not be made for the first time in a reply brief").

¹² In the alternative, the arguments raised by Petitioner that were previously raised in his § 2255 motion are deemed improper. These include Circumstance 1-Reason 2, Dkt. No. 189 at 4-5, Circumstance 3, *id.* at 17 (regarding the conspiracy and conscious avoidance instructions), Circumstance 4, *id.* at 17, Circumstance 5, *id.* at 18, and Circumstance 6, *id.* at 18. Where a § 2255 motion and subsequent coram nobis petition raise identical arguments, the Court must determine whether the subsequent coram nobis petition is

barred by application of procedural rules in the § 2255 context. See *Brooks*, 2023 WL 3819374, at *4 n.4. “Although the Second Circuit has not yet addressed this issue, several district courts within this circuit have imported into the coram nobis context the test from *Sanders v. United States*, 373 U.S. 1 (1963), for when a successive habeas petition is procedurally barred.” *Id.* (listing cases). That test prohibits consideration of a *coram nobis* petition where “(1) the same grounds presented in the [coram nobis] petition were determined adversely to petitioner in an earlier collateral proceeding; (2) the prior determination was on the merits; and (3) the ‘ends of justice’ would not be served by reaching the merits of the repetitive grounds in the current petition.” *Durrani*, 294 F. Supp. 2d at 209-10 (citing *Sanders*, 373 U.S. at 15). Each of Petitioner’s arguments were decided against him in the earlier proceedings, and each argument was decided on the merits. See *generally* Dkt. 178. Though all but two of the issues were determined by the application of preclusion and procedural default, the Second Circuit has “clarif[ied] that the denial of an initial § 2255 motion on grounds of procedural default . . . constitutes a disposition on the merits.” *Carter v. U.S.*, 150 F.3d 202, 203 (2d Cir. 1998). Regardless, the Court’s dismissal of the entire § 2255 motion with prejudice is determinative of the merits. See *Durrani*, 294 F. Supp. 2d at 211 (“[a] dismissal with prejudice is a ‘final judgment’ on the merits”). The Court also finds that the ends of justice would not be served by reaching the merits

Circumstance 1. Petitioner's first circumstance is "actual innocence." Dkt. No. 189 at 4 ("Circumstance 1"). "[T]o establish actual innocence in a collateral attack, a petitioner must show more than a mere possibility of acquittal." *Marshall v. United States*, 368 F. Supp. 3d 674, 678 (S.D.N.Y. Mar. 12, 2019) (citing *Fountain v. United States*, 357 F.3d 250, 255 (2d Cir. 2004)). Instead, Petitioner must show that "in light of [] new evidence, it is more likely than not that no reasonable juror would have found him guilty beyond a reasonable doubt." *Angus v. United States*, 17-CV-583, 2020 WL 3843728, at *4 (E.D.N.Y. July 8, 2020) (citing *Schlup v. Delo*, 513 U.S. 298, 299 (1995)); see also *Fountain*, 357 F.3d at 255. Petitioner provides a slew of examples and reasons allegedly demonstrating he is actually innocent.

First, Petitioner's repeated arguments as to the sufficiency of the trial evidence establishing the required "overt acts" are facially insufficient to justify coram nobis relief. Dkt. No. 189 4:13 ("Fremont Reasons 1-6," "Washington Mutual Bank Reasons 1-8," and "Citimortgage Reasons 1-

with respect to those overlapping claims. *Id.* (citing *U.S. ex rel Schnitzler v. Follette*, 406 F.2d 319, 321 (2d Cir. 1969)). Therefore, the Court need not consider the merits of Petitioner's repeated arguments. Nevertheless, for the sake of thoroughness and with knowledge that Petitioner has pressed these arguments for several years, the Court moves on the address each argument in turn.

5"); Dkt. No. 196 at 3 ("Actual Innocence Example 1").¹³ Petitioner's arguments do not involve "new evidence" capable of even suggesting factual innocence, *Angus*, 2020 WL 3843728, at *4, but instead are attempts at relitigating the very same issues that were present at trial and on appeal. This will not suffice to justify *coram nobis* relief. Additionally, the Second Circuit found that the

¹³ Regardless, as to "Actual Innocence Example 1," Petitioner points to Government Trial Exhibit 17.4B, which he argues evidences his innocence under 18 U.S.C. § 1014 by establishing that one of the lending institutions to which a false HUD-1 form was submitted, Fremont Investment & Loan, did not consider the form until after agreeing to the loan. Dkt. No. 189 at 7; Dkt. No. 196 at 3. Petitioner argues he therefore could not have influenced Fremont to grant the loan by submitting a false form. *Id.* But, as admitted by Petitioner, this evidence dates to, and was used in, the trial. *Id.* Petitioner's own proffered case, *House v. Bell*, clarifies that where a collateral challenge is "based on trial evidence, the court presumes the jury resolved evidentiary disputes reasonably." 547 U.S. 518, 538 (2006). Only where new evidence is proffered does the court "assess how reasonable jurors would react to the overall, newly supplemented record." *Id.* Government Trial Exhibit 17.4B is definitively not "new evidence" capable of justifying a finding of actual innocence, and this Court presumes the jury assessed the evidence reasonably.

jury had enough evidence to convict Petitioner on the remaining conviction. *Bouchard*, 828 F.3d at 128. Therefore, this Court could not reassess the pre-existing evidence and alleged trial errors which Petitioner relies on even if it found reason to; the issue is moot because the evidence itself has been deemed sufficient. *See Yong Wong Park v. U.S.*, 441 Fed. Appx. 18, 20 (2d Cir. 2011) (finding “a trial court must follow an appellate court’s previous ruling on an issue in the same case” in the context of a coram nobis petition).

Second, Petitioner points to the fact that Kevin O’Connell, one of the Government’s witnesses, recanted his trial testimony in an interview with government agents and alleges that the witness committed perjury by testifying that he discussed the scheme with Petitioner. Dkt. No. 189 at 13 (“AUSA Edward Broton declared that I am innocent”); Dkt. No. 196 at 4 (“Actual Innocence Example 2”). However, the alleged O’Connell perjury was already raised on direct appeal, where the Second Circuit found even absent the recanted evidence “there was ample independent evidence proving that [Petitioner] was aware of the fraudulent nature of the schemes.” *Bouchard*, 828 F.3d at 129. Thus, this Court cannot find that “no reasonable juror would have found [Petitioner] guilty” had they known the O’Connell testimony was recanted. *Angus*, 2020 WL 3843728, at *4. To do so would contradict the Second Circuit’s findings on the sufficiency of the evidence to establish Petitioner’s guilt absent the recanted testimony.

Yong Wong Park, 441 Fed. Appx. at 20. Moreover, Petitioner did, in fact, suggest to the jury through cross-examination that the O'Connell testimony was false as to the subject of the recantation. *Bouchard*, 828 F.3d at 128-29. Indeed, in their jury summation, the Government admitted that O'Connell had not discussed the scheme with Defendant. *Id.* As such, the recantation of the evidence cannot qualify as "new evidence" which more likely than not would sway a reasonable juror. The jury already had the information it would have gleaned had it been presented with the fact of the witness's recantation and alleged perjury.

Third, Petitioner relies on statements made by an Assistant U.S. Attorney Edward Broton in the evidentiary hearing related to the recantation of the witness's testimony to suggest Petitioner is innocent. Dkt. No. 189 at 13 ("AUSA Edward Broton declared that I am innocent"); Dkt. No. 196 at 9 ("Actual Innocence Example 10"). The statements make no such suggestion. Instead, it is clear from the record that Broton's statements were made to enable the court to determine the weight of the witness's recanted testimony. Again, given the "ample independent evidence [outside of the recanted testimony] proving that [Petitioner] was aware of the fraudulent nature of the schemes," and the Second Circuit's finding that the existing evidence was sufficient to convict, the Court cannot find that the Broton statements would make it more likely than not that no

reasonable juror could convict Petitioner. *Angus*, 2020 WL 3843728, at *4.

Fourth, Petitioner argues a separate Government witness, Michael Crowley, was “coerced into committing perjury at trial.” Dkt. No. 196 at 4 (“Actual Innocence Example 3”). Petitioner takes issue with two points of Crowley’s trial testimony. First, Petitioner argues that grand jury testimony reveals that Crowley also lied about holding discussions with Petitioner in his trial testimony. *Id.* But even taken as true, the allegations of Crowley’s perjury would not justify relief. As the Second Circuit noted, a third witness, Francis Disonell, testified as to Petitioner’s awareness of the fraudulent nature of the schemes. *Bouchard*, 828 F.3d at 129. Given the availability of other evidence, it is not more likely than not that no reasonable juror would convict. *Angus*, 2020 WL 3843728, at *4. Second, Petitioner contends that part of Crowley’s trial testimony, regarding the purchasing of property for \$40,000 and its sale for \$80,000, was fed to Crowley during questioning in the related grand jury proceedings as a mere example of a potential scheme, and that “the jury never heard that [the witness’s] ‘40/80’ trial perjury was actually a fictional ‘example’ used for illustrative purposes[.]” *Id.* (citing Dkt. No. 50 at 11-12). The concern is unfounded. In fact, just two pages before Petitioner’s chosen citation, Dkt. No. 50 at 11-12, the witness states “for example, we would buy a property that we could buy say for \$40,000, we would then get an appraisal on a

property, say at \$80,000 would be the appraised value so that's what we would sell the properties for." *Id.* at 9 (emphasis added). The jury did, in fact, hear that the "40/80" trial testimony was an example used for illustrative purposes. Regardless, the Petitioner fails to explain how the "40/80" testimony was prejudicial. In all, the concerns with Crowley's testimony cannot justify *coram nobis* relief.

Fifth, Petitioner relies on the fact that the jury was never shown an email sent by "Prosecutor Olmsted," one of the Prosecutors on the case, sent to Petitioner two months before his indictment. Dkt. No. 196 at 5 ("Actual Innocence Example 4"). Petitioner claims the Olmsted email contained a false summary of grand jury testimony and was designed to induce Petitioner to plead guilty. *Id.* Specifically, Petitioner takes issue with Olmsted's description of O'Connell and Crowley's grand jury testimony. The Olmsted email is an "old email [Petitioner] located," was sent far before the trial, and does not pertain to the factual innocence of Petitioner. *Id.* Petitioner fails to explain how an old email sent by a prosecutor years after the conduct for which he was convicted took place could possibly speak to his factual innocence. Even if the email were taken, somehow, as an admission of Crowley and O'Connell's perjury, Petitioner's argument would still hold no weight. Yet again, the alleged discrepancy involves a supposed discussion between Crowley, O'Connell, and Petitioner, but the existence of that meeting is not determinative of whether there was sufficient evidence to convict

Petitioner. *Bouchard*, 828 F.3d at 129. As such, because a reasonable juror could convict Petitioner based on evidence that has nothing to do with the email, the email is facially incapable of justifying a writ of *coram nobis*.¹⁴

Sixth, Petitioner cites a letter submitted by Francis Disonell, another Government witness that was found to have participated in the scheme, four years prior to Petitioner's trial in Disonell's own sentencing proceedings in which he "beg[s] for leniency." *Id.* at 7 ("Actual Innocence Example 5"). The letter contains Disonell's assertion that he thought he was engaged in "a legitimate business." *Id.* Disonell testified at trial and was subject to cross-examination; any previous allegedly

¹⁴ The Court also notes the grand jury testimony cited by Petitioner and included in the Petition does not appear to contradict the Olmsted's email summary. The cited grand jury testimony merely establishes that O'Connell did not have "any conversation with [Petitioner] about . . . double HUD closings," and that Crowley did not "have any conversations . . . about the technical elements of how [he and Petitioner] were going to close" including any conversations regarding "double HUD closings." *Id.* at 6 (citing Grand Jury Transcript, June 22, 2011 at Pages 13, 21) (emphasis added). The cited grand jury testimony does not, however, state that the witness never met Petitioner. The allegedly false email explicitly notes that neither witness "discussed 'double HUD' closings with [Petitioner] specifically." *Id.* at 5.

inconsistent statements would merely impact the weight of that testimony (if at all) and falls far flat of constituting the kind of "new evidence" of Petitioner's actual innocence capable of justifying a writ of *coram nobis*. Moreover, Petitioner admits that the letter does not mention him, and Disonell's own beliefs are hardly relevant to Petitioner's guilt. Dkt. No. 196 at 7.

Seventh, Petitioner cites to Disonell's grand jury testimony along with a transcript of an IRS interview to assert that Disonell's trial testimony was false. Dkt. No. 196 at 7-8 ("Actual Innocence Example 6"). But Petitioner did in fact attempt to impeach the witness's testimony at trial using the very same allegedly inconsistent conversation with the IRS. Dkt. No. 49 at 66:15 20. And again, this "evidence" is relevant only to the weight of Disonell's testimony. The Court finds that the allegedly inconsistent stories are far from sufficient to meet the demanding *coram nobis* standard for actual innocence. The Court finds it is not more likely than not that no reasonable juror would convict even if each "version" of Disonell's testimony was presented at trial. *Angus*, 2020 WL 3843728, at *4.

Eighth, Petitioner also points to circumstances regarding his two paralegals, Laurie Hinds and Malissa Edgerton, as establishing actual innocence. Petitioner argues that Hinds and Edgerton made exculpatory statements and that Hinds had a "secret deal" with the Government, all of which constitutes new evidence not heard by the jury. Dkt. No. 196 at 8-9 (Actual Innocence

Examples 7, 8, 9). First, no such exculpatory statements exist; at most, the cited statements vaguely assert Petitioner's ignorance of specific facts and the witnesses' opinion of Petitioner. *Id.* Moreover, both admitted their role in the conspiracy and acknowledged the illegality of their conduct. Dkt. No. 200 at 6-7. Petitioner does not explain, nor could he reasonably argue, that the hand-picked statements from Hinds and Edgerton prove his actual innocence; it is unlikely a reasonable juror would be swayed by the opinions of Petitioner's employees of his character. Additionally, the alleged "secret" deal between Hinds and the Government is arguably no secret at all; the jury was made aware of Hinds's cooperation agreement with the Government during trial. Dkt. 50 at 61:12-15. And Hinds swore under oath that she received no promises of leniency in exchange for her guilty plea. Petitioner relies on a post-trial affidavit submitted by his long-term employee suggesting Hinds was told by the Government she would receive no jail time in exchange for a guilty plea. Dkt. No. 196 at 8. Again, a reasonable juror would have reason to doubt the credibility of such an affidavit, particularly when considered alongside Hinds's sworn statement that she received no leniency. Petitioner also provides no explanation as to how the alleged "secret deal" between Hinds and the Government could undermine the conviction or pertain to Petitioner's own innocence. The alleged "secret deal" and exculpatory statements fall far short of the

evidence required to establish "actual innocence" for purposes of a writ of *coram nobis*.

Ninth, Petitioner also points to the use of fake "show money checks" at trial as evidence of his actual innocence. Dkt. No. 196 at 9 ("Actual Innocence Example 11"). This argument has already been considered and rejected by this Court as a basis for a new trial. Dkt. Nos. 89, 94, 105. Therefore, it cannot possibly be considered justification for a writ of *coram nobis*. See *United States v. Viertel*, No. 01-CR-571-3 (JGK), 2012 WL 1604712, at *2 (S.D.N.Y. May 8, 2012) ("This claim is barred because the petitioner already raised it in his motion for a new trial").

Tenth, and finally, Petitioner argues that an "exculpatory 'tape'" was never turned over in discovery and would provide evidence of actual innocence. Dkt. No. 196 at 9 ("Actual Innocence Example 12"). The Court has already ruled that Petitioner's argument regarding the tape fails to "show reason to believe that the [P]etitioner may . . . be able to demonstrate that he is . . . entitled to relief." Dkt. No. 178 at 15. Thus, the Court cannot find that the tape would meet the high burden of justifying *coram nobis* relief. Additionally, Petitioner fails to explain how the tape, which allegedly records O'Connell's previous admission regarding the manipulation of the relevant real-estate documents, proves or even suggests Petitioner's factual innocence. As admitted by Petitioner, the tape "did not refresh O'Connell's recollection," and thus, it's relevance to Petitioner's

innocence is questionable, if not impossible. Dkt. No. 196 at 9.

The Court finds that none of the reasons, examples, or “new evidence” put forward by Petitioner is sufficient. Circumstance 1 fails to justify *coram nobis* relief.

Circumstance 2. Petitioner moves on to argue the Supreme Court’s decision in *Ruan v. United States*, 597 U.S. 450 (2022), justifies *coram nobis* relief. Petitioner fails to adequately explain why the decision alters his own conviction. In *Ruan*, the Supreme Court held that in a prosecution under the Comprehensive Drug Abuse Prevention and Control Act, once a defendant produces evidence of authorization for distributing controlled substances, the Government must show beyond a reasonable doubt that the defendant knowingly or intentionally acted in an unauthorized manner. *Id.*

The relevant statute, 21 USCA § 841 (“§ 841”), reads, in relevant part, as follows: “[e]xcept as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally-- to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.” *Id.* at subsection (a)(1). The Court’s holding is relatively narrow: it held that “§ 841’s ‘knowingly or intentionally’ *mens rea* applies to the ‘except as authorized’ clause” in the statute. *Ruan*, 597 U.S. at 457 (quoting § 841). While the Supreme Court relied on broad precedent creating a presumption that criminal statutes are drafted to impose

liability only where “defendant[s] possess a culpable mental state,” nothing in the decision suggests the Supreme Court viewed its decision as altering the proper interpretation of other criminal statutes. *Id.* at 458. As such, the Court finds *Ruan* holds no bearing on this case.

Even if it did, Petitioner primarily uses *Ruan* as a basis to re-argue the very same issues he has repeatedly pressed regarding the inadequacy of the jury instructions. Dkt. No. 189 at 16 (citing Exhibit 6 at 16-20); see also Dkt. No. 153 at 14-15. Though far from clear based on the Petition alone, Petitioner appears to argue *Ruan* requires that those jury instructions include an instruction that Petitioner must be found to have had a willful *mens rea* beyond a reasonable doubt. More accurately though, Petitioner at best makes the case that *Ruan* is somehow analogous and lends support to arguments he has previously made in his § 2255 motion. Dkt. No. 153 at 14-15. To the extent his argument overlaps with that motion, the argument is precluded. See *Brooks*, 2023 WL 3819374, at *4 n.4. Regardless, the overarching jury instructions, cited by Petitioner in Exhibit 6 and included at Dkt. 117, do include instructions that “every element of the crimes charged” need to be “prove[n] beyond a reasonable doubt.” *Id.* at 16:17-18. Specifically relating to aiding and abetting, the Court instructed the jury that Petitioner must “have participated in [an unlawful venture] as something he wished to bring about.” *Id.* at 31:8-10. Such a jury instruction has been found by the Second Circuit to be “legally correct” for

establishing liability for aiding and abetting. *U.S. v. Trantham*, 446 Fed. Appx. 339, 342 (2d Cir. 2011). Thus, Petitioner's arguments as to *Ruan* fail, and Circumstance 2 cannot justify *coram nobis* relief.

Circumstance 3. Petitioner next argues that a slew of jury instructions, including the instructions he previously attacked as insufficient under *Ruan*, are "erroneous." Dkt. No. 189 at 17. Petitioner provides no explanation for why the identified instructions are improper. Instead, he cites to an exhibit attached to his petition, which contains over 20 pages of argument. *Id.* (citing Exhibit 6 at 10-31). To the extent the Petition relies on arguments made in Exhibit 6, a 149-page complaint Petitioner filed with the Attorney Grievance Committee, the Petition fails. Such references are blatant attempts to side-step this Court's rules regarding page length by attaching over 100 pages of additional argument. See N.D.N.Y. L.R. (Section XIII 1.1(a)).¹⁵ The Court warned Petitioner to adhere to the local rules regarding submission length. *See* Dkt. 178 at 5 n.2. Petitioner's arguments are also conclusory and

¹⁵ Though there are no specific rules regarding the length of a *coram nobis* petition, the Court utilizes the rules governing the filing of a habeas corpus petition.

insufficient, and thus, cannot defeat this Court's presumption "that the proceedings were correct[.]" *United States v. Rutigliano*, 887 F.3d 98, 108 (2d. Cir. 2018).

Circumstance 4. Next, Petitioner argues that the prosecution violated the *Ex Post Facto* Clause of the Constitution, which prevents the Government from prosecuting individuals for acts that were not illegal at the time they were committed. Dkt. No. 189 at 17; U.S.C.A. Const. Art. 1, § 10, cl. 1. This Court denied Petitioner's exact argument on procedural default grounds in ruling on his § 2255 motion. Dkt. No. 178 at 7. Now, the Court additionally finds the argument meritless.

Petitioner bases his argument on the Second Circuit's ruling that the convictions on three charges based on his interactions with BNC must be overturned because, in part, BNC was not a "financial institution" under 18 U.S.C. § 20 (which provided the definition of "financial institution" for the statute charged) at the time Petitioner committed the acts in question. Dkt. No. 189 at 17. But as the Second Circuit noted, the Government's failure was evidentiary, not constitutional. Though, "[a]t the time of the charged conduct . . . BNC was not a covered institution[,] . . . the Government might have been able to prove that Bouchard knew that money from mortgage lenders came from banks by virtue of his knowledge of the industry." *Bouchard*, 828 F. 3d at 127. Regardless, the Second Circuit did in fact reverse the three substantive convictions against Petitioner which relied on the definition of "financial institution." *Id.*

at 126-28. In contrast, the Second Circuit upheld the conspiracy conviction on the explicit basis that it did not rely solely on the jury's findings related to the reversed convictions. *Id.* at 128. Thus, Petitioner's standing conviction on the conspiracy charge does not rely on the meaning of the term "financial institution" at the time of the charged conduct, and Petitioner's argument is meritless.

Circumstance 5. Petitioner repeats his argument that "inadmissible evidence on the [reversed counts] . . . was used by the jury to arrive at its guilty verdict on Count 1-Conspiracy." Dkt. No. 189 at 18. This Court has already decided, on the merits, that Petitioner has not met his "extremely heavy burden" to establish prejudicial spillover. Dkt. No. 178 at 9 (citing *United States v. Griffith*, 284 F.3d 338, 351 (2d Cir. 2002)). This Court finds no reason to disrupt the previous decision's findings and adopts them in full to the extent it does not rely on preclusion through Brooks. *Supra* fn. 12.

Circumstance 6. Again, Petitioner relies on the ineffective assistance of his trial counsel in an attempt to vacate his conviction, citing directly to the argument made in his § 2255 motion, which this Court denied. Dkt. No. 189 at 18-19. This time, Petitioner argues his trial counsel's disbarment on January 18, 2018, which occurred after his § 2255 motion was filed but before this Court issued its decision, warrants further consideration. *Id.* It does not. Petitioner admits the disbarment was unrelated to his counsel's work in his criminal proceedings and makes no attempt at connecting

the conduct which led to disbarment to the conduct of Petitioner's criminal proceedings. *Id.* To the extent the disbarment can be considered as relevant, this Court has already ruled that even with another attorney, the outcome of the trial would not be different given the "overwhelming evidence" implicating Petitioner in the conspiracy. Dkt. No. 178 at 13; see *Kieser v. New York*, 56 F.3d 16, 18 (2d Cir. 1995) (requiring a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different") (quotation marks omitted). Therefore, Circumstance Six cannot justify *coram nobis* relief.

Circumstance 7. Finally, Petitioner, relying entirely on the arguments made in the attached Exhibit 6 to the Petition, argues that prosecutorial misconduct "contaminated" his criminal proceedings. Dkt. No. 189 at 19. Again, the Court refuses to consider the arguments made solely in Exhibit 6 as a blatant violation of the local rules. *Supra* Circumstance 3. Regardless, the Court has reviewed Exhibit 6 and found none of the arguments persuasive. "Courts in the Second Circuit apply a three-part test when considering whether prosecutorial misconduct was prejudicial: (1) the severity of the misconduct; (2) the measures adopted to cure the misconduct; and (3) the certainty of conviction absent the misconduct." *Brooks*, 2023 WL 3819374, at *6 (citing *United States v. Elias*, 285 F.3d 183, 190 (2d Cir. 2002)). As discussed, the Second Circuit has already held there is "ample . . . evidence" to sustain the

conviction, and as such, even if true, Petitioner's conclusory and unsubstantiated allegations of misconduct could not warrant coram nobis relief. *Bouchard*, 828 F.3d at 129.

E. The Discovery Motion. The Court similarly denies Petitioner's motion for discovery and the accompanying request for oral argument on the Petition. Specifically, Petitioner seeks an order "compelling Federal Prosecutor Tamara Thomson to participate in Discovery by appearing for a deposition whereupon her testimony, under oath, will be taken before a Notary Public . . . with questions asked by [Petitioner]." Dkt. No. 201 at 1.

Again, under Rule 6(a), "[a] judge may, for good cause, authorize a party to conduct discovery under the Federal Rules of Criminal Procedure or Civil Procedure, or in accordance with the practices and principles of law." A petitioner has shown good cause "where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is . . . entitled to relief." *Bracy*, 520 U.S. at 908–09 (quoting *Harris*, 394 U.S. at 300). "A [coram nobis] petitioner, unlike the usual civil litigant in federal court, is not entitled to discovery as a matter of ordinary course." *Id.* at 904. Petitioner "must show good cause for his request." *Durrani*, 294 F. Supp. at 217 (quoting *Perez v. United States*, 274 F.Supp.2d 330, 336 (E.D.N.Y.2003)). "Generalized statements about the possible existence of material do not constitute good cause." *Cardoso v. United States*, 642 F. Supp.

2d 251, 265 (S.D.N.Y. 2009) (citing *Green v. Artuz*, 990 F. Supp. 267, 271 (S.D.N.Y. 1998)).

Given the above findings, *supra* Sections IV (B-D), Petitioner is not permitted additional discovery. Just as in *Durrani*, 294 F. Supp. at 218, Petitioner has “sought post-conviction relief” through several means: namely, a direct appeal, a § 2255 motion, a discovery motion related to the § 2255 motion, and an appeal of this Court’s denial of his § 2255 motion. See Dkt Nos. 111, 153, 166, 181, 184. And just as in *Durrani*, Petitioner “presents no credible evidence” that would justify granting his motion for discovery. *Durrani*, 294 F. Supp. at 217. Indeed, a request to depose a Federal Prosecutor over a decade after conviction and after years of post-conviction proceedings based on a litany of previously raised and/or baseless assertions of innocence can only be described as a “mere fishing expedition.” *Perez*, 274 F.Supp.2d at 330.

Nor is Petitioner granted oral argument. The Court denies his petition in full and sees no reason to grant oral argument on issues that are facially insufficient to justify *coram nobis* relief and have, in part, been repeatedly litigated since 2012. See *Lalonde v. City of Ogdensburg*, 662 F. Supp. 3d 289, 303 n.2 (N.D.N.Y. 2023) (citing L.R. 7.1(a)).

V. CONCLUSION

Accordingly, the Court hereby
ORDERS that Petitioner’s Petition, Dkt. No. 189, is DENIED; and the Court further

ORDERS that Petitioner's motion for discovery, Dkt. No. 201, is DENIED; and the Court further

ORDERS that Petitioner's request for oral argument, Dkt. No. 201, is DENIED as moot; and the Court further

ORDERS that the Clerk serve a copy of this Order on the parties in accordance with the Local Rules.

IT IS SO ORDERED.

Dated: September 26, 2024 Albany, New York

Anne M. Nardacci
U.S. District Judge

**Additional material
from this filing is
available in the
Clerk's Office.**