

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RODNEY L. KAVVA,
ATTORNEY AT LAW
871 SO. JACKSON SUITE 201
SEATTLE WA 98104

GORDON K. HIRABAYASHI,
Defendant Petitioner,
v.
UNITED STATES OF AMERICA,
Plaintiff Respondent.

No. C83-122V
(Former Crim.
No. 45738)

GOVERNMENT'S MEMORANDUM OF LAW

As set forth in the government's proposed prehearing order, there are four major issues of law relevant to this hearing:

(1) Whether petitioner has shown sound reasons for failing to seek appropriate relief earlier.

(2) Whether petitioner has shown present adverse legal consequences sufficient to create an actual case or controversy.

(3) Whether petitioner (a) has carried his burden of rebutting the presumption of regularity that attaches to the original proceedings, and if so (b) whether petitioner has carried his burden of proving that intentional governmental misconduct occurred prior to his conviction which rendered "irregular and void" his misdemeanor curfew violation and (c) which "precluded" affirmance of his conviction on any ground.

1 And, assuming that the Court believes that this subject is
2 within the scope of this Court's earlier order defining the
3 subject matter of this hearing (which we deny), then:

4 (4) Whether the government had a constitutional obligation,
5 after the affirmance of petitioner's conviction in the Supreme
6 Court, to initiate sua sponte this collateral proceeding on
7 petitioner's behalf. We point out that the government's earlier
8 pleadings in this case have exhaustively briefed these issues.
9 A more concise inventory of our primary legal arguments follows.

10 The legal standards by which a petition for a writ of coram
11 nobis is judged are well settled. As set forth in United
12 States v. Darnell, 716 F.2d 479, 481 n.5 (7th Cir. 1983):

13 A coram nobis petitioner . . . is confronted with judicial-
14 ly-created standards that severely circumscribe the avail-
15 ability of the writ. [Coram nobis] limits the
16 issues that may be raised to those "of the most fundamental
17 character." United States v. Morgan, 346 U.S. [502] at 511.
18 * * * It is presumed that the challenged proceedings were
19 correct and a heavy burden rests on the petitioner to
20 demonstrate otherwise. In addition, a standard akin to the
21 "actual prejudice" standard is applied: the coram nobis
22 petitioner must demonstrate that but for the fundamental
23 errors committed a more favorable judgment would have been
24 rendered. United States v. Dellinger, 657 F.2d 140, 144 n.6
25 (7th Cir. 1981). The petitioner also must demonstrate
26 present adverse legal consequences flowing from the conviction sufficient to satisfy the "case or controversy" requirements of Article III. Id. Finally, in Morgan, the Supreme Court stated that there must be "sound reason" for the petitioner's "failure to seek appropriate earlier relief." United States v. Morgan, 346 U.S. at 512. * * * The doctrine of laches adequately protects against "sandbagging" and ensures that coram nobis relief will not be granted where a petitioner's inexcusable delay in raising this claim has prejudiced the government. See Norris v. United States, 687 F.2d at 910 (Cudahy, J., concurring). These safeguards against abuse of the writ serve essentially the same function as the cause and prejudice standard.

1 Accordingly, this memorandum will discuss the law applicable
2 to each of these legal issues and will demonstrate that peti-
3 tioner is not entitled to coram nobis relief. 1/

4 1. Petitioner has the burden of proving "sound reasons" for
5 his failure to seek appropriate relief earlier.

6 A recent Ninth Circuit opinion, Maghe v. United States, 710
7 F.2d 503 (9th Cir.), cert. denied, 103 S.Ct. 3549 (1983),
8 restated the rule announced by the Supreme Court in United
9 States v. Morgan, 346 U.S. 502, 512 (1954):

10 To be entitled to a writ of coram nobis, Maghe must show
11 that, there are "sound reasons" for his failure to seek
12 relief earlier. United States v. Morgan, 346 U.S. 502, 512,
13 74 S.Ct. 247, 253, 98 L.Ed. 248 (1954). The district court
14 properly denied Maghe's petition without a hearing because
15 he failed to allege an adequate factual basis justifying his
16 25-year delay in seeking relief. See United States v.
17 Taylor, 648 F.2d 565, 573 (9th Cir.), cert. denied, 545 U.S.
18 866, 102 S.Ct. 329, 70 L.Ed.2d 168 (1981).

19 The court then went on to explain that a prior lack of
20 interest or a newly acquired interest in seeking relief is not a
21 "sound reason" that will justify a long delay in seeking legal
22 relief. Accord United States v. Correa-DeJesus, 708 F.2d 1283,
23 1286 (7th Cir. 1983).

24 1/ Submission of this memorandum is made without prejudice to
25 the right of the United States to submit, sua sponte, additional
26 memoranda of law to the Court up to our forty page limit based
upon petitioner's submissions and issues raised at the hearing.

1 2. Petitioner must demonstrate present adverse legal
2 consequences.

3 Petitioner must demonstrate present adverse legal
4 consequences flowing from his conviction. Absent such adverse
5 legal consequences there is no justiciable case or
6 controversey. 2/

7 Collateral attacks upon old criminal convictions, where the
8 sentence has already been served, are moot "if it is shown that
9 there is no possibility that any collateral legal consequences
10 will be imposed on the basis of the challenged conviction."
11 Sibron v. New York, 392 U.S. 40, 57 (1968); United States v.
12 Morgan, supra, 346 U.S. at 512-513; Ybarra v. United States,
13 supra; Chavez v. United States, 447 F.2d 1373 (9th Cir. 1971).
14 This doctrine was recently discussed in Lane v. Williams, 455
15 U.S. 624, 632 (1982). There, the Supreme Court noted that the
16 typical legal consequences which warranted an exercise of
17 collateral relief involved civil penalties such as loss of the
18 right to vote, the right to serve as an official of a labor
19 union for a specified period of time, or to engage in certain
20 businesses. None of those allegations are made here. The
21 misdemeanor conviction at issue does not deprive petitioner of
22
23
24

25 2/ Although this court has previously ruled on this issue, the
26 respondent preserves this jurisdictional objection.

1 any of his civil rights (to vote, etc.). As in Lane v.
2 Williams, supra, since no felony violations are involved

3 *** No civil disabilities such as those present in Carafas
4 [v. La Valle, 391 U.S. 234] result . . . At most, certain
5 nonstatutory consequences may occur; employment prospects, or
6 the sentence imposed in a future criminal proceeding, could
7 be affected *** The discretionary decisions that are made by
8 an employer or a sentencing judge, however, are not governed
9 by the mere presence or absence of a recorded violation . .
Any disabilities that flow from what respondents did . . .
are not removed or even affected by a District Court
order . . . In these circumstances, no live controversy
remains.

10 In St. Pierre v. United States, 319 U.S. 41, 43 (1943) the
11 Supreme Court stated that it is an insufficient allegation, as a
12 matter of law, to allege as a present adverse legal consequence
13 "that the judgment may impair [the petitioner's]
14 credibility . . . in any future legal proceeding." In Sibron,
15 the Court did not overrule that holding, but rather revalidated
16 and took considerable pains to distinguish it on the unique
17 facts present in Sibron. In this regard, the Sibron opinion
18 states, 392 U.S. at 56 fn. 17:

19 We note that there is a clear distinction between a
20 general impairment of credibility, to which the Court
21 referred in St. Pierre, see 319 U.S., at 43, and New York's
22 specific statutory authorization for use of the conviction
to impeach the "character" of a defendant in a criminal
proceeding. The latter is a clear legal disability
deliberately and specifically imposed by the legislature.
(Emphasis added.)

23 In the instant case, this "clear distinction" between a
24 general and specific impairment of credibility is totally
25 absent. There is no specific statutory disability imposed by
26

1 the federal legislature attaching to this misdemeanor
2 conviction. Indeed, just the opposite is true here. The
3 federal legislature has repealed the statute involved in the
4 instant case, 18 U.S.C. § 1383, and enacted 18 U.S.C. § 4001(a)
5 to prohibit the repetition of any similar executive orders.

6 If petitioner and this Court were correct that the "remote"
7 possibility of impeachment from a forty year old, already
8 repealed malum prohibitum misdemeanor in some undetermined state
9 or foreign legal forum is a sufficient disability to maintain a
10 case or controversy, then the above-quoted language from Sibron
11 was totally unnecessary and St. Pierre has been overruled, not
12 distinguished. Every outstanding conviction, no matter how
13 slight its effect, could hypothetically lead to impeachment in
14 some forum and would therefore be sufficient, per se, to
15 maintain collateral review. That result would render St. Pierre
16 a nullity and would have obviated the Sibron decision's careful
17 language distinguishing, not overruling, St. Pierre. See, e.g.,
18 392 U.S. at 56 fn. 17 supra and also at pp. 51, 53 & fn. 13, and
19 57.

20 The second adverse legal consequence that petitioner and now
21 this Court have identified, "that the conviction will become a
22 consideration in some future sentencing," is also legally
23 insufficient. That too is universally true of all convictions
24 in every conceivable hypothetical situation. Therefore, this
25 ruling is also in direct conflict with the continued viability
26 of St. Pierre. Once again, in Sibron a specific legislative