6-10-1985

Government's Memorandum of Law

United States District Court Western District of Washington

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

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.

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

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

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

> A coram nobis petitioner . . . is confronted with judicially-created standards that severely circumscribe the availability of the writ. [Coram nobis] limits the issues that may be raised to those "of the most fundamental character." United States v. Morgan, 346 U.S. [502] at 511. * * * It is presumed that the challenged proceedings were correct and a heavy burden rests on the petitioner to demonstrate otherwise. In addition, a standard akin to the "actual prejudice" standard is applied: the coram nobis petitioner must demonstrate that but for the fundamental errors committed a more favorable judgment would have been rendered. United States v. Dellinger, 657 F.2d 140, 144 n.6 (7th Cir. 1981). The petitioner also must demonstrate 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.

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

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

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

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

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

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

2. Petitioner must demonstrate present adverse legal consequences.

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

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

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

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

> *** No civil diabilities such as those present in Carafas [v. La Valle, 391 U.S. 234] result . . . At most, certain nonstatutory consequences my occur; employment prospects, or the sentence imposed in a future criminal proceeding, could be affected *** The discretionary decisions that are made by an employer or a sentencing judge, however, are not governed 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.

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

> We note that there is a clear distinction between a general impairment of credibility, to which the Court referred in St. Pierre, see 319 U.S., at 43, and New York's 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.)

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

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

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

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

provision in the New York Criminal Code mandated that any subsequent repetition of that misdemeanant conduct (possession of burglary tools) by Sibron would thereafter be treated as a felony. 392 U.S. at 56 & at 48 fn. 5. That kind of specific legislative penalty enhancement is not present in this case. In contrast, the mere speculative possibility that "the sentence imposed in a future criminal proceeding, could be affected" not only by the underlying conduct (which a federal judge is always free to consider, see 18 U.S.C. § 3577), but additionally by the judgment of conviction, was recently reconsidered in Lane v. Williams, 455 U.S. 624, 632 (1982) and rejected over Justice Marshall's dissent on that very point, 455 U.S. at 637.

Furthermore, the record in this case shows that this conviction is not within the Sibron rule because it is not like "most criminal convictions" which we readily concede ordinarily entail adverse consequences. Most criminal convictions, however, either involve a felony with its concomitant loss of civil rights, or involve moral turpitude, or are malum in se, or involve statutory crimes which have not long ago been legislatively repealed and discredited. They do not commonly involve situations where the defendant marches into the police station demanding to be arrested for a regulatory violation in order to test its constitutionality in the Supreme Court.

3.Petitioner has the burden to rebut the presumption of regularity and to prove intentional government misconduct prior to conviction rendering his misdemeanor curfew violation irregular and void and precluding affirmance of his conviction on any ground.

The petitioner has the "heavy burden" of rebutting the presumption that the challenged proceedings were correct. United States v. Darnell, 716 F.2d at 481 n.5. See also INS v. Miranda 459 U.S. 14, 18 (1982) (presumption of regularity). Further, he must "demonstrate that but for fundamental errors committed a more favorable judgment would have been rendered." Id. The Supreme Court stated in United States v. Frady, 456 U.S. 152, 166 (1982), that "to obtain collateral relief a [petitioner] must clear a significantly higher hurdle than would exist on direct appeal," that is, the petitioner must satisfy the "cause and actual prejudice" standard. The controlling caselaw in this Circuit requires that coram nobis petitions be resolved in the same manner as habeas corpus proceedings. United States v. Taylor, 648 F.2d 565, 573 n. 25 (9th Cir.), cert. denied, 454 U.S. 866 (1981). Engle v. Isaac, 456 U.S. 107 (1982), clearly applies to similarly situated habeas corpus petitioners in this Circuit. Leiterman v. Rushen, 704 F.2d 442, 444 (9th Cir. 1983) (on habeas corpus, Engle v. Isaac requires "actual prejudice," i.e., some "causal nexus" between even a "massive [governmental] violation of due process" and the conviction); Magby v. Wawrzaszek, 741 F.2d 240, 244 (9th Cir.

1984) (on habeas corpus, petitioner who has shown no "cause" cannot raise a Miranda claim if he failed to raise the challenge at trial and had "the tools" to do so). Furthermore, the "cause" and "actual prejudice" tests must be satisfied independently and sequentially. Engle v. Isaac, 456 U.S. 107, 134 n. 43 (1982); United States ex rel. Devine v. DeRobertis, 754 F.2d 764, 768 (7th Cir. 1985) (on habeas corpus, the Court need not reach "actual prejudice" unless the petitioner has first established "cause"); Palmes v. Wainwright, 725 F.2d 1511, 1525-1526 (11th Cir.), cert. denied, 105 S.Ct. 227 (1984) (same); Williams v. Duckworth, 724 F.2d 1439, 1443 (7th Cir.), cert. denied, 105 S.Ct. 143 (1984) (same).

In addition, the doctrine of res judicata bars the petitioner from reopening his case simply to relitigate issues because his decision to disobey the statute in 1942 might have been more favorably treated in 1983. The Supreme Court in Federated Department Stores, Inc. v. Moitie, 452 U.S. 394, 401-02 (1981), stated in words equally applicable here :

> This court has long recognized that "[p]ublic policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties." Baldwin v. Traveling Men's Assn., 283 U.S. 522, 525 (1931).

The Court also stated, 452 U.S. at 398:

> . . . the res judicata consequences of a final . . . judgment on the merits [are not] altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case. Angel v. Bullington, 330 U.S. 183, 182 (1947); Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371 (1940); Wilson's Executor v. Dean, 121 U.S. 525, 534 (1887).

Current case law may or may not divest petitioner's Supreme Court decision (and the Mitchell v. Harmony, 54 U.S. (13 How.) 115, 134-5 (1851) line of cases) of any current stare decisis effect. But such subsequent rulings cannot redecide the earlier case for the particular individual who litigated and lost that earlier case. 3/

The recent opinion in Korematsu v. United States , 584 F. Supp. 1406 (N.D. Cal. 1984) ignored these impediments to coram nobis relief for two reasons. That court concluded that the government had waived various jurisdictional objections which that court implicitly held were waivable. (Exhibit 1 of Government's Exhibits to its Supplemental Points and Authorities (hereinafter "G.Ex.")). Those factual and legal circumstances -- even if true in that case (which we deny) -- are not true here. In addition, the Korematsu court stated that the Ninth Circuit decision in United States v. Taylor, 648 F.2d 565 (9th Cir.), cert. denied, 454 U.S. 866 (1981) permitted a district

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3/ Since petitioner argues that the Supreme Court erroneously decided the issues in his case, a reappraisal of those old legal rulings would necessarily constitute "a clear break with the past" and would have been nonretroactive. United States v. Johnson, 457 U.S. 537, 549 (1982). Thus, petitioner's conviction would not have been vulnerable to collateral attack on these grounds alleging "new case law" even if another litigant (such as Korematsu) not barred by the doctrine of res judicata had succeded in overturning the Hirabayashi case law in the very next term.

In other words, even if United States v. Korematsu, 323 U.S. 214 (1944) had been decided differently, that would not have helped this petitioner.

court to grant coram nobis relief even when "arguable prejudice" is not shown, therefore creating an exception to the well-established contrary rule laid down in United States v. Morgan, 346 U.S. 502 (1954) (G. Ex. 1, p.26).

The opinion in Korematsu misreads the Taylor opinion. The Taylor court stated that "...we address solely the issue of whether Taylor has demonstrated that he is entitled to a hearing and do not decide whether relief is warranted." 648 F.2d at 570. Taylor went on to cite Morgan and restate the general rule that coram nobis relief is only available "to correct errors of fact of such fundamental character as to render the proceeding itself irregular and invalid" Id. at n.14. Then the court stated that "Taylor's claim gives rise to the somber prospect that the Government committed a fraud on the court which ultimately worked a great prejudice to Taylor's case." 648 F.2d at 571 (emphasis added). In that context -- where great prejudice to the petitioner's case was at issue -- the Taylor court stated that a hearing on a coram nobis petition (not ultimate relief) could be premised on allegations of prosecutorial misconduct.

All of these predicates to the Taylor language were ignored by the Korematsu court which improperly relied on language in the opinion -- taken out of context -- as the basis for a new Ninth Circuit exception to the Morgan rule allowing ultimate coram nobis relief (not simply a hearing), when no actual prejudice has been proved. Moreover, even if this conclusion

were not contrary to the intent of the Taylor court, see 648 F.2d at 570 & n.14, it runs contrary to Morgan itself, as well as United States v. Hasting, 103 S.Ct. 1974 (1983) and United States v. Morrison, 449 U.S. 361, 365-367 (1981).

4. There is no obligation upon the government to initiate this collateral proceeding on petitioner's behalf.

Finally, even assuming arguendo that the government newly discovered some exculpatory material relevant to petitioner's case after his conviction had been affirmed by the Supreme Court, the government has no obligation to initiate this collateral proceeding on petitioner's behalf. Petitioner has cited no authority that the government must initiate collateral attacks whenever some evidence comes to light which might arguably be exculpatory.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I served by Express Mail upon Rodney Kawakami, counsel for petitioner, a copy of the Government's Memorandum of Law, this 8th day of June, 1985.

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