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5-6-1985

Government's Memorandum in Support of Its Motion for Reconsideration

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JUDGE VOORHEES
[ORIGINALLY NOTED ON MOTION
CALENDAR: MARCH 22, 1985
ORAL ARGUMENT REQUESTED]

NOTE ON MOTION CALENDAR:
MAY 24, 1985
[BUT SEE ACCOMPANYING MOTION TO
SHORTEN TIME TO MAY 7, 1985]

FILED
LODGED
ENTERED
RECEIVED

MAY - 6 1985

AT SEATTLE
CLERK U.S. DISTRICT COURT
BY WESTERN DISTRICT OF WASHINGTON
DEPUTY

10 UNITED STATES DISTRICT COURT
11 WESTERN DISTRICT OF WASHINGTON

12 GORDON K. HIRABAYASHI,
13 Petitioner,
14 vs.
15 UNITED STATES OF AMERICA,
16 Respondent.

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

18 GOVERNMENT'S MEMORANDUM IN SUPPORT OF ITS
19 MOTION FOR RECONSIDERATION

20 The United States, by Victor D. Stone, has previously
21 advised the Court that the government believes that substantial
22 public interests would be harmed by "reopening old wounds" and
23 militates against precipitously holding a full blown evidentiary
24 hearing in this case which would include examination of retired
25 and octogenarian government witnesses and which would go beyond a
26

GOV'T MEMO RE RECONSIDERATION - 1

1 determination of the jurisdictional laches issue, at least in
2 advance of appellate resolution of the government's
3 jurisdictional objections. In that regard, the government
4 initially raised the questions of both an interlocutory appeal in
5 this case from the Court's ruling (May 18, 1984 Tr. at
6 pp. 106-107) and the appropriateness of a later motion for
7 reconsideration of the Court's ruling (id. at p. 128).
8 Subsequently, the government filed a motion for reconsideration
9 and combined it with an alternative motion to stay the district
10 court hearing in this case pending appellate resolution by the
11 Ninth Circuit of an earlier (January 1984) district court ruling
12 in Yasui v. United States, which this Court has acknowledged
13 raises "related issues." In light of the seriousness of the
14 matter at issue (which the Court recognized, id.), the government
15 also requested the opportunity to present oral argument on its
16 renewed motion. Since the Court's April 30, 1985 ruling appears
17 to the government to rest on new and different but still
18 erroneous legal grounds from the Court's earlier order, and since
19 nothing in the Court's April 30, 1985 ruling addresses the
20 Court's decision not to grant oral argument prior to denying the
21 government's renewed motion nor precludes reconsideration of that
22 April 30, 1985 Order, the government has this day moved for
23 reconsideration of the Court's April 30, 1985 order.

24 In support of its motion for reconsideration, the government
25 states the following reasons:

26 1. The Court now appears to have accepted the government's
contention that moral stigma and injury to reputation do not

GOV'T MEMO RE RECONSIDERATION - 2

1 constitute "present adverse legal consequences" sufficient to
2 create a case or controversy. Nonetheless, relying on Sibron v.
3 New York, 392 U.S. 40, 57 (1968) and Holloway v. United States,
4 393 F.2d 731, 732 (9th Cir. 1968), the Court has stated that
5 "most criminal convictions ... entail adverse collateral legal
6 consequences." The Court has then concluded that this petitioner
7 has demonstrated the possibility of adverse legal consequences,
8 even though "remote," by alleging that his forty year old
9 misdemeanor "conviction will be used for impeachment purposes in
10 some future legal proceeding or that the conviction will become a
11 consideration in some future sentencing."

12 As a matter of law, Sibron itself contradicts this Court's
13 ruling. In St. Pierre v. United States, 319 U.S. 41, 43 (1943)
14 the Supreme Court stated that it is an insufficient allegation,
15 as a matter of law, to allege as a present adverse legal
16 consequence "that the judgment may impair [the petitioner's]
17 credibility ... in any future legal proceeding." In Sibron, the
18 Court did not overrule that holding, but rather revalidated and
19 took considerable pains to distinguish it on the unique facts
20 present in Sibron. In this regard, the Sibron opinion states,
21 392 U.S. at 56 fn. 17:

22 We note that there is a clear distinction between
23 a general impairment of credibility, to which the Court
24 referred in St. Pierre, see 319 U.S., at 43, and New
25 York's specific statutory authorization for use of the
26 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.)

GOV'T MEMO RE RECONSIDERATION - 3

1 In the instant case, this "clear distinction" between a
2 general and specific impairment of credibility is totally absent.
3 There is no specific statutory disability imposed by the federal
4 legislature attaching to this misdemeanor conviction. Indeed,
5 just the opposite is true here. The federal legislature has
6 repealed the statute involved in the instant case, 18 U.S.C.
7 1383, and enacted 18 U.S.C. 4001(a) to prohibit the repetition of
8 any similar executive orders.

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

22 The second adverse legal consequence that petitioner and now
23 this Court have identified, "that the conviction will become a
24 consideration in some future sentencing," is also legally
25 insufficient. That too is universally true of all convictions
26 in every conceivable hypothetical situation. Therefore, this

GOV'T MEMO RE RECONSIDERATION - 4

1 ruling is also in direct conflict with the continued viability of
2 St. Pierre. Once again, in Sibron a specific legislative
3 provision in the New York Criminal Code mandated that any
4 subsequent repetition of that misdemeanor conduct (possession of
5 burglary tools) by Sibron would thereafter be treated as a
6 felony. 392 U.S. at 56 & at 48 fn. 5. That kind of specific
7 legislative penalty enhancement is not present in this case. In
8 contrast, the mere speculative possibility that "the sentence
9 imposed in a future criminal proceeding, could be affected" not
10 only by the underlying conduct (which a federal judge is always
11 free to consider, see 18 U.S.C. 3577), but additionally by the
12 judgment of conviction, was recently reconsidered in Lane v.
13 Williams, 455 U.S. 624, 632 (1982) and rejected over Justice
14 Marshall's dissent on that very point, 455 U.S. at 637.

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

26

GOV'T MEMO RE RECONSIDERATION - 5

1 This case not only involves none of the usual incidents of a
2 criminal conviction, but the record itself documents the
3 insubstantiality of even the "remote" allegations of general
4 impeachment and general sentencing consideration. Petitioner has
5 actually lived with his two misdemeanor convictions for some
6 forty years and yet his affidavit contains not a single instance
7 where he was actually impeached or actually affected at
8 sentencing. When his situation is compared to the Ninth Circuit
9 case this Court relies upon, Holloway v. United States, 393 F.2d
10 731, 733 (9th Cir. 1968), the differences are insurmountable. In
11 Holloway the felony of escape, imposition of a five year
12 sentence, and the concomitant loss of civil rights were
13 specifically noted by that Court, 731 F.2d at 732. Holloway's
14 escape and recapture after a plea but prior to sentencing on a
15 different federal felony and at a time when he was sought in
16 connection with still other federal felony charges arising in
17 Texas showed moral turpitude. The escape felony was not a mere
18 malum prohibitum, see United States v. Bailey, 444 U.S. 394, 404
19 n. 4 & 406 n. 6 (1980) and the felony statute at issue, 18 U.S.C.
20 751, was (and is) still in force. Holloway averred that there
21 was an actual affect from the earlier conviction because he stood
22 to be released from prison earlier on the subsequent Texas
23 conviction if he was correct, 731 F.2d at 733. Finally, Holloway
24 did not voluntarily create a regulatory test case and then demand
25 to be arrested intentionally to carry a constitutional challenge
26 to the Supreme Court. Not a single one of these factors is

GOV'T MEMO RE RECONSIDERATION - 6

1 similar to the instant case. In Sibron the Supreme Court stated
2 that there was "nothing abstract, feigned or hypothetical about"
3 Sibron's appeal and that Sibron had a "substantial stake in the
4 judgment of conviction which survives." 392 U.S. at 57 & 58
5 quoting Fiswick v. United States, 329 U.S. 211, 222 (1946)
6 (felony conviction). On the contrary, litigation here at this
7 point in time over these malum prohibitum misdemeanor convictions
8 will be both abstract and hypothetical, and the record shows that
9 the actual affect of the surviving forty year old misdemeanor
10 judgments of conviction, standing alone, has been insubstantial.
11 If this conviction can be challenged at this late date on coram
12 nobis, then any conviction can be challenged on coram nobis,
13 contrary to the language in St. Pierre and the language in
14 Sibron.

15 For these reasons, we submit that Sibron undercuts, it does
16 not support, this Court's ruling.

17 2. This Court also stated in its April 30, 1985 Order that
18 the two pronged "cause and prejudice standard" of Engle v. Isaac,
19 456 U.S. 107 (1982) is inapposite "because this Circuit has
20 declined" to extend it to coram nobis actions, citing United
21 States v. Darnell, 716 F.2d 479, 481 n. 5 (7th Cir. 1983), cert.
22 denied, ___ U.S. ___, 104 S.Ct. 1454 (Dec. 5, 1983).

23 Darnell is a Seventh Circuit case, not a Ninth Circuit case
24 as this Court's opinion indicated. It is, therefore, not
25 accurate to state that this Circuit has declined to apply the
26

1 cause and prejudice standard rule to coram nobis cases.
2 Moreover, the controlling caselaw in this Circuit requires that
3 the question at issue (of whether a hearing is required on a
4 coram nobis motion) be resolved in the same manner as in habeas
5 corpus proceedings. United States v. Taylor, 648 F.2d 565, 573
6 n. 25 (9th Cir.), cert. denied, 454 U.S. 866 (1981). Therefore,
7 Engle v. Isaac is not inapplicable but must be applied to
8 petitioner's request for a coram nobis hearing since Engle v.
9 Isaac clearly applies to the similarly situated habeas corpus
10 petitioners in this Circuit. Leiterman v. Rushen, 704 F.2d 442,
11 444 (9th Cir. 1983) (On habeas corpus, Engle v. Isaac requires
12 "actual prejudice," i.e., some "causal nexus" between even a
13 "massive [governmental] violation of due process" and the
14 conviction.); Magby v. Wawrzaszek, 741 F.2d 240, 244 (9th Cir.
15 1984) (On habeas corpus, petitioner who has shown no "cause"
16 cannot raise a Miranda claim if he failed to raise the challenge
17 at trial and had "the tools" to do so). Moreover, the "cause"
18 and "actual prejudice" tests operate as independent and
19 sequential bars to federal court review. Engle v. Isaac, 456
20 U.S. 107, 134 n. 43 (1982); United States ex rel. Devine v.
21 DeRobertis, 754 F.2d 764, 768 (7th Cir. 1985) (On habeas corpus,
22 the Court need not reach "actual prejudice" unless the petitioner
23 has first established "cause"); Palmer v. Wainwright, 725 F.2d
24 1511, 1525-1526 (11th Cir. 1984), cert. denied, ___ U.S. ___, 105
25 S.Ct. 227 (Oct. 1, 1984) (same); Williams v. Duckworth, 724 F.2d
26

GOV'T MEMO RE RECONSIDERATION - 8

1 1439, 1443 (7th Cir. 1984), cert. denied, ___ U.S. ___, 105 S.Ct.
2 143 (Oct. 1, 1984) (same).

3 Since this Court has indicated that it is "unable to rule"
4 at this point (April 30 Order at pp. 3 & 4) that the petition has
5 satisfied the "threshold showing," 456 U.S. at 129, of cause and
6 actual prejudice that Isaac v. Engle requires of even a
7 constitutional due process claim, the petition must be denied for
8 that reason. 1/

9 3. This Court rejects the government's suggestion that it
10 will be prejudiced if a hearing is held in June 1985, recounting
11 that the Court scheduled the evidentiary hearing nearly a year
12 ago.

13 This overlooks the gravamen of the government's complaint
14 which is that the likely public and private trauma that will be
15 exacted by such a forty year old inquiry should not be
16 unnecessarily precipitated prior to appellate resolution of the
17 government's substantial jurisdictional objections. Moreover, in
18 the circumstances presented here, even a second twelve month
19 interim delay of the already forty year delayed hearing, similar
20 to the first delay which this Court ordered, could have no
21 serious incremental effect on the already dim memories and

22

23 1/ Even if Darnell were controlling in this Circuit which it is
24 not, Darnell states that in coram nobis cases "a standard 'akin'
25 to the actual prejudice standard" and the doctrine of laches
26 serves "essentially the same function as the cause and prejudice
standard." 716 F.2d at 481 n. 5. Consequently, Darnell does not
suggest that the cause and prejudice standard is "inapposite,"
just the opposite. The standard it promulgates simply carries a
different name.

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1 dispersed witnesses. Therefore, where the same issues are
2 already well on their way to resolution in the appellate process,
3 it would be an abuse of discretion not to grant the government's
4 request to await that appellate resolution, but instead, to
5 preempt the meaningfulness of the Ninth Circuit's appellate
6 resolution of the Yasui case by proceeding in this district court
7 with a hearing, incurring the personal and public emotional
8 and physical hardships such a hearing will engender in the
9 interim.

10 For each of the foregoing reasons, it is respectfully
11 submitted that the Court should grant respondent's motion for
12 reconsideration and respondent's earlier motion to dismiss, or in
13 the alternative, for a stay.

14 Respectfully submitted,

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