

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Alfred W. Trenkler,)
 Petitioner)
)
 v.) CIVIL ACTION 06-CA-12072-RWZ
)
UNITED STATES OF AMERICA,)
 Respondent)

GOVERNMENT'S OPPOSITION TO TRENKLER'S *CORAM NOBIS* PETITION
AND MOTION FOR RECONSIDERATION OF
THE COURT'S FEBRUARY 20, 2007, MEMORANDUM AND ORDER
GRANTING A WRIT OF *CORAM NOBIS* TO REOPEN SENTENCING

The United States opposes the petition of Alfred W. Trenkler ("Trenkler") for a writ of *coram nobis* and respectfully requests that this Court reconsider its order granting his request to reopen his sentence. In his petition, Trenkler presents a sentencing argument grounded in cases issued years before his conviction that he indisputably could have raised at trial, on direct review, or in a timely petition under §2255. Having failed to do so, and having failed to convince the First Circuit to hear his claim pursuant to its mandamus powers, Trenkler now asks this Court to address his argument in a petition for a writ of *coram nobis*. Trenkler is not entitled to the relief he seeks.

Trenkler's petition establishes no valid basis for merits review of his long-delayed claim. Having lost through his own actions the right to bring his claim before this Court pursuant to 28 U.S.C. §2255, First Circuit precedent precludes Trenkler from

circumventing the jurisdictional bar on successive §2255 petitions by filing this substantively identical petition under a different name. Moreover, assuming this Court's jurisdiction, *coram nobis* would still provide no basis for merits review. The doctrine, to the extent it retains any vitality, provides no remedy for individuals who are in custody and raise legal, rather than factual, claims. It also requires Trenkler to justify his failure to make his arguments earlier, which he has not done and cannot do.

Trenkler's claim also fails on its merits, because he has not established fundamental error - indeed any prejudicial error - in his sentencing. His claim that a jury verdict was required to support a life sentence under the versions of 18 U.S.C. §§34 and 844 that existed at the time of his sentencing rests on an implausible reading of the relevant statutes. Even if such an error occurred, however, changes in the law shortly after Trenkler was sentenced rendered any such error harmless. The revised version of §844, which Trenkler says fixed the problem he has identified, would have applied to Trenkler on remand after direct review, or after a timely petition under §2255, and this Court would have been authorized and required to impose precisely the same sentence that it did. Finally, even if these hurdles did not defeat Trenkler's claim, the sentencing error of which he complains does not constitute the type of error warranting extraordinary collateral relief.

PROCEDURAL HISTORY

On December 16, 1992, a federal grand jury indicted Trenkler and Thomas A. Shay ("Shay") for crimes arising out their roles in the bombing death of Boston Police Bomb Squad Officer Jeremiah Hurley and the maiming of his partner, Bomb Squad Officer Francis Foley.¹ The original indictment charged: (1) that in October 1991, the two received explosive materials in interstate commerce with the intent that the explosives would be used to kill, injure and intimidate Thomas L. Shay (Shay's father, hereinafter "Shay Sr.") and cause damage to a 1986 Buick and that this act actually caused the death of Officer Hurley, in violation of 18 U.S.C. §§844(d) and 2 (Count Two); (2) that the two committed this same crime and actually caused serious personal injury to Officer Foley (Count Three); (3) that on October 28, 1991, the two maliciously attempted to destroy Shay Sr.'s Buick by means of fire and explosive, and in fact caused the death of Officer Hurley, in violation of 18 U.S.C. §844(i) (Count Four); (4) that the two committed this same offense and actually caused serious personal injury to Officer Foley (Count Five); and (5) that the two conspired to commit these crimes, in violation of 18 U.S.C. §371 (Count One).

¹Consistent with the Court's February 20, 2007, order, the following statement does not discuss events leading to the bombing or details of the crime. The facts and procedural history set out here, rather, are offered to support the government's arguments, for example, that Trenkler's claim is barred and does not suggest a miscarriage of justice.

At the time of indictment, §§844(d) and (i) provided:

if personal injury results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection, [the defendant] shall be imprisoned for not more than twenty years, or fined not more than \$20,000 or both; and if death results to any person, including any public officer performing duties as a direct or proximate result of conduct prohibited by this subsection, shall be subject to imprisonment for any term of years, or to the death penalty or to life imprisonment as provided in section 34 of this title.

Section 34 in turn provided:

Whoever is convicted of any crime prohibited by this chapter, which has resulted in the death of any person, shall be subject also to the death penalty or to imprisonment for life, if the jury shall in its discretion so direct or, in the case of a plea of guilty, or a plea of not guilty where the defendant has waived a trial by jury, if the court in its discretion shall so order.

When indicted, Trenkler was represented by Terry Philip Segal, Esq. of Segal & Feinberg, and Shay was represented by Jefferson Boone, Esq. On January 4, 1993, the court appointed then private attorney and now United States District Court Judge Nancy Gertner, of Dwyer, Collora & Gertner, as lead counsel for Shay. [Criminal case 92-10369, Docket entry 25]. Amy Baron-Evans, Esq., an associate at Dwyer, Collora & Gertner, assisted in Shay's defense. During the course of the case, Attorney Segal was assisted by other attorneys at Segal & Feinberg, i.e. Matthew H. Feinberg, Esq., Scott P. Lopez, Esq., and Brenda R. Sharton, Esq.

On January 5, 1993, the government advised Attorneys Segal and Gertner in writing that it did not intend to seek the death penalty but that "[if] convicted after trial of the charges contained in Counts Two and Four of the indictment, [it would] seek a mandatory term of life imprisonment for each defendant. This sentence is authorized by the applicable statutes, and appears to be required by Sections 2A1.1, 2K1.3(c)(1)(B) and 2K1.4(c)(1) of the Federal Sentencing Guidelines." [Exhibit 1].

On June 11, 1993, defense counsel jointly moved to dismiss Counts II or III and Counts IV or V. [Exhibit 2, docket entries 174 and 175]. They claimed that these counts charged single violations of §§844(d) and (i) in two separate counts and were multiplicitous. According to defense counsel, the portion of §§844(d) and (i) quoted earlier could "only be read as a sentencing consideration, providing for a higher maximum punishment for a single receipt or attempt to destroy, based on whether injury or death results, rather than an additional element of the crime." In response, the government superseded the indictment. Prior to doing that, however, it sent a draft superseding indictment to defense counsel. In a cover letter, the government wrote that it had decided to supersede the indictment to avoid any argument that the indictment itself inflated the defendants' wrongdoing. The letter explained that the indictment merged Counts Two and Three and Counts Four and Five and asked the defendants to advise if they had

"any difficulties with what the government is proposing." [Exhibit 3]. On June 18, 1993, Attorney Baron-Evans wrote that "[w]e have no objection to the superseding indictment." [Exhibit 4]. Accordingly, on June 24, 1993, the indictment was superseded. [Docket entry 205]. The superseding indictment charged the defendants in three counts: with conspiracy in Count One, the §844(d) offense in Count Two, and the §844(i) offense in Count Three. The district court severed the trials, and Shay went to trial and was convicted first.

On November 29, 1993, after a 17-day trial, the jury convicted Trenkler of all counts. [Docket entries 486 to 487]. Consistent with its position that death and injury were only sentencing factors, the defense did not request a jury instruction on those issues; likewise, it did not ask for the jury to choose between a sentence of life imprisonment or "any term of years." On March 8, 1994, this Court sentenced Trenkler to life imprisonment on Counts Two and Three, and 60 months' imprisonment on Count One, to be served concurrently.

Trenkler, represented by new counsel (Morris M. Goldings, Esq., Amy J. Axelrod, Esq., and R. David Beck, Esq., of Mahoney, Hawkes & Goldings) appealed his conviction (Appeal 94-1301). On July 18, 1995, the Court of Appeals for the First Circuit rejected that appeal. The First Circuit held that this Court did not err under FRE 404(b) in admitting evidence of Trenkler's participation

in an earlier bombing. United States v. Trenkler, 61 F.3d 45, 52-56 (1st Cir. 1995). The court also held that, although evidence derived from a computer database concerning the characteristics of other explosive devices should not have been admitted to help establish that Trenkler built the bomb in this case, this error was harmless. 61 F.3d at 57. Trenkler did not file a petition for a writ of *certiorari*, and his conviction therefore became final 90 days later. Clay v. United States, 537 U.S. 522, 532 (2003) (where no *certiorari* petition is filed, §2255's one-year limitation period starts to run when the time for seeking *certiorari* expires).

On December 22, 1995, Trenkler filed a motion, pursuant to FRCP 33, for a new trial or, in the alternative, for an evidentiary hearing on the grounds of newly-discovered evidence. [Docket entry 566]. Earlier, in United States v. Shay, 57 F.3d 126, 133-34 (1st Cr. 1995), the First Circuit held that Shay should have been permitted to offer testimony (from a Dr. Phillips) that Shay suffered from a mental disorder that caused him to tell self-aggrandizing lies, making his various incriminating statements unreliable. In his Rule 33 motion, Trenkler argued that the First Circuit's Shay decision rendered Dr. Phillips's testimony "newly discovered evidence" within the meaning of Rule 33. He explained that, although he was aware of Dr. Phillips's testimony at the time of his trial, he did not know until the First Circuit's June 22, 1995 decision that the testimony was admissible. Trenkler also

contended that the government had failed to disclose the existence of an alleged agreement with a witness for leniency in exchange for testimony. In February 1997, this Court denied Trenkler's motion for a new trial. [Docket entry 597]. Still represented by Attorneys Goldings, Axelrod and Beck, Trenkler appealed this decision and the Court's separate denial of his motion for an inquiry into possible jury misconduct (Appeal No. 97-1329). On January 6, 1998, the First Circuit affirmed this Court's rejection of those claims. United States v. Trenkler, 134 F.3d 361, 1998 WL 10265 (1st Cir. 1998)(unpublished).

On January 7, 1999, Trenkler filed a motion pursuant to 28 U.S.C. §2255 claiming that his trial counsel rendered ineffective assistance by not attempting to introduce Dr. Phillips' testimony. A motion under §2255 generally must be filed within one year of "the date on which the judgment of conviction becomes final." 28 U.S.C. §2255(1).² For prisoners whose convictions became final

²Section 2255 provides that:

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of-

- (1) the date on which the judgment of conviction becomes final;
- (2) the date on which the impediment to making a motion created by governmental action...is removed, if the movant was prevented from making a motion by such governmental action;
- (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the

before the Anti-Terrorism and Effective Death Penalty Act ("AEDPA") was enacted, the limitations period expired on April 24, 1997, one year after the statute's effective date. This Court concluded that Trenkler's §2255 motion was subject to that deadline and that his §2255 was time-barred. On October 16, 2001, the First Circuit affirmed this conclusion. Trenkler v. United States, 268 F.3d 16, 19 (1st Cir. 2001).

On August 11, 2000, Trenkler filed another Rule 33 motion. [Docket entry 625]. In that motion, he argued, *inter alia*, that a document introduced into evidence was fraudulent and that Shay now claimed Trenkler was innocent. This Court denied Trenkler's motion on December 28, 2000. [Docket entry 643]. On April 6, 2001, the First Circuit (Appeal No. 01-1323) found Trenkler's notice of appeal was untimely and dismissed the appeal for lack of jurisdiction.

On October 3, 2002, Trenkler filed a petition for writ of habeas corpus in the Middle District of Pennsylvania, pursuant to 28 U.S.C. §2241. Trenkler claimed that the Supreme Court's decision in Jones v. United States, 529 U.S. 848 (2000), heightened the interstate commerce requirements of 18 U.S.C. §844(i) and

Supreme Court and made retroactively applicable to cases on collateral review; or (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

thereby removed the conduct for which he was convicted from the scope of both §§844(d) and (i). The district court denied this petition. On appeal, Trenkler was represented first by Morris Goldings, Esq. and then by James L. Sultan, Esq. and Catherine J. Hinton, Esq. of Rankin & Sultan. In an earlier decision, the Third Circuit had found that "a prisoner who had no earlier opportunity to challenge his conviction for a crime that an intervening change in substantive law may negate, exemplifies the uncommon situation in which §2255 is inadequate and ineffective and in which a §2241 petition is cognizable" under §2255's "savings clause."³ In Re Dorsainvil, 119 F.3d 245, 251 (3rd Cir. 1997). The Third Circuit found that Trenkler's §2241 petition did not raise a viable "savings clause" claim. Trenkler v. Pugh, 83 Fed.Appx. 468 (3rd Cir. 2003) (unpublished disposition), cert. denied, 542 U.S. 921 (2004).

On August 26, 2004, Trenkler filed a petition for a writ of mandamus (Appeal No. 04-2147) in the First Circuit for the first

³The "savings clause" provides:

An application for a writ of habeas corpus on behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

time presenting his current argument that §§844(d) and (i) did not permit the judge to impose a life sentence without the jury first having authorized such a sentence. The First Circuit did not ask the government to respond to this petition, as it would have if it determined the mandamus petition had some merit. See FRAP 21(b)(1). Rather, on February 16, 2005, it summarily dismissed it on the ground that it constituted an impermissible second or successive petition:

Petitioner seeks, through a petition for writ of mandamus, to vacate his two life sentences. We deny the petition for writ of mandamus because to allow it would be effectively to negate the stringent gatekeeping restrictions on second or successive §2255 petitions. 28 U.S.C. §§2255 ¶8, 2244(b)(2).

[Exhibit 5].⁴ On June 22, 2005, the Supreme Court denied Trenkler's petition for a writ of *certiorari*.

⁴Section 2255, ¶8 provides:

A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain--

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

Five months later, in December 2005, Trenkler wrote a letter to this Court raising the same issue presented in his mandamus petition. [Criminal No. 92-10369, docket entry 668]. Trenkler claimed that he discovered the alleged sentencing error while reading about a wholly different (*i.e.*, Sentencing Guidelines) sentencing error in another Massachusetts district court case. He did not mention that the First Circuit had summarily rejected a mandamus petition raising the same claim, although that claim was presented in a mandamus petition researched and drafted by an attorney (Dana Alan Curhan, Esq.). The Court appointed counsel.

On November 6, 2006, 11 years after his conviction became final, Trenkler's new court-appointed counsel raised the issue presented in Trenkler's letter and in the earlier mandamus petition in a *Petition and Motion for a Writ of Coram Nobis and/or Audita Querela* (Civil Action 06-12072). As an apparent excuse for failing to raise the issue earlier, Trenkler claimed that §34's link to §844 and §34's requirements were not "reasonably discoverable" (if they were reasonably discoverable, Trenkler claimed, someone would have mentioned them) and that his trial lawyer's apparent failure to recognize the argument constituted ineffective assistance of counsel. See Strickland v. Washington, 466 U.S. 668 (1984).⁵ No

⁵To establish ineffective assistance of counsel under Strickland, a defendant must show that the performance of his lawyer (or, if he had separate trial and appellate counsel, lawyers) was ineffective and, second, that this deficient performance prejudiced the defense. 466 U.S. at 687. "This

affidavit supported the claim that his trial lawyer was unaware that he could try to persuade the Court that §34 required a jury recommendation of life imprisonment. Moreover, Trenkler did not allege that his appellate attorneys were ineffective.

On February 20, 2007, this Court granted the *coram nobis* petition. Trenkler v. United States, slip op., 2007 WL 551620 (D. Mass. Feb. 20, 2007). The Court found, as have courts from other circuits, that at the time of Trenkler's prosecution, §844 only authorized a life sentence if the jury recommended one. Although Congress struck the phrase "as provided by section 34" in §§844(d) and (i) in 1994, see Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat 1796 (1994) §60003(a)(3)(C), the Court found that it had no authority to sentence Trenkler to life imprisonment at the time of sentencing and that the error was therefore fundamental, warranting *coram nobis* relief. The Court also found that Trenkler's lawyers were unaware of this purported statutory sentencing limitation and that this ineffectiveness excused Trenkler's failure to raise the argument earlier.⁶ The

requires a showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id.

⁶The Court also granted the petition because it was unopposed. The government has already explained that its failure to respond to the *coram nobis* petition was a deeply regrettable unintentional mishap. The Court has graciously accepted this explanation and is now accepting the government's memorandum in opposition to Trenkler's *coram nobis* petition. [See Civil Action 06-CA-12072, docket entry 6].

Court granted the petition and has ordered resentencing.

ARGUMENT

I. THIS COURT SHOULD HAVE DISMISSED TRENKLER'S REQUEST WITHOUT REACHING ITS MERITS AS AN UNAUTHORIZED SECOND OR SUCCESSIVE REQUEST FOR RELIEF UNDER §2255.

A. This Court had no jurisdiction to review Trenkler's petition since it is in substance an unapproved successive request for relief under §2255.

The AEDPA established strict limits on federal collateral review of criminal convictions and sentences. As noted earlier, these limits include a one-year statute of limitations and the requirement that any "second or successive" petition under §2255 be considered only after being determined by the relevant court of appeals to rely on either newly discovered evidence convincingly negating the defendant's guilt or a new and retroactively applicable rule of constitutional law. See 28 U.S.C. §2244(b)(2) & (d)(1). The "second or successive" provision of the AEDPA creates a jurisdictional bar, "stripping the district court of jurisdiction [to hear such petitions]. . . unless and until the court of appeals has decreed that [the petition] may go forward." Pratt v. United States, 12 F.3d 54, 57 (1st Cir. 1997).

Trenkler's January 5, 1999, §2255 petition, dismissed by this Court as time-barred, gave Trenkler his one "full and fair opportunity" to obtain review of collateral claims. Altman v. Benik, 337 F.3d 764, 766 (7th Cir. 2003)(*per curiam*)(holding that prior untimely habeas petition "counts" for purposes of the second

or successive determination and therefore the defendant "needs [the appeals] court's permission to file another petition"); Villanueva v. United States, 346 F.3d 55, 61-62 (2nd Cir. 2003)(holding that "a habeas or §2255 petition that is properly dismissed as time-barred under AEDPA constitutes an adjudication on the merits for successive purposes"). Nonetheless, Trenkler did not seek First Circuit authorization to make a successive application. Instead, he petitioned the First Circuit to address his current sentencing arguments under its mandamus jurisdiction. The First Circuit refused, stating that to grant the request as framed would "negate the stringent gatekeeping restrictions on second or successive §2255 petitions." [Exhibit 5]. Trenkler then brought his claims in this Court, now styled as a petition for a writ of *coram nobis*.

Trenkler's decision not to seek First Circuit authorization is not surprising, as his current claim for resentencing is not based on a retroactively applicable rule of constitutional law or on newly discovered evidence establishing his innocence of the offense. Trenkler acknowledges his inability to meet §2255's requirements in his mandamus petition, claiming that further review pursuant to §2255 is "foreclosed" and characterizing mandamus as "currently the only remedy available" to obtain review of his sentencing argument. [Petition, p. 9]. However, Trenkler cannot now use his inability to obtain authorization as justification for obtaining the extraordinary relief of *coram nobis*. Giving effect

to AEDPA's requirements and First Circuit precedent dictates instead that this Court dismiss Trenkler's petition without reaching its merits, as an unauthorized petition under §2255. *Cf. Pratt*, 12 F.3d at 57 ("[A] district court, faced with an unapproved second or successive habeas petition, must either dismiss it . . . or transfer it to the appropriate court of appeals.").⁷

It is settled law in this circuit, as elsewhere, that "*coram nobis* may not be used to circumvent the clear congressional directive embodied in the 'second or successive' provisions of §2255." *United States v. Barrett*, 178 F.3d 34, 55 (1st Cir. 1999); see also *Matus-Leva v. United States*, 287 F.3d 758, 761 (9th Cir. 2002) ("A petitioner may not resort to *coram nobis* merely because he has failed to meet the AEDPA's gatekeeping requirements."); *Obado v. New Jersey*, 328 F.3d 716, 718 (3rd Cir. 2003) (per curiam) ("*Coram nobis* . . . may not be used to avoid AEDPA's gatekeeping requirements."); *cf. Melton v. United States*, 359 F.3d 855, 857 (7th Cir. 2004) ("Prisoners cannot avoid the AEDPA's rules by inventive captioning.").⁸ Where §2255 applies to the substance of

⁷Because the question goes to this Court's subject matter jurisdiction, this would be so whether or not the government objected. See *United States v. Gonzalez*, 311 F.3d 440, 441 (1st Cir. 2002) ("[A] court is expected to raise the subject-matter jurisdiction objection on its own motion at any stage and even if no party objects.").

⁸ In this brief, the government follows Trenkler and the Court in treating his request as principally a request for a writ of *coram nobis*. The government recognizes that Trenkler also requested, in the alternative, a writ of *audita querela*. Many of

a prisoner's claim, it constitutes "controlling authority" that precludes resort to the All Writs Act. Barrett, 178 F.3d at 55; Penn. Bureau of Corr. v. United States Marshals Serv., 474 U.S. 34, 43 (1985) (noting that the "All Writs Act is a residual source of authority" that is not controlling when "a statute specifically addresses the particular issue at hand"); see also United States v. Schomaker, 40 Fed.Appx. 612, *1 (1st Cir. July 26, 2002)(unpublished disposition)("Because petitioner is in federal custody and contests the validity of his sentence, 28 U.S.C. §2255 provides the exclusive avenue for seeking relief."); Alvarado-Ortiz v. United States, 55 Fed.Appx. 6, *1 (1st Cir. Jan. 31, 2003)(unpublished disposition)("Because petitioner is currently in custody for the convictions at issue, he may seek relief pursuant to 28 U.S.C. §2255. . . . Because a §2255 petition is available to him, the writ of *coram nobis* is not.")(internal citation omitted). In order to give effect to that controlling authority, a petition

the arguments against the grant of that writ - including the argument that resort to the remedy is foreclosed by §2255 and AEDPA - overlap with those addressing *coram nobis*. See Barrett, 178 F.3d 54 n.17 (explaining that its analysis of the availability of relief under the All Writs Act "does not turn on the nature of the writ sought"). However, *audita querela* is also substantively inapposite in the circumstances of this case. Under the doctrine, relief must be based on grounds that did not exist at the time of judgment. See generally United States v. Holder, 936 F.2d 1, 2 (1st Cir. 1991) (citing definition of *audita querela* as addressing "relief from judgment . . . on account of some matter of defense or discharge arising since [the judgment's] rendition")(emphasis added). Trenkler's claim is not based on this type of intervening occurrence.

that is in substance a petition under §2255 must be treated as such for AEDPA purposes, no matter how it is captioned. See Gonzalez v. Crosby, 545 U.S. 524, 530-31 (2005)(holding that AEDPA's rules governing second or successive §2255 claims apply equally to motions for relief from final judgments under Fed. R. Civ. P. 60(b) that, in substance, seek to present new grounds for previously denied §2255 filings); U.S. v. Fraser, 407 F.3d 9, 10-11 (1st Cir. 2005)(declining to recall mandate to allow claim under United States v. Booker, 543 U.S. 220 (2005) because gatekeeping provisions of §2255 barred use of that provision to advance Booker claims and "[i]f mandate could be recalled merely based on Booker, that result would provide an avenue to escape the restrictions Congress has imposed on habeas review"); Munoz v. United States, 331 F.3d 151, 153 (1st Cir. 2003)(declining to permit defendant to use Rule 60(b) motion to circumvent gatekeeping requirements of §2255 and raise claims under Apprendi v. New Jersey, 530 U.S. 466 (2000)). Spivey v. State Bd. of Pardons and Paroles, 279 F.3d 1301, 1303 (11th Cir. 2002)(summarizing precedent holding that where a plaintiff's §1983 claim was the "functional equivalent of a second habeas petition," the court would "apply the rules regulating second or successive habeas petitions"); United States v. Nelson, 465 F.3d 1145, 1148 (10th Cir. 2006)(holding that, in determining whether the "second or successive" restriction applies, "[i]t is the relief sought, not [the] pleading's title, that determines

whether the pleading is a §2255 motion"); Melton, 359 F.3d at 857 ("Any motion filed in a district court that imposed the sentence, and substantively within the scope of §2255 ¶1, is a motion under §2255, no matter what title the prisoner plasters on the cover.").

There can be no doubt that Trenkler's petition falls within the substantive scope of §2255, which encompasses any claim by a federal prisoner that his "sentence was imposed in violation of the Constitution or laws of the United States . . . or that the sentence was in excess of the maximum authorized by law" See, e.g., Love v. Menifee, 333 F.3d 69, 72 (2nd Cir. 2003)(holding that an analogous sentencing challenge on Apprendi grounds "plainly fits the requirements for a motion under §2255"). Indeed, the First Circuit's ruling expressly recognizes that the substance of Trenkler's claim makes it subject to §2255's stringent gatekeeping requirements, thus preventing the claim from being reviewed on its merits via a petition for mandamus. As a result, §2255 and not the All Writs Act controls this claim. Barrett, 175 F.3d at 55.

Trenkler's petition and this Court's memorandum attempt to avoid this conclusion by suggesting that AEDPA may not control where, as here, a petitioner no longer has the right to bring his claims under §2255. [See Petition, p. 5-6 & n.3; Memorandum, p. 5]. This line of argument, however, was directly addressed, and rejected, by Barrett. There, the First Circuit held that, "for the purposes of determining whether the All Writs Act applies[,] the

fact that §2255 bars [a petitioner's] second petition does not make [§2255] any less controlling." 178 F.3d at 55. To conclude otherwise, the Court stated, would undermine Congress's purposes in enacting AEDPA. See *id.* (quoting with approval United States v. Damiano, 1997 WL 5390704, at *2 (E.D. Pa. Aug. 6, 1994), stating that "given the broad purposes of [AEDPA], it would be astounding if the 'second or successive restrictions could be rendered wholly ineffective by the simple ruse of labeling future §2255 motions as petitions for writs of *coram nobis*" (some internal punctuation omitted).

Because Trenkler's request presented a claim within the substantive scope of §2255, the Court should not have reached its merits. Instead, the Court should have followed the First Circuit in treating Trenkler's petition as an unauthorized second or successive §2255 petition and dismissing it. See United States v. Torres, 282 F.3d 1241, 1245-46 (10th Cir. 2002) (district court could properly treat prisoner's request under All Writs Act as substantively a successive §2255 petition and dismiss it as unauthorized); Spivey, 279 F.3d at 1304-05 (where §1983 claim was "functional equivalent" of second habeas claim and no application had been made to circuit before filing it, "the district court lacked jurisdiction to entertain [the] claim" and properly dismissed it); see also Schomaker, 40 Fed.Appx. at *1 (upholding decision that prisoner was "ineligible for *coram nobis* relief"

where no authorization had been sought from or could appropriately be granted by appeals court); Alvarado-Ortiz, 55 Fed.Appx. at *6 (upholding decision to summarily deny request for writ of *coram nobis* to address alleged Apprendi violations).⁹

B. Section 2255 is not "inadequate or ineffective" and Trenkler therefore cannot bring a savings clause claim under §2241.

Trenkler suggests in a footnote that *coram nobis* relief may be available because §2255 has become "inadequate or ineffective" in the context of this case. [Petition, p. 6 n.3]. This argument misconstrues the "inadequate or ineffective" language, which applies not to *coram nobis*, but to the §2255 "savings clause." The savings clause identifies the circumstances under which certain claims may be brought pursuant to 18 U.S.C. §2241 despite non-compliance with §2255's gatekeeping provisions. See Sustache-Rivera v. United States, 221 F.3d 8, 15-17 (1st Cir. 2000). To construe this language as also opening the door to other forms of relief, such as *coram nobis*, would treat as a nullity Congress's express language applying the "inadequate or ineffective" test only to "application[s] for a writ of habeas corpus." 28 U.S.C. §2255. The inescapable conclusion to be drawn from that language is that Congress intended §2255 to "control" with respect to claims within

⁹While the fact that Trenkler's petition constitutes an unapproved successive application for §2255 relief is sufficient to require its dismissal, the petition is also plainly untimely under AEDPA's one-year statute of limitations.

the savings clause, by directing that they be heard under §2241, and that the limits of the savings clause describe the limits of permitted collateral review. See Ex Parte Farrell, 189 F.2d 540, 545 (1st Cir. 1951) ("Where the appeal statutes establish the conditions of appellate review, an appellate court cannot rightly exercise its authority to issue a writ under the 'all writs' sections . . . the only effect of which would be to avoid those conditions and thwart the congressional policy."), *quoted with approval in Barrett*, 178 F.3d at 55.

Trenkler did not file his current motion under §2241, an omission that the government treats as an implicit admission he could not satisfy the requirements of the savings clause. That conclusion is undoubtedly correct. Section 2255 does not become "inadequate or ineffective . . . merely because a petitioner cannot meet the AEDPA 'second or successive' requirements," Barrett, 173 at 50 (explaining that "[s]uch a result would make Congress's AEDPA amendment of §2255 a meaningless gesture"), or the time limitations on §2255 petitions. See generally Charles v. Chandler, 180 F.3d 753, 757 (6th Cir. 1999) (*per curiam*) (collecting cases). A determination that §2255 is "inadequate or ineffective" must be grounded in "the inefficacy of the remedy, not the personal inability to use it." United States v. Cradle, 290 F.3d 536, 538-39 (3rd Cir. 2002). To date, courts of appeals have held the savings clause to authorize relief only in extraordinarily rare

circumstances, such as those presented by Supreme Court's decision in Bailey v. United States, 516 U.S. 137 (1995). In Bailey, the Supreme Court adopted a construction of 18 U.S.C. §924(c)(1), which criminalizes use of a firearm when committing a federal crime, that was narrower than had been applied by appeals courts. See Bailey, 516 U.S. at 150; Sustache-Rivera, 221 F.3d at 14 n.9, 16 n. 13 (discussing this history). The Bailey decision had the effect of negating the criminality of some individuals whose convictions had already become final under the broader interpretation of the statute. However, §2255's gatekeeping requirements provided no avenue for relief because Bailey was not a constitutional decision. Sustache-Rivera, 221 F.3d at 16.

Under these narrow circumstances, several courts of appeals held that resort to §2241 was permissible to allow a prisoner to raise an otherwise-barred claim that his §924(c) conviction was based on conduct that Bailey made non-criminal. See Wofford v. Scott, 177 F.3d 1236, 1242-45 (11th Cir. 1999); In re Davenport, 147 F.3d 605 (7th Cir. 1998); Triestman v. United States, 124 F.3d 361, 373-80 (2nd Cir. 1997); Dorsainvil, 119 F.3d at 252. While the First Circuit has not defined the exact parameters of the savings clause, its cases evidence a comparable view that it could apply in a Bailey-like situation where strict application of the gatekeeping requirements would prevent a defendant from arguing that a Supreme Court decision reveals that his actions were not

criminal all, or where a defendant would otherwise be prevented from arguing that he is actually innocent for reasons contained in the existing record that could not have been raised earlier. Barrett, 178 F.3d at 51-52; *but see id.* at 52 & n.12 (acknowledging that these examples may have been further limited by the Supreme Court's decision in Bousley v. United States, 523 U.S. 614 (1998)).

The foregoing cases provide no basis for review of Trenkler's request. The central rationale for those decisions - that the defendants were left with no possibility of raising claims negating their guilt because the Supreme Court's decision causing that result was issued after the time limits of §2255 had passed - is wholly absent here. Trenkler's claim relies on an interpretation of 18 U.S.C. §§844(d) & (i) and 34 that could have been made at any time prior to his sentencing, on direct review, or even in a timely §2255 filing, but simply was not. Moreover, his argument goes to the length of his sentence, not his guilt or innocence of the underlying offense. Trenkler's position is thus like the appellant in Wofford, who was held ineligible to use the savings clause to raise his sentencing claims where he "had a procedural opportunity to raise each of the claims and have it decided either at trial or on appeal." 177 F.3d at 1245. Because Trenkler has no viable savings clause claim, he cannot escape AEDPA's jurisdictional bar. Put another way, he cannot raise through a *coram nobis* petition a claim that is not cognizable under AEDPA.

II. TRENKLER'S CLAIM DOES NOT FALL WITHIN THE APPROPRIATE SCOPE OF CORAM NOBIS, WHICH DOES NOT APPLY WHEN THE DEFENDANT IS IN CUSTODY OR TO CORRECT PURELY LEGAL ERRORS.

Assuming that this Court could take jurisdiction over Trenkler's request, the Court would nonetheless have to deny that request as a matter of law, because *coram nobis* constitutes an inappropriate vehicle for correcting the error Trenkler alleges. To the extent *coram nobis* retains any vitality at all, it applies only to those no longer in custody, and then to correct fundamental errors of a factual nature. This case presents neither circumstance.

While the Supreme Court in United States v. Morgan, 346 U.S. 502 (1954), held that the federal courts retain jurisdiction to issue writs of *coram nobis* under the All Writs Act, the Court made clear that it was an "extraordinary remedy." Id. at 511. The Court stated: "Continuation of litigation after final judgment and exhaustion or waiver of any statutory right of review should be allowed through this extraordinary remedy only under circumstances compelling such ends to achieve justice." Id. More recently, in Carlisle v. United States, 517 U.S. 416 (1996), the Supreme Court suggested that this extraordinary remedy is all but extinct. The Court rejected use of *coram nobis* to act on an untimely post-verdict motion for acquittal and suggested the remedy would almost never be necessary in light of modern statutory remedies. The Court recalled its remark in United States v. Smith, 331 U.S. 469,

475 n.4 (1947) that, since the enactment of the Federal Rules of Criminal Procedure, "it is difficult to conceive of a situation in a federal criminal case today where [a writ of *coram nobis*] would be necessary or appropriate." Carlisle, 517 U.S. at 429 (brackets in original).

To the extent *coram nobis* retains vitality at all, it may be applied only under limited circumstances. At common law, the writ of error *coram nobis* existed solely to correct errors of fact "of the most fundamental character" that had not been brought to the attention of the district court and that "rendered the proceeding itself irregular." United States v. Addonizio, 442 U.S. 178, 186 (1979). Moreover, it generally applied "once the petitioner was no longer in custody." United States v. Sawyer, 239 F.3d 31, 37 (1st Cir. 2001). When Morgan confirmed the ability of federal courts, pre-AEDPA, to issue writs of *coram nobis* under the All Writs Act, it did so with specific reference to the writ's use as it existed at common law. Morgan, 346 U.S. at 507-08 (describing the writ's historical use and noting that its subsequent use in the United States had always "been with reference to its common law scope").

Subsequent cases, in this jurisdiction and elsewhere, have consistently reaffirmed that "a prisoner may not challenge a sentence or conviction for which he is currently in custody through a writ of *coram nobis*." United States v. Torres, 282 F.3d 1241, 1245 (10th Cir. 2002); see Sawyer, 239 F.3d at 37; Owens v. Boyd,

235 F.3d 356, 360 (7th Cir. 2001)("[W]rits in the nature of *coram nobis* are limited to former prisoners who seek to escape the collateral civil consequences of wrongful conviction."); United States v. Baptiste, 223 F.3d 188, 189 (3rd Cir. 2000)("[C]oram *nobis* has traditionally been used to attack convictions with continuing consequences when the petitioner is no longer 'in custody' for purpose of 28 U.S.C. §2255."); Zabel v. United States Attorney, 829 F.2d 15, 17 (8th Cir. 1987)("Coram *nobis* lies only where the petitioner has completed his or her sentence and is no longer in federal custody, is serving a sentence for a subsequent state conviction, or has not begun serving the federal sentence under attack.")(some internal punctuation omitted). Given this settled limitation on the writ's scope, Trenkler's status as a prisoner makes *coram nobis* relief unavailable to him.

The principle that *coram nobis* extends only to errors of fact is also well established. In Carlisle, the Supreme Court held that *coram nobis* relief would not lie based on a claim of insufficient evidence, because *coram nobis* "was traditionally available only to bring before the court 'factual errors material to the validity and regularity of the legal proceeding itself,' such as the defendant's being underage or having died before the verdict." 517 U.S. at 429. The First Circuit and other appeals courts have reached similar conclusions. See United States v. Michaud, 925 F.2d 37, 39, 41-42 (1st Cir. 1991)(noting that "[h]istorically, *coram nobis*

has been justified where errors of fact are raised" and rejecting defendant's arguments as "predicated on factual and legal allegations that either were disposed of on direct appeal . . . or are insufficiently specific to raise an issue of fact that would merit relief."); United States v. Blanton, 94 F.3d 227, 231 (6th Cir. 1996)(describing *coram nobis* relief as available only to address "an error of fact, unknown at the time of trial, of a fundamentally unjust character"); *but see Sawyer*, 239 F.3d at 37-38 (acknowledging language in Carlisle, but also noting, in *dicta*, that some federal courts have "assume[d] that writs of *coram nobis* may correct errors of law as well as errors of fact").¹⁰ Because Trenkler's petition presents a purely legal issue *coram nobis* constitutes an inappropriate remedy.

III. EVEN IF HIS CLAIM IS REVIEWABLE AS A PETITION FOR A WRIT OF CORAM NOBIS, TRENKLER HAS NOT MET THE REQUIREMENTS FOR A WRIT OF CORAM NOBIS TO BE GRANTED.

Even if Trenkler's petition is properly before this Court and susceptible of review under the writ of *coram nobis*, Trenkler has not established that he is entitled to relief under the writ. *Coram nobis* is an "extraordinary remedy," Morgan, 346 U.S. at 511, "limited to those cases where the errors were of the most fundamental character, that is, such as rendered the proceeding

¹⁰ While raising the issue, the Sawyer Court ultimately did not decide the question of whether a "fundamental legal error" could be addressed via *coram nobis*, finding it could decide the case on other grounds. Id. at 38.

itself irregular and invalid." Michaud, 925 F.2d at 39. To establish entitlement to such relief, "a petitioner must 1) explain [his] failure to seek relief from judgment earlier, 2) demonstrate continuing collateral consequences from the conviction, and 3) prove that the error is fundamental to the validity of the judgment." Sawyer, 239 F.3d 38. Trenkler's claim fails under all three of these prongs.

A. Trenkler cannot establish an error.

At the time of Trenkler's prosecution, the statute provided, *inter alia*, for punishment for "any term of years." This phrase indisputably includes life imprisonment. United States v. Nieves-Rivera, 961 F.2d 15, 16 (1st Cir. 1992)("[I]t seems to us, as it has seemed to every other federal appellate court that has considered the matter, that a crime 'subject to imprisonment for any term of years or for life,' is a crime that is 'punishable by ... life imprisonment.'"). Yet various cases have said that, under this version of §844, life imprisonment could only be imposed if a jury directed or recommended that sentence. United States v. Hansen, 755 F.2d 629, 631 (8th Cir. 1985)(since the record did not reflect that the jury recommended a life sentence, the district court could not impose one); United States v. Williams, 775 F.2d 1295, 1299 (5th Cir. 1985)(in the absence of a "jury recommendation or jury waiver," the defendant may not be sentenced to life imprisonment); United States v. Prevatte, 16 F.3d 767, 783 (7th

Cir. 1994)("[U]nder the language of §34, a life sentence may not be imposed unless the jury recommends.")(following Hansen and Williams); United States v. Gullett, 75 F.3d 941, 949-950 (4th Cir. 1996)(noting in *dicta* that the district court could not sentence the defendant to life imprisonment, because the jury had not directed a life sentence); United States v. Tocco, 135 F.3d 116, 131 (2nd Cir. 1996)(noting in *dicta* that "[t]he plain language of [§34] authorizes the imposition of a life sentence only by jury recommendation in the absence of a plea."). Almost uniformly, these cases provide little analysis in support of their conclusion that §844 required a jury verdict to impose a life sentence where the government did not seek the death penalty. We think these cases are wrong.

Section 844's incorporation of §34 ensured that §844's death penalty complied with then-existing Supreme Court death penalty jurisprudence in those cases where the death penalty was sought. But Congress's compliance with prevailing death penalty law did not remove a district court's ability to impose a sentence of life in those cases where the death penalty was not sought. This conclusion is supported by the legislative history of §§34 and 844, the language of §844, and principles of statutory construction.

Section 844's predecessor statute, 18 U.S.C. §837, provided that if personal injury resulted from the transportation of an explosive, the defendant would be subject to imprisonment for not

more than 10 years and "if death result[ed] shall be subject to imprisonment for any term of years or for life, but the court may impose the death penalty if the jury so recommends." Civil Rights Act of 1960, Pub. L. No. 86-449, 74 Stat. 86 (1960), *reprinted in* 1960 U.S.C.C.A.N. 97, 99. In 1970, Congress repealed §837 and promulgated a new, more inclusive statutory scheme, 18 U.S.C. §844, designed to further reduce the hazards associated with the misuse of explosives. Organized Crime Control Act of 1970, Pub. L. No. 91-452, 82 Stat. 922 (1994), *reprinted in* 1970 U.S.C.C.A.N. 1073, 1109-1119. Section 844 increased the maximum penalties provided for §844 offenses and, by incorporating §34, ensured that §844's death penalty complied with United States v. Jackson, 390 U.S. 570 (1968). In Jackson, the Supreme Court struck down a provision of the Federal Kidnaping Act that rendered eligible for the death penalty only defendants who invoked their right to trial by jury, not those who pleaded guilty, and thereby imposed an impermissible burden upon a defendant's right to trial. In its opinion, the Court favorably compared §34, the death penalty for aircraft wrecking, to the kidnaping statute. Jackson, 570 U.S. at 578-579, n.15 ("The language of the aircraft-wrecking statute, 18 U.S.C. §34, is of particular interest here because it reflects a congressional awareness of the precise problem the Government suggests Congress overlooked in the kidnaping area."). Thus, by incorporating §34 into §844, Congress ensured that §844's death

penalty complied with then-existing Supreme Court jurisprudence. H.R. Rep. No. 91-1549 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4007, 4045 ("In present section 837(b) the death penalty may be imposed if death results. The provision is constitutionally defective, United States v. Jackson, 88 S.Ct. 1209, 390 U.S. 570, 20 L.Ed.2d 138 (1968), and has been replaced in section 844(d) by language imposing life imprisonment or the death penalty, where death results, pursuant to 18 U.S.C. 34, which is not constitutionally defective."). In 1994, Congress enacted the present comprehensive death penalty scheme. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796, *reprinted in* 1994 U.S.C.C.A.N. 1796, 1959-1982 (1994). The Federal Death Penalty Act, Title VII of the Violent Crime Control and Law Enforcement Act of 1994, created a number of new capital offenses and contained capital-sentencing provisions for the new capital offenses and for previously existing ones which did not contain them. In conjunction with this comprehensive legislation, Congress amended §34 to remove its procedural directives and struck "as provided in section 34" from §844. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796, *reprinted in* 1994 U.S.C.C.A.N. 1796, 1968. In sum, the history reveals that life imprisonment was always an option when death resulted and that the phrase "shall be subject to . . . the death penalty or to life imprisonment as provided in section 34" had only

to do with the application of the death penalty when it was sought. There is no reason why that language should place any limits on the maximum sentence applicable when the government does not pursue the death penalty; put another way, there is no reason why this language should place any limits on the phrase "any term of years" when the government does not seek the death penalty, as it did not do in this case.

The interpretation given by the courts that have found that the phrase "shall be subject to. . . the death penalty or to life imprisonment as provided in section 34" runs afoul of the plain language of the statute which provides for "any term of years," and to basic principles of statutory construction. The interpretation makes the phrase "any term of years" somewhat meaningless, a result that is to be avoided. See United States v. Campos-Serrano, 404 U.S. 293, 301 n. 14 (1971) ("A statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.").¹¹ Moreover, it leads to a result that defies commonsense. The interpretation given to §844(d) and (i)'s penalty provisions by cases like Hansen and Williams have led subsequent courts to wonder what sentence may be imposed in the absence of a life sentence and to engage in the practice, anomalous in federal criminal practice, of determining

¹¹The Seventh Circuit rejected this statutory construction argument in United States v. Martin, 63 F.3d 1422 (7th Cir. 1995), but it did not consider the legislative argument made here.

through actuarial evidence the defendant's life expectancy and imposing a sentence just short of that. See, e.g., Tocco, 135 F.3d at 131 (noting that district court determined the defendant's life expectancy and the number of good time credits the defendant would earn in prison, and then imposed a sentence that, with good time, would be one-month short of the defendant's life expectancy); Martin, 63 F.3d at 1434 (noting that limiting "any term of years" to something less than life "might complicate sentencing" and "create sentencing disparity, because a twenty-year-old might receive a sixty year sentence for the same crime that a seventy-year-old could receive only ten years"). The Hansen-type interpretation, moreover, leads to different maximum penalties under §34 depending upon whether a defendant's guilt is determined by a jury ("shall be subject also to the death penalty or to imprisonment for life, if the jury shall in its discretion so direct") or by the court ("or, in the case of a plea of guilty, or a plea of not guilty where the defendant has waived a trial by jury, if the court in its discretion shall order"), a result that is neither sensible, nor constitutionally supportable. Courts must give statutes a "practical, commonsense reading," see O'Connell v. Shalala, 79 F.3d 170, 176 (1st Cir. 1996), not one that is impractical in application and constitutionally suspect.¹²

¹²Because we disagree with Trenkler that the jury should have been asked to decide whether he should serve life imprisonment or a term of years, we disagree with Trenkler's assertion that the

B. The defendant has not shown cause to excuse his procedural default.

In any event, even if a prisoner may use an ancient writ to circumvent the time and gatekeeping requirements of §2255 (and we do not think he may) and even if Trenkler can show there was an error during his trial or sentencing, he must still demonstrate, *inter alia*, a legitimate reason for failing to raise the claim earlier. This he cannot do. In the context of *coram nobis* claims, the First Circuit has expressed this idea as the prisoner's need to explain his failure to seek relief earlier. Sawyer, 239 F.3d at 38. In fact, the defendant must demonstrate cause for his procedural default and actual prejudice. Bousley, 523 U.S. at 622; United States v. Frady, 456 U.S. 152, 170 (1982). See Sustache-Rivera, 221 F.3d at 17 ("Whether Sustache's petition is properly treated as falling under §2255 or under §2241, he must show cause and prejudice for his failure to have previously made the claim.").¹³ An ineffective assistance of counsel claim may

government was negligent in "failing" to submit such a question to the jury."

¹³"Actual innocence" also may excuse a procedural default but it does not apply in this context. Bousley, 523 U.S. at 622. The Supreme Court has applied the actual innocence exception to procedural default in the capital case context, Sawyer v. Whitley, 505 U.S. 333 (1992), but it has not applied it in the non-capital case context, Dretke v. Haley, 541 U.S. 386, 393 (2004). While the government does not believe the actual innocence exception translates into the non-capital context, that exception does not apply here for another reason. "Actual innocence" means "factual innocence." See Bousley, 523 U.S. at 623. Trenkler's claim is not that he is "factually innocent" of the facts giving rise to the

establish cause, see Smullen v. United States, 94 F.3d 20, 23 (1st Cir. 1996), but the claim must be credible. There is no credible claim of ineffectiveness here. Indeed, Trenkler's unsupported claim that his lawyers did not know that they could make the argument he now makes would have justified summary dismissal of the *coram nobis* petition. See Michaud, 925 F.2d at 39 (conclusory allegations unsupported by specifics are insufficient to require a court to grant an evidentiary hearing, as are contentions that in the face of the record are wholly incredible).¹⁴ There was indeed no reason for defense counsel not to have discovered the possibility of the argument that Trenkler now makes. The statutes under which Trenkler was indicted and then convicted and sentenced directed the reader to §34. Moreover, by the time of Trenkler's sentencing (and appeal), two circuit courts had interpreted the statute to require a jury verdict. Thus, the issue was not so sufficiently novel so as to provide cause for defense counsel's "failure" to raise it. See Engle v. Issac, 456 U.S. 197, 130, n.35

life imprisonment sentence (as, for example, a defendant might argue if he received a sentence under the Armed Career Criminal Act based on a predicate conviction later determined to be invalid, see, e.g., United States v. Mikalajunas, 186 F.3d 490, 495 (4th Cir. 1999)), but that a purported procedural error should preclude the imposition of a life sentence.

¹⁴Trenkler has also not established that he did not know - e.g., for example, did not discuss with his lawyers - the possibility and potential risks and benefits of making this argument. His *coram nobis* petition was unsupported by any declaration or affidavit.

(1982)(futility cannot constitute cause if it means simply that a claim was unacceptable to that particular court at that particular time"); Bousley, 523 U.S. at 622 (because other defendants had argued, albeit unsuccessfully, for a narrow reading of §924(c) later adopted by the Supreme Court, Bousley's counsel's failure to advance argument could not be attributed to its novelty).¹⁵

The law and the record provide, moreover, more credible explanations for why defense counsel did not raise the issue. The First Circuit had not addressed the penalty provisions; even if this Court does not accept the government's interpretation of the

¹⁵In its *coram nobis* order, the Court relied in part on the First Circuit's decision in Hardy v. United States, 691 F.2d 39, 41-42 (1st Cir. 1982), to find that Trenkler should be excused from his procedural default. Hardy's sentence had been enhanced pursuant to 21 U.S.C. §851 although the government had not made the requisite filing. The Hardy court questioned whether the standard cause and prejudice analysis applies "where a court acts without authority," 691 F.2d at 41, but found that Hardy had shown cause because, *inter alia*, the government on appeal "seem[ed] confused as to the basis for sentencing," and "the remanding of this case will only require a simple resentencing." 691 F.2d at 41-42. More recently, the First Circuit has made clear that the cause and prejudice test applies where the government has failed to file an §851 information. Prou v. United States, 199 F.3d 37, 47 (1st Cir. 1999). In Prou, the First Circuit found that the defendant showed that his lawyer was ineffective for failing to object at sentencing to the imposition of an enhanced sentence when the government had filed the §851 information after trial rather than before trial as §851 requires. 199 F.3d at 48. The First Circuit also found that had counsel called attention to the government's failure to timely file the §851 at sentencing, the district court would not have been permitted to impose an enhanced sentence. Id. These cases are inapposite for reasons discussed in the text: Trenkler can neither show cause for his default, nor actual prejudice. Moreover, this case does not involve the simple resentencing contemplated in Hardy.

statutory scheme in the context of this *coram nobis* litigation, it cannot be disputed that the alternative explanation provided here is one that would have given counsel grave pause. The government's interpretation of the statutory scheme might have provoked one to wonder whether, once the jury in its discretion directed a life sentence, that decision would be binding on the district court. See 18 U.S.C. §34 ("shall be subject also to the death penalty or to imprisonment for life, *if the jury shall in its discretion so direct*")(emphasis added).¹⁶ In any event, even if the jury's "direction" were not mandatory, it would certainly be persuasive. The record evidences that the attorneys for both Trenkler and Shay - prominent and sophisticated defense attorneys - did not want the subject of penalty to go to the jury. As discussed in the procedural section of this brief, they insisted that "death" and "personal injury" under §§844(d) and (i) were not matters to be proved to the jury; whether a sentence of life imprisonment should be imposed was, in their estimation, a matter only for the sentencing court. [See Exhibit 2]. Defense counsel reasonably would not have wanted these issues to go to the jury. To the contrary, they wanted to argue (and did argue) at sentencing that the Guidelines did not authorize a sentence of life. A special

¹⁶*But see United States v. Goltz*, 187 F.Supp. 1168, 1772 (D. South Dakota 2002)(stating that there is no indication that Congress intended to impose mandatory minimum sentence of life imprisonment where death results).

verdict either directing or authorizing life imprisonment would have undermined their claim that a life sentence could not be imposed.¹⁷ Defense counsel also may have believed the Court would feel more apt to depart from the Guidelines in the absence of the jury verdict. And certainly defense counsel may have had some concern that had they insisted on a jury verdict, the government might have thought differently about seeking the death penalty. Strategic decisions that may later be subject to question do not amount to ineffective assistance of counsel. See Scarpa v. Dubois, 38 F.3d 1, 11 (1st Cir. 1994)(distinguishing errors from tactical choices or some plausible strategic aim). In short, Trenkler has not established that the so-called failure of multiple defense counsel to make his current §34 argument was an excusable oversight as opposed to a calculated stratagem. He has not shown cause for his failure to raise the claim earlier.

¹⁷Because death resulted from Trenkler's crimes, §2K1.3(c)(1)(B) required the Court to apply the most analogous guideline. Trenkler argued that Officer Hurley's death was accidental, and that the Court should not apply the first or second degree murder guideline, resulting in a lower guideline sentencing range than advocated by the government. [See *Trenkler's Sentencing Memorandum of Defendant, Alfred W. Trenkler, on the Appropriate Offense Level Computation*]. In support of this argument, Trenkler pointed out that the jury was not required to find that the defendant intended to injure or kill anyone [Docket entry #545, page 3], an argument aided in part by the defense's earlier litigation to narrow the charges presented in the indictment.

C. Trenkler has not established that the error he alleges was prejudicial or constitutes the type of fundamental error justifying *coram nobis* relief.

As discussed earlier, while the First Circuit has not decided whether a writ of *coram nobis* is available to vacate a criminal conviction premised upon a fundamental error of law, Sawyer, 239 F.3d at 38 (and we think it is not), it has said that a defendant seeking *coram nobis* relief must prove, *inter alia*, that any error is fundamental. Trenkler is not entitled to relief because even if a defendant may bring a claim pursuant to a petition for a writ of *coram nobis* that is broader than the limited innocence claims permitted under §2255's savings clause, the alleged error he identifies does not constitute the type of "fundamental error" recognized in *coram nobis* jurisprudence that would justify upsetting his long-settled life sentence.

To establish a fundamental error, a defendant must show both that he was actually prejudiced (under Bousley) and that a miscarriage of justice would result if the purported error goes uncorrected.¹⁸ Trenkler can do neither. Had Trenkler claimed during the context of his criminal prosecution that the jury had to authorize a maximum sentence of life imprisonment, the government

¹⁸To establish "actual prejudice," a petitioner must demonstrate "not merely that the errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage," infecting his trial with error of constitutional dimensions." Frady, 456 U.S. at 170.

would have submitted such a request for authorization to the jury. Given the facts of the case - e.g., that Trenkler built the bomb that exploded and killed one person and maimed another - Trenkler cannot credibly argue that the jury would not have authorized the possibility of a life sentence. As noted by this Court in its *coram nobis* order, the Seventh Circuit in Prevatte found that the defendant could establish plain error in the absence of a jury recommendation of life because "had the question of life sentence been put to the jury, it could have determined that a sentence of life was not warranted." 16 F.3d at 783, n.16. We think Prevatte wrongly applied the plain error standard (plain error, for example, requires that the error be clear by the time of appellate consideration, Johnson v. United States, 520 U.S. 461, 466-67 (1997), and it was not settled in Prevette's favor at the time of his appeal)¹⁹ but perhaps more significantly, the actual prejudice standard relevant to collateral attacks is more demanding than that for plain error. Fraday, 456 U.S. at 166 ("We reaffirm the well-settled principle that to obtain collateral relief a prisoner must clear a significantly higher hurdle than would exist on direct

¹⁹Indeed, collateral review is not the appropriate time to ask a court to resolve newly presented legal claims. Although Trenkler claims the statute must be read as he states, the government believes differently. To decide Trenkler's *coram nobis* petition, then, this Court must interpret the statute and resolve the arguments presented by counsel without direction from the First Circuit. This kind of litigation is inconsistent with the doctrinal underpinnings of collateral review and undermines society's concern with the finality of judgments.

appeal"); Ramirez-Burgos v. United States, 313 F.3d 23, 32, n.12 (1st Cir. 2002) ("the actual prejudice standard is more demanding than that for plain error"). Trenkler simply cannot show that, if asked, the jury would not have recommended or directed a life sentence. This is especially true if §34 is interpreted to require that the jury merely recommend that a defendant be exposed to a maximum life sentence with the Court to have discretion to impose a lesser sentence. *Cf.* United States v. Savarese, 385 F.3d 15, 21 (1st Cir. 2004) (declining to reverse based on a claimed Apprendi error under the fourth requirement of the plain error test).

Moreover, Trenkler has not shown, and cannot show, that the error he alleges falls within the narrow class of fundamental errors traditionally held to justify the extraordinary remedy of *coram nobis*. Relief may be granted under *coram nobis* only for errors that effectively vitiate the "validity and regularity of the legal proceeding itself." Carlisle, 517 U.S. at 429; *see* United States v. Keane, 852 F.2d 199, 203 (7th Cir. 1988) ("[*Coram nobis*] is limited to defects that sap the proceedings of any validity."); United States v. Stoneman, 870 F.2d 102, 106 (3rd Cir. 1989) (for *coram nobis* to be appropriate "[t]he error must go to the jurisdiction of the trial court, thus rendering the trial itself invalid"). The examples referred to by the Supreme Court, including "the defendant's being under age or having died before the verdict," Carlisle, 517 U.S. at 429, "insanity of a defendant,

a conviction on a guilty plea through coercion of fear of mob violence [or] failure to advise of right to counsel," Morgan, 346 U.S. at 511-512, reflect this view. Each identifies a situation in which the circumstances call into question the fundamental basis of the court's actions with respect to the defendant. See also Nicks v. United States, 955 F.2d 161, 166-67 (2nd Cir. 1992)(failure to hold constitutionally required competency hearing constituted error of such magnitude to be addressed via *coram nobis*). Errors affecting proceedings in less central ways, including those affecting the defendant's sentence, have been held beyond the scope of *coram nobis*. See Lowery v. United States, 956 F.2d 227, 229-30 (11th Cir. 1992)(allegation of error affecting use of prior conviction to increase present sentence found insufficient to justify *coram nobis* relief); Granville v. United States, 613 F.2d 125, 126-27 (5th Cir. 1980)(allegations of sentencing error not subject to reversal in *coram nobis* where sentence was within statutory range and not "arbitrary or capricious action amounting to gross abuse of discretion"); Stoneman, 870 F.2d at 106 (fact that defendant was convicted based in part on theory later found invalid by Supreme Court did not justify *coram nobis* relief where error did not call into question validity of proceedings as a whole).

Trenkler contends that imposing a life sentence without a jury determination constituted such an error, arguing that the Court's

actions resulted in imposition of an unauthorized sentence in violation of his constitutional rights. [Petition, pp. 9-10]. Assuming Trenkler is right in his interpretation of the statute, he fundamentally mischaracterizes the nature and significance of the error that occurred. Under the particular circumstances of this case, sentencing Trenkler to life without the benefit of a required jury determination would have violated none of his constitutional rights and would have almost certainly constituted harmless error.

At the outset, the government notes that Trenkler's claim that he received an "unauthorized" sentence is overstated. While §34 has been interpreted to require a jury to determine the applicability of a life sentence, the statute did not require this in all cases. Most obviously, the statute permitted the court to impose a life sentence for the crime of which Trenkler was convicted if a defendant pled guilty or waived a jury. Trenkler's claim that the sentence he received exceeded the statutory maximum, in violation of the Eighth Amendment, is also plainly incorrect. The provisions of 18 U.S.C. §§34 and 844 authorized not only life imprisonment but the death penalty for the crimes Trenkler committed. That courts have interpreted §844 to require a jury to play a role in imposing a life sentence does not mean that such a sentence became constitutionally excessive when those procedures were not followed.

This conclusion has been affirmed in the decisions of two

circuit courts addressing the *ex post facto* implications of the 1994 change in law that eliminated the jury provision. See United States v. Joyner, 201 F.3d 61 (2nd Cir. 2000); United States v. Grimes, 142 F.3d 1342 (11th Cir. 1998). In Joyner and Grimes, the defendants were convicted for crimes that took place before the 1994 amendments became effective, but sentenced afterwards. Joyner, 201 F.3d at 80; Grimes, 142 F.3d at 1351. When the courts imposed life sentences under the new procedures - without a jury determination - the defendants objected that the earlier version of the statute required a jury verdict and that the life sentences violated the *ex post facto* clause because it increased the punishment to which they were exposed. Id. The courts disagreed, finding that the change did not constitute an *ex post facto* violation because "the punishment attached to [the] crime [was] not altered by the amendment to the statute; the only change is a procedural one that allocates responsibility between two different decision makers." Grimes, 142 F.3d at 1353; see Joyner, 201 F.3d at 80; Dobbert v. Florida, 432 U.S. 282, 293-94 (1977)(rejecting *ex post facto* challenge to change in state statute altering the role of judge and jury in death penalty cases and stating that "[t]he new statute simply altered the methods employed in determining whether the death penalty was to be imposed; there was no change in the quantum of punishment attached to the crime").

Trenkler also cannot establish a violation of his rights under

the Fifth and Sixth Amendments as a result of the alleged error in sentencing. Settled law holds that defendants have no constitutional right to jury sentencing, even in capital cases. Spaziano v. Florida, 468 U.S. 447, 459 (1984)("[A] capital sentencing proceeding involves the same fundamental issue involved in any other sentencing proceeding - a determination of the appropriate punishment to be imposed on an individual The Sixth Amendment never has been thought to guarantee the right to a jury determination of that issue.")(internal citations omitted); Harris v. Alabama, 513 U.S. 504, 515 (1995)(holding in the context of an Eighth Amendment challenge that "[t]he Constitution permits the trial judge, acting alone, to impose a capital sentence."). While intervening Supreme Court precedent has established a right under the Sixth Amendment and Due Process clause to have a jury find certain facts underlying an enhanced sentence, *see, e.g., Apprendi*, 530 U.S. at 466, these holdings do not help Trenkler. A jury's recommendation of a life sentence or "term of years" is not a "fact" - like drug weight - that requires submission to a jury.²⁰

²⁰The only "fact" that Apprendi would require to be found by a jury in order to impose a life sentence here is that a "death result[ed] to any person." 18 U.S.C. §§844(d), (i). The evidence supporting that fact was overwhelming, so that any Apprendi error was harmless, if not waived. United States v. Morgan, 384 F.3d 1, 8 (1st Cir. 2004)("In the post-Apprendi world, this court adopted a rule that any such error in sentencing should be harmless so long as the evidence for the trial judge's factual findings is overwhelming and no reasonable jury could have disagreed with them.").

Trenkler also seems to claim that his due process rights were violated simply because statutory procedures were not followed. However mere failure to adhere to statutory procedures does not equate to a due process violation, especially where, as here, a constitutionally adequate remedy exists in the form of direct review and §2255. See Barrett, 178 F.3d at 53 (concluding that the court did not have to consider whether defendant's Jencks Act claim was of constitutional dimension, where §2255 provided an adequate remedy, even though defendant failed to use it).

Any lingering doubt regarding the significance of the error Trenkler alleges is dispelled once his sentencing is considered in the context of changes that occurred shortly thereafter in the disputed language of §844(i) and (d). This Court sentenced Trenkler in March 1994. As noted earlier, six months later, on September 13, 1994, Congress enacted the change to §844 that makes it clear that a judge may sentence a defendant to life imprisonment without a jury's verdict. Violent Crime Control and Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796, *reprinted in* 1994 U.S.C.C.A.N. 1796, 1968, tit. VI, §60003(a)(1). Because the "change" posed no *ex post facto* problem, it applied immediately. Joyner, 201 F.3d at 80; Grimes, 142 F.3d at 1353. A decision on Trenkler's direct appeal did not issue until July 18, 1995. Trenkler, 61 F.3d at 45.

From this timeline, it is apparent that, had Trenkler included

his present claims in his direct appeal, he could have obtained no benefit. Due to the intervening change in law, a remand of Trenkler's sentence on this issue at the conclusion of his direct appeal would have been meaningless.²¹ By the time the remand occurred, this Court would have had authority to reimpose a life sentence (without a jury verdict) pursuant to the post-1994 statute, see Grimes, 142 F.3d at 1351-52 (noting the "general rule" that "a defendant should be sentenced under the law in effect at the time of sentencing"), and law of the case principles would have required that it do so. Given that remand could have served no purpose, the First Circuit would have found the error harmless. *Cf. United States v. Salameh*, 261 F.3d 271, 275-76 (2nd Cir. 2001)(holding that the court had no need to reach issue of whether defendant's sentence, imposed on remand pursuant to post-1994 version of §844, was equivalent to life sentence because, at this point, "defendants had no right to avoid a life sentence that was tantamount to life imprisonment"). The same result would have followed had Trenkler raised his claim, as AEDPA required him to

²¹This timing distinguishes the present case from those on which Trenkler relies. The appeals in Hansen, 755 F.2d 629, Williams, 775 F.2d 1295, and Prevatte, 16 F.3d 767, were all argued and decided before the statutory change went into effect, so that the courts were required to craft a remedy for the error they believed they had found. Gullett, 75 F.3d 941, and Tocco, 135 F.3d 116, address the issue only in *dicta* and are not to the contrary.

do, in a timely first petition under §2255.²² Indeed, there would be no bar to this Court reimposing the life sentence now, pursuant to the current version of §844.²³

Under these circumstances, Trenkler plainly cannot meet the high standard needed to justify *coram nobis* relief. Nor, as discussed, can he establish the "actual prejudice" required as a matter of Supreme Court precedent to excuse his procedural default. As a result, Trenkler has established no valid ground for reopening his eminently justified life sentence.

CONCLUSION

The Supreme Court has long realized that permitting a claim to be "brought at any distance of time" would be contrary to the goals of criminal justice. Adams v. Woods, 6 U.S. (2 Cranch) 336, 342 (1805). Finality interests are of particular importance to collateral review in criminal matters. Collateral review "extends the ordeal * * * for both society and the accused." Engle v.

²²We also note that, where life sentences were found impermissible under §844 before Congress clarified the law, courts responded by imposing sentences just short of actuarial life expectancy. See Tocco, 135 F.3d at 131-32 (upholding sentence calculated to be, with good time credits, approximately a month less than the defendant's 31-year life expectancy); Gullett, 75 F.3d at 950-951 (upholding sentence calculated by the district court to be, with good time credits, less than a year less than the defendant's life expectancy of 33.8 years). There is no reason to anticipate this Court would have responded differently, another reason that Trenkler cannot show a fundamental error or miscarriage of justice.

²³For this reason, Trenkler cannot establish that he suffers continuing collateral consequences, as required under Sawyer.

Isaac, 456 U.S. at 127. It frustrates deterrence and rehabilitation, because effective deterrence depends on the expectation that punishment will be swift and sure, and successful rehabilitation requires the defendant to accept that he is justly subject to sanction and needs to be rehabilitated. 456 U.S. at 127 n.32; see also McCleskey v. Zant, 499 U.S. 467, 492 (1991) ("[T]he ordeal worsens during subsequent collateral proceedings. Perpetual disrespect for the finality of convictions disparages the entire criminal justice system"). Taking into account these costs, Congress explicitly chose in AEDPA to restrict a prisoner's right to raise and litigate new claims. Trenkler, well represented by a variety of lawyers over the years, has had many opportunities to challenge his conviction and sentence and his present claim is justifiably barred under AEDPA. It is thus for good reason that he cannot clear the significant statutory and procedural hurdles described here to obtain relief. There is, moreover, neither an error nor a miscarriage of justice in the sentence imposed by this Court after the jury's verdict of guilt and the Court's careful deliberation of the facts. Accordingly, the government respectfully requests that the Court reconsider its February 20,

2007, order and dismiss Trenkler's petition for a writ of *coram nobis* for lack of jurisdiction or, in the alternative, deny it on the merits.²⁴

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Certificate of Service

I hereby certify that on March 7, 2007, this Opposition was filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants.

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²⁴In the event the Court declines to reconsider its order, the United States requests permission to file a sentencing memorandum prior to any resentencing in this case.