UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 06-12072-RWZ

ALFRED W. TRENKLER

v.

UNITED STATES OF AMERICA

MEMORANDUM OF DECISION AND ORDER

February 20, 2007

ZOBEL, D.J.

In 1994, petitioner Alfred Trenkler ("Trenkler") was sentenced to two concurrent life terms on his 1993 convictions of violations of 18 U.S.C. §§ 844 (d) and (i), receipt of explosives and attempted destruction of property by explosives, as well as conspiracy to violate section 844, 18 U.S.C. § 371. Trenkler now petitions the court for a writ of coram nobis to reopen sentencing in this case in order to correct the imposition of a sentence which, at the time, was available only at the direction of the jury. Both because the petition is unopposed and based on its merits, I grant the writ and order petitioner to be delivered to this court for resentencing.

I. HISTORY

A. Conviction and Sentencing

On November 29, 1993, a jury convicted Trenkler of violating 18 U.S.C. § 371 (count 1) and 18 U.S.C. §§ 844(d) and (i) (counts 2 and 3) for his role in the construction and placement of a bomb which exploded, killing one Boston Police

Officer and maiming another. (See Docket 92-cr-10369-RWZ, #487.) On March 8, 1994, he was sentenced to life imprisonment on counts 2 and 3, along with a sixty-month sentence on count 1, the conspiracy charge, all to be served concurrently. At the time, both subsection (d) and (i) of 18 U.S.C. § 844 provided for "imprisonment for any term of years, or to the death penalty or to life imprisonment as provided in section 34 of this title" if "death results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection." 18 U.S.C. § 844 (1993) (emphasis added). Section 34, in turn, provided for the death penalty or life imprisonment, "if the jury shall in its discretion so direct." Id. at § 34 (1993) (emphasis added). While the court did not have the authority to sentence Trenkler to life imprisonment on the explosives counts under the express language of the statue, neither the government nor defense counsel brought section 34 to the court's attention at the time. Even the U.S. Probation Office, in the Pre-Sentence Report, incorrectly asserted that life imprisonment was an option available to the court.

B. Amendments to Sentencing Statutes and Post-Conviction Challenges

Six months after Trenkler was sentenced, Congress amended 18 U.S.C. §§ 844(d) and (i) by striking "as provided in section 34 of this title" and also amended 18 U.S.C. § 34 by striking "if the jury shall in its discretion so direct." See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796, §§ 60003(a)(1), 60003(a)(3)(A), 60003(a)(3)(C) (Sept. 13, 1994). Thereafter as amended, section 844 provided for life imprisonment with no reference to section 34, and section

34, as amended, authorized the imposition of life imprisonment without any requirement for a jury trial on the issue.

Shortly after sentencing, on April 12, 1994, Trenkler's trial counsel withdrew and was replaced by new counsel, who handled the appeal. The First Circuit affirmed Trenkler's convictions on July 18, 1995. The life sentence issue was not raised on direct appeal, nor in Trenkler's subsequent legal challenges to his conviction and sentence. These challenges included a December 22, 1995, motion for a new trial, and a January 7, 1999, petition under 28 U.S.C. § 2255 seeking vacation of his conviction for ineffective assistance of counsel, both to this court, and an October 2002 petition for a writ of habeas corpus to the district court in Pennsylvania challenging his sentence on other grounds. All proved unsuccessful.

In 2003, Trenkler read about a similar sentencing error in another case. He contacted his attorneys, who filed a petition for a writ of mandamus in the First Circuit on August 24, 2004. The petition was denied on February 16, 2005, on the ground that to allow it would negate the gatekeeper restrictions on second or successive § 2255 petitions. The Supreme Court denied a writ of certiorari on June 22, 2005.

C. Instant Petition for Writ of Coram Nobis

Finally, on December 1, 2005, Trenkler wrote a letter asking this court to rectify the error. (Docket 92-cr-10369-RWZ, #668.) At the request of the court, new counsel reviewed the letter and ultimately filed the instant petition for a writ of coram nobis and

request for appointment of counsel on November 6, 2006.[1] I allowed the motion for appointment of counsel and directed the government to "file a responsive pleading on or before 1/5/07." (Docket, Electronic Order 11/15/2006.) On January 26, 2007, I entered a second order stating that "[u]nless [the government] submits a responsive pleading by February 2, 2007, the court will decide the matter without opposition." (Docket #2.) The government has filed no opposition.

II. DISCUSSION

The writ of error coram nobis provides a remedy to correct "errors of the most fundamental character" that have occurred in a criminal proceeding. United States v. Morgan, 346 U.S. 502, 512 (1954). The writ is an "extraordinary remedy [available] only under circumstances compelling such action to achieve justice." Id. at 511. "Historically, coram nobis has been justified where errors of fact are raised which have not previously been before the court."[2] United States v. Michaud, 925 F.2d 37, 39 (1st Cir. 1991). "A writ of coram nobis is an appropriate remedy by which the court can correct errors in criminal convictions where other remedies are not available." Korematsu v. United States, 584 F. Supp. 1406, 1411 (N.D. Cal. 1984) (granting the

[1] The petition, in the alternative, moves for a writ of audita querela. The common law writ of audita querela provides relief from a judgment based on a legal defense arising after the judgment. United States v. Holder, 936 F.2d 1, 2 (1st Cir. 1991). In this case, the writ of coram nobis is more appropriate, as the sentence imposed was infirm at the time it issued.

[2] There is a split of opinion on whether coram nobis is also available for errors of law. The First Circuit, however, has not limited the availability of coram nobis solely to errors of fact. See United States v. Sawyer, 239 F.3d 31, 35 (1st Cir. 2001).

writ to vacate petitioner's earlier conviction where "much of the evidence upon which petitioner base[d] his motion was not discovered until recently" and the government offered no opposition to the petition).

Here, no other remedy is available to Trenkler. He has already exhausted his right to petition under the writ of habeas corpus. 28 U.S.C. § 2255, as amended in 1996, normally allows a prisoner in custody only a single application to the district court for habeas relief, and even then the motion must be made within one year from the date on which his conviction becomes final. 28 U.S.C. § 2255. Subsequent habeas petitions are strictly limited to (1) newly discovered evidence proving actual innocence, or (2) a new rule of constitutional law retroactive to the petitioner. Id. Even in the rare instances meeting these requirements, the petition must first be approved by the appropriate court of appeals. Id. The First Circuit denied Trenkler's writ of mandamus seeking to vacate his sentences because it did not meet either of these exceptions for a second or successive § 2255 petition. The writ of coram nobis, therefore, is the only procedural mechanism available to him to correct his improper sentence.

This court has jurisdiction to consider Trenkler's petition under the All Writs Act, 28 U.S.C. § 1651.[3] See United States v. Sawyer, 239 F.3d 31, 38 (1st Cir. 2001) (noting that Morgan affirmatively resolved the question whether "coram nobis was still available in federal court for criminal cases"). In order to succeed in his petition, Trenkler must (1) "prove that the error is fundamental to the validity of the judgment,"

[3] 28 U.S.C. § 1651(a) provides: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

(2) explain his failure to seek relief from judgment earlier, and (3) "demonstrate continuing collateral consequences from the conviction." Sawyer, 239 F.3d at 39.

The First Circuit has, in general, been hostile to the use of the writ where the petitioner merely seeks to retry issues that should have been or actually were decided in an earlier proceeding. See United States v. Barrett, 178 F.3d 34 (1st Cir. 1999) (holding that "while there are very rare circumstances in which review may exist [under the All Writs Act] even if the requirements of § 2255 have not been met," petitioner could not raise an issue under the Act where he had already raised it in his § 2255 reply brief); Michaud, 925 F.2d at 44 (holding petitioner had not demonstrated "fundamental error warranting issuance of a writ of coram nobis" where most of his allegations had already been addressed on appeal); Hager v. United States, 993 F.2d 4, 5 (1st Cir. 1993) (affirming a lower court decision denying the writ, where petitioner was aware of the facts allegedly justifying relief at the time of his guilty plea, yet did not file a timely appeal); Enwonwu v. United States, 199 Fed. Appx. 6 (1st Cir. 2006) (unpublished) (holding a "run-of-the-mill" ineffective assistance of counsel claim, "even if meritorious, is hardly so extraordinary as to warrant coram nobis relief").

In none of these earlier cases was the court presented with a petitioner serving a life sentence imposed in clear violation of federal statute, and who, along with the government and the court, was unaware of the error until after the time period allowing for a normal procedural correction had elapsed. Trenkler's procedural position is more like that of a prisoner who discovers too late evidence to prove actual innocence than that of a petitioner who failed to raise known arguments at the first opportunity and now

seeks another bite of the apple. See Barrett, 178 F.3d at 41 (noting that a prisoner may file a second or successive § 2255 petition if that petition is based on evidence that would establish "actual innocence"). Thus, the instant case presents exactly the sort of extraordinary circumstances in which the writ of coram nobis is appropriate to correct a "fundamental error of law" resulting in a "miscarriage of justice." See Sawyer, 239 F.3d at 45; see also Morgan, 346 U.S. at 512 (explaining that where no other remedy is available and sound reasons exist for the failure to seek earlier relief, coram nobis "must be heard by the federal trial court . . . [o]therwise a wrong may stand uncorrected which the available remedy would right").

A. The Sentencing Error is Fundamental to the Validity of the Judgment

There is no question that this court did not have the authority to sentence Trenkler to life imprisonment under the law in effect at the time. Section 34, referenced by section 844, only authorized a life sentence "if the jury shall in its discretion so direct." 18 U.S.C. § 34 (1993) (emphasis added). Other courts interpreting the interaction of these two statutes have come to the same conclusion. United States v. Prevatte, 16 F.3d 767 (7th Cir. 1994) (holding district court committed error in sentencing bomber to life imprisonment for violation of 18 U.S.C. § 844(i) without jury recommendation); United States v. Hansen, 755 F.2d 629, 631 (8th Cir. 1985) ("Absent the recommendation of the jury, this sentence [of life imprisonment for violation of 18 U.S.C. § 844(i)] was improper and must be vacated."); United States v. Gullett, 75 F.3d 941, 950 (4th Cir. 1996) ("Courts interpreting the pre-1994 version of section 34 have held that, under the plain language of section 34, a life sentence may not be imposed

absent jury direction."); United States v. Williams, 775 F.2d 1295, 1299 (5th Cir. 1985) ("[U]nder the clear meaning of the combination of sections 844(i) and 34, Williams may be sentenced by the district court only to 'any term of years' and not to life imprisonment in the absence of a jury recommendation or jury waiver."). Thus, the error by this court in sentencing Trenkler to life imprisonment is directly "fundamental to the validity of the judgment" because it resulted in an invalid sentence. See Prevatte, 16 F.3d at 783 n.16 ([I]mposition of the [life sentence] sentence by the wrong entity is imposition of "an erroneous sentence.")

In Morgan, the Court described the writ of coram nobis as encompassing errors "of the most fundamental character." Morgan, 346 U.S. at 512 (quoting United States v. Mayer, 235 U.S. 55, 69 (1954)). There can be no question that the imposition of an illegal sentence is an error "of the most fundamental character." If the goal of the court is to mete out justice in accordance with the law, a sentence that does not conform to statute, even if inadvertent, is an error most fundamental to the rule of law.

The error is also fundamental because it resulted in an actual miscarriage of justice. In Prevatte, the Seventh Circuit examined the importance of the lower court's error in imposing a life sentence in violation of sections 844 and 34. 16 F.3d at 783 n.16. Because the jury could have determined a life sentence was not warranted, the court concluded that it was "plain error to impose a life sentence without a jury direction." Id. Citing a standard that would reverse for plain error **"only when . . . convinced that it is necessary to avert an actual miscarriage of justice," the** court nevertheless remanded the case to the district court for resentencing. Id. (internal

quotations removed). Thus, as in Prevatte, resentencing is necessary to correct "an erroneous sentence" and "avert an actual miscarriage of justice." Id.

Finally, the error is fundamental because it violated Trenkler's Eighth Amendment rights.[4] "A sentence that exceeds the statutory maximum has traditionally been viewed as a violation of the eighth amendment's prohibition against cruel and unusual punishment." Ford v. Moore, 296 F.3d 1035, 1038 n.6 (11th Cir. 2002) (quoting Ralph v. Blackburn, 590 F.2d 1335, 1337 (5th Cir.1979)). Here, the maximum allowable penalty without a jury finding was something less than life. Because Trenkler received a sentence that could not be imposed by the court under the relevant statutes, he is imprisoned in violation of his constitutional rights.

B. Petitioner Could Not Seek Earlier Relief

Neither this court, nor the government, nor Trenkler were aware of the statutory sentencing limitation at the time he was sentenced, or thereafter, until he discovered the error a decade later. In similar circumstances the First Circuit noted: "Given that even the government seems confused as to the basis for sentencing, we can hardly fault appellant for not raising the issue earlier." Hardy v. United States, 691 F.2d 39, 41-42 (1st Cir. 1982) (finding sufficient cause and prejudice to allow appellant to collaterally attack the lower court's imposition of an unauthorized sentence, even though he had not raised the issue on direct appeal). In that case, the court held that a lesser showing of cause for failing to present the issue earlier is appropriate where the

[4] Petitioner argues that the error is also fundamental because it violated his Fifth Amendment right to due process of law and his Sixth Amendment right to a trial by jury.

district court was without authority to impose the sentence. Id.; see also Suveges v. United States, 7 F.3d 6, 10 (1st Cir. 1993) (suggesting that adequate cause and prejudice to overcome a procedural default existed where the district court lacked authority to impose the sentence given and defense counsel was unaware of the error and therefore did not raise it on direct appeal).

By the time Trenkler's appeal was filed by new counsel, the statutes had been amended and the source of the error buried. As soon as he became aware of the error, he contacted his attorneys and has diligently pursued relief, first by petitioning the First Circuit, and now by the instant petition for coram nobis. Cf. Hager v. United States, 933 F.2d 4, 5 (1st Cir. 1993) (denying a petition for a writ of coram nobis where appellant failed to pursue a timely appeal on an issue known to him at his Rule 11 hearing).

As the First Circuit noted in a similar case remanded for "a simple resentencing" due to an sentence imposed without authority, "[n]one of the evils of a long-delayed retrial such as deaths of witnesses or lapses in memory are present in such a case." Hardy, 691 F.2d at 42. Thus, a lesser showing of cause for the delay in raising the issue is appropriate. Here, there is no attack on Trenkler's convictions that might require a new trial, nor is there any risk that he will go unpunished due to the delay in uncovering the imposition of the illegal sentence. The unusual circumstances of this case provide adequate cause for Trenkler's not seeking relief from this court earlier, and this case, too, calls only for a simple resentencing.

C. Petitioner Continues to Suffer Collateral Consequences

Clearly, Trenkler continues to suffer the collateral consequences of the sentencing error. He will likely die in prison while serving the two invalid life sentences imposed by this court. Had the error not occurred, the maximum possible legal sentence would offer him the possibility of leaving prison in his lifetime. See, e.g., United States v. Martin, 63 F.3d 1422, 1434 (7th Cir. 1995) (holding that section 34 required the imposition of a sentence of less than defendant's life expectancy, absent jury direction); United States v. Tocco, 135 F.3d 116, 131 (2d Cir. 1998); Gullett, 75 F.3d at 951.

III. CONCLUSION

This petition presents the extraordinary circumstances for which the writ of coram nobis provides the only possible relief to avert a miscarriage of justice. Trenkler is imprisoned for life under a sentence not authorized by statute; no other remedies are available, and his petition is unopposed.

Accordingly, Trenkler's petition is GRANTED and the concurrent life sentences imposed by this court on March 8, 1994, will be VACATED. The U.S. Marshal Service shall deliver petitioner to this court on April 4, 2007, at 2:00 p.m. for resentencing.

February 20, 2007
DATE

/s/Rya W. Zobel
RYA W. ZOBEL
UNITED STATES DISTRICT JUDGE