

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,

Plaintiff,

v.

ALFRED TRENKLER,

Defendant.

Criminal No. 1:92-cr-10369-RWZ-2

00 CA 12072 RWZ

MAGISTRATE JUDGE MBB

**DEFENDANT'S PETITION AND MOTION FOR A WRIT OF *CORAM NOBIS* AND/OR
AUDITA QUERELA, AND REQUEST FOR APPOINTMENT OF COUNSEL AND
FURTHER BRIEFING**

Pursuant to 28 U.S.C. § 1651 (the "All Writs Act"), defendant Alfred Trenkler hereby petitions and moves for a writ of *coram nobis* and/or a writ of *audita querela* to reopen sentencing in the above-entitled action in order to correct an error of the most fundamental character, and the manifest injustice that resulted, when the Court, without submitting the issue to the jury, sentenced Mr. Trenkler to two concurrent life terms in violation of 18 U.S.C. § 34, which at the time of sentencing provided that the penalty of "imprisonment for life" was only available "if the jury shall in its discretion so direct." 18 U.S.C. § 34 (1956). The Court was without authority to impose the current sentence, and the effect of the error was to strip Mr. Trenkler of, among other things, his Fifth Amendment right to due process of law, his Sixth Amendment right to a trial by jury, and his Eight Amendment right not to be subjected to cruel and unusual punishment. Through this petition and motion, Mr. Trenkler requests that the Court vacate his current illegal sentence and reopen the case for re-sentencing.

Although the basic legal and factual grounds for this petition and motion are set forth below, Mr. Trenkler, who is indigent, also requests that the undersigned counsel be formally

Motion for appointment of counsel allowed.
The government shall file a responsive pleading on or before 1/5/07
Ryan Zabel 11/15/06

appointed to represent him in this matter, and that an opportunity for further briefing on the issues be provided upon such appointment.

I. FACTUAL AND PROCEDURAL BACKGROUND

In 1993, a jury convicted Mr. Trenkler of violating 18 U.S.C. §§ 844(d) and (i), and 18 U.S.C. § 371 (conspiracy) through his alleged role in the production and placement of a bomb under a vehicle, which ultimately exploded and led to the death of a Boston police officer. In March of 1994, this Court sentenced Mr. Trenkler to two concurrent life terms. At the time of sentencing, sections 844(d) and (i) provided that “if death results to any person” from violations of those sections, a defendant 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.” 18 U.S.C. § 844 (1993), *amended by* Pub. L. 103–322, § 60003 (September 13, 1994) (emphasis added). Section 34 at that time read that any person convicted of a crime where death results “shall be subject also to the death penalty or to imprisonment for life, if the jury shall in its discretion so direct.” *Id.* at § 34 (1993), *amended by* Pub. L. 103–322, § 60003 (September 13, 1994) (emphasis added).

Despite the plain language of the statutes, the Court did not submit the life sentence issue to the jury. Instead, presumably unaware of section 34’s jury requirement, the Court sentenced Mr. Trenkler to two concurrent life terms on its own, evidently believing that it had authority to do so, although in fact it did not. Neither the Government nor defense counsel brought section 34 to the Court’s attention, and the probation office affirmatively (and erroneously) represented to the Court in its pre-sentence report that the Court’s only sentencing option was a life term. (*See* Pre-Sentence Report at “Part D, Sentencing Options,” p. 21). In short, neither the Court, the Government nor Mr. Trenkler’s counsel at the time knew or discovered that Mr. Trenkler had a right to a jury trial on the life sentence issue, or that the Court lacked authority to impose such a

sentence absent such a jury endorsement.

On April 12, 1994, shortly after sentencing, Mr. Trenkler's trial counsel withdrew from the case and was replaced by new counsel. Appellate briefing began on August 2, 1994 and concluded with the filing of Mr. Trenkler's reply brief on October 12, 1994. Meanwhile, on September 13, 1994, six months after the Court sentenced Mr. Trenkler to two life terms in contravention to then-existing Sections 844 and 34 of Title 18, Congress enacted Public Law 103-322, also known as the Violent Crime Control and Law Enforcement Act of 1994. The 1994 Act amended sections 844(a) and 844(i) by striking the language "as provided in section 34 of this title." *See* Pub. L. 103-322, §§ 60003(a)(3)(A), 60003(a)(3)(C). It also amended section 34 by striking the language "if the jury shall in its discretion so direct." *Id.* at § 60003(a)(1). Thus, from September 13, 1994 (the day of the Act's enactment) onward, section 844 no longer contained any reference to section 34, and section 34 no longer gave a defendant the right to a jury trial on the life sentence issue or prohibited the Court from imposing such a sentence of its own accord.

On July 18, 1995, the First Circuit affirmed Mr. Trenkler's convictions on direct appeal. On September 5, 1995, the mandate issued and the judgment became final. Over the next several years, Mr. Trenkler filed multiple challenges to his convictions, but, presumably because Mr. Trenkler's counsel had changed after trial, and because the amended sections 34 and 844 contained no reference to Mr. Trenkler's right to have had a jury decide the life sentence issue, Mr. Trenkler and his new counsel remained completely unaware of this Court's violation of that right, and therefore did not raise it in any of those challenges. Specifically, on December 22, 1995, Mr. Trenkler filed a motion for a new trial in this Court based on newly discovered evidence under Fed. R. Crim. P. 33, which did not raise the life sentence issue. The motion was

denied on February 4, 1997, and the First Circuit affirmed the denial on January 28, 1998. On January 7, 1999, Mr. Trenkler filed a petition in this Court under 28 U.S.C. § 2255 seeking vacation of his conviction for ineffective assistance of counsel, which again did not raise the life sentence issue. On April 18, 2000, this Court denied the petition as untimely under the new provisions of the Anti-Terrorism and Effective Death Penalty Act (AEDPA), which, effective April 24, 1996, imposed a one-year statute of limitations on the filing of section 2255 petitions. On October 24, 2001, the First Circuit affirmed the denial of the petition as time-barred. Finally, in October 2002, Mr. Trenkler petitioned for a writ of habeas corpus in the district court in Pennsylvania, challenging his sentence on the grounds that a new Supreme Court decision decriminalized one of his convictions. Again, because Mr. Trenkler and his counsel remained unaware of the Court's sentencing error, no challenge on those grounds was raised. The district court denied the petition for lack of jurisdiction, and the Third Circuit affirmed on December 18, 2003.

It was only after Mr. Trenkler read about the recent, highly-publicized case of *United States v. Barone*, in which Judge Wolf corrected a similar sentencing error that had occurred based on a misreading of the applicable statute, that Mr. Trenkler himself (without the aid of an attorney) was prompted to scrutinize the statutes governing his own sentence.¹ It was then that Mr. Trenkler, for the first time, discovered what had happened in his case, and he immediately contacted his attorney. This led to his diligent filing of a petition for a writ of mandamus in the First Circuit on August 24, 2004, but the petition was denied on February 16, 2005 on the

¹ In *Barone*, upon vacating the defendant's sentence due to egregious prosecutorial misconduct, Judge Wolf also discovered that he had erred in sentencing the defendant to life in prison for a racketeering offense whose statutory maximum was in fact 10 years. Media coverage in October 2003 reported the error, which, like the one here, was missed not only by the Court, but by federal probation officers, the prosecutors, and defense counsel. See, e.g., *Boston Man Is Freed 10 Years After Killing in Mob Case*, Washington Post, Oct. 26, 2003.

grounds that mandamus was not available to correct errors that fell outside of the stringent requirements for successive petitions under the AEDPA-amended 28 U.S.C. § 2255. Mr. Trenkler then diligently petitioned the Supreme Court for a writ of certiorari, but his petition was denied on June 20, 2005. On December 1, 2005, Mr. Trenkler sent a letter to this Court requesting that it invoke its authority to redress its own error. The Court, in turn, recently referred the matter to the undersigned counsel.

II. ARGUMENT

A. This Court Has Authority to Entertain This Motion

Under the All Write Act, this Court has authority to “issue all writs necessary or appropriate in aid of [its] . . . jurisdiction[] and agreeable to the usages and principles of law.” 28 U.S.C. § 1651. This includes the writs of *coram nobis* and *audita querela*. See *United States v. Morgan*, 346 U.S. 502, 506-7, 511 (1954) (The “power granted to issue writs of *coram nobis* by the all-writs section . . . comprehend[s] the power for the District Court to take cognizance of [a] motion in the nature of a *coram nobis* [W]e hold that the District Court has power to grant such a motion.”). A motion for these writs “is a step in the criminal case and not, like habeas corpus where relief is sought in a separate case and record, the beginning of a separate civil proceeding [T]he procedure by motion in the case is now the accepted American practice.” *Id.* at 506 n4; accord *United States v. Valdez-Pacheco*, 237 F.3d 1077, 1079 (9th Cir. 2001) (“A federal prisoner’s right to petition for the . . . common law writ of *coram nobis* . . . is part of the original criminal case, not a separate civil proceeding.”).²

² In this respect, the writs of *coram nobis* and *audita querela* are the functional equivalent of a Rule 60(b) motion in a civil case, which permit the district court to relieve a party from a final judgment “within a reasonable time” under the circumstances. Fed. R. Civ. P. 60(b). Indeed, in the civil context, Rule 60(b) expressly coincides with and replaces these writs. See *id.* (“Writs of *coram nobis*, *coram vobis*, [and] *audita querela* . . . are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules.”) In the criminal context, however, the writs survive and continue to

B. A Writ of *Coram Nobis* Should be Granted to Correct Mr. Trenkler's Illegal Sentence.

The Court's sentencing error meets all of the traditional requirements for a writ of *coram nobis*. With no other remedy available to Mr. Trenkler, failure to grant this motion and petition will result in a complete and intolerable miscarriage of justice. The writ of *coram nobis* is "an unusual legal animal that courts will use to set aside a criminal judgment . . . under circumstances compelling such action to achieve justice." *United States v. Barrett*, 178 F.3d 34, 57 fn. 20 (1st Cir. 1999) (citations omitted). Those circumstances exist where a petitioner can successfully (1) Demonstrate "that an error of 'the most fundamental character' . . . occurred;" (2) Explain why he "did not earlier seek relief from the judgment," and (3) Show that he "continues to suffer significant collateral consequences from the judgment." *Id.*³ While Mr. Trenkler sets forth the basic grounds for a showing of each of these circumstances in this case, he respectfully requests that counsel be appointed so that he may submit more detailed briefing on

serve the function that Rule 60(b) now serves in a civil case. *See, e.g., Morgan*, 346 U.S. at 506 (A motion for these writs "is a step in the criminal case . . . As it is such a step, we do not think that Rule 60 (b), Fed. Rules Civ. Proc., expressly abolishing the writ of *error coram nobis* in civil cases, applies" to criminal cases.)

³ Relief through *coram nobis* is independent from, and not necessarily precluded by, 28 U.S.C. § 2255. As the Supreme Court held in *Morgan*, "[w]e see no compelling reason to reach th[e] conclusion" that § 2255 "should be construed to cover the entire field of remedies in the nature of *coram nobis* in federal courts." *United States v. Morgan*, 346 U.S. 502, 510 (1954). Likewise, in *Barrett*, the First Circuit held that "there are very rare circumstances in which review may exist [by *coram nobis*] even if the requirements of § 2255 have not been met." *United States v. Barrett*, 178 F.3d 34, 38 (1st Cir. 1999). The Court further held that "there are situations in which § 2255 is not 'controlling' despite the fact that the petitioner remains in custody—for instance, where § 2255 is 'inadequate or ineffective.'" *Id.* at 56. This case presents "one of those very rare circumstances." As the *Barrett* court recognized, § 2255 is "inadequate or ineffective," and alternative remedies such as the writs petitioned for here are available, where, for example, the unavailability of section 2255 relief to address the error "raises serious constitutional questions," or results in "a complete miscarriage of justice." *Id.* at 51-52; *accord Triestman v. United States*, 124 F.3d 361, 380 (2d Cir. 1997); *In re Dorsainvil*, 119 F.3d 245, 251 (3d Cir. 1997); *United States v. Ransom*, 985 F. Supp. 1017, 1019 (D. Kan. 1997) (granting a writ of *coram nobis*, section 2255 notwithstanding, because the writ was needed "to correct [an] error[] resulting in a complete miscarriage of justice" and the "circumstances compel[ed] such action to achieve justice.") (quoting *United States v. Bustillos*, 31 F.3d 931, 934 (10th Cir. 1994).) For the reasons discussed in the text above, the error in this case indeed worked a complete miscarriage of justice, and failure to correct it will raise serious constitutional issues and result in a further miscarriage of justice.

the merits of this motion and petition.

1. The Court's Imposition of an Illegal Life Sentence is an "Error of the Most Fundamental Character."

It was indisputably error for the Court to sentence Mr. Trenkler to a life term when the law in effect at the time of Mr. Trenkler's sentencing plainly said that it could not. As set forth above, the law in effect at the time provided that Mr. Trenkler could only be subject to "imprisonment for life, if the jury shall in its discretion so direct." *Id.* at § 34 (1993), *amended by* Pub. L. 103-322, § 60003 (September 13, 1994) (emphasis added). The Court's failure to adhere to section 34 and submit the issue to the jury was an error of the most fundamental character. Indeed, "circuit courts considering the application of the pre-1994 versions of § 884(i) and § 34 have consistently concluded that only a jury had authority to impose a life sentence and that the judge could only impose a sentence for a term of years less than life." *United States v. Grimes*, 142 F.3d 1342, 1352 (11th Cir. 1998); *see, e.g., United States v. Tocco*, 135 F.3d 116, 131 (2d Cir. 1998) ("The plain language of this section [34] authorizes the imposition of a life sentence only by jury recommendation."); *United States v. Gullett*, 75 F.3d 941, 950 (4th Cir. 1996) ("Under the plain language of section 34 [prior to the 1994 amendments], a life sentence may not be imposed absent jury direction."); *accord United States v. Prevatte*, 16 F.3d 767, 783 (7th Cir. 1994); *United States v. Williams*, 775 F.2d 1295, 1299 (5th Cir. 1985).

Other courts passing on the precise error at issue here have further held, correctly, that such errors by definition constitute "plain error." As the Seventh Circuit held in *Prevatte*, for example, plain error is "not only a clear error, but an error likely to have made a difference in the judgment, so that failure to correct it could result in a miscarriage of justice, that is, the conviction of an innocent person or the imposition of an erroneous sentence." *Prevatte*, 16 F.3d at 783 (emphasis added). Applying that lofty standard, the Seventh Circuit held that, in the case

of section 34 as it existed before the 1994 amendments, “[t]he judge may not usurp the function of the jury as defined by Congress. We believe that imposition of the sentence by the wrong entity is imposition of ‘an erroneous sentence’ within the meaning of the plain error standard. Therefore, we conclude that it was plain error to impose a life sentence without a jury direction.” *Id.* (emphasis added.)⁴

The error that this Court committed was not only “plain” as the *Prevatte* court defined it, but fundamental in character. “Fundamental errors” have been defined as those that “rendered the proceeding itself irregular and invalid.” *Morgan*, 346 U.S. at 509. Certainly, the “plain error” of departing from, and violating, section 34 rendered the sentencing proceeding both “irregular and invalid.” Needless to say, the proceeding was irregular because it did not conform to the statutory requirements. It was invalid, because the Court did not have authority to conduct it in the manner that it did, or to impose the sentence that it did.

The error was also “fundamental” in that it violated at least Mr. Trenkler’s Fifth Amendment right to due process of law, his Sixth Amendment right to a trial by jury, and his Eighth Amendment right not to be subjected to cruel and unusual punishment. Mr. Trenkler’s Fifth Amendment due process rights were, and continue to be, violated because he was deprived of life and liberty without the legal process prescribed by Congress—a trial by jury on the life

⁴ Of course, the error in this case was also not “harmless.” To state the obvious, had the Court followed the statute when it sentenced Mr. Trenkler, the sentence would have to be less than a life term. *See, e.g., United States v. Martin*, 63 F.3d 1422, 1433-34 (7th Cir. 1995) (Under section 34, “the judge may only impose life imprisonment ‘if the jury so directs.’ If the jury does not so direct, the sentence is limited to a term of years” and “that term of years must be less than life. . . . [A] sentencer cannot be permitted to evade the restrictions on one kind of sentence by imposing a substantially identical one with a slightly different name.”). Further, at the time the error occurred, the jury had long been discharged. Thus, this is not a case where, had the error been recognized, the Court had the option to submit the question to the jury. Lastly, even if the question could have been submitted to the jury, the jury may well have declined to impose a life sentence. As the Court held in *Prevatte*, “Certainly, had the question of life sentence been put to the jury, it could have determined that a sentence of life was not warranted.” *United States v. Prevatte*, 16 F.3d 767, 783 (7th Cir. 1994).

sentence issue. Likewise, Mr. Trenkler's Sixth Amendment "right to have the jury find the existence of 'any particular fact' that the law makes essential to his punishment" was violated because the Court "impose[d] a sentence that [wa]s not solely based on facts reflected in the jury verdict or admitted by the defendant." *United States v. Booker*, 543 U.S. 220, 232 (2005). Indeed, in this case, because the Court believed (erroneously) that it had authority to impose a life sentence, the jury was *specifically* instructed not to consider facts related to the sentence. (See Trial Tr. Day 17 at p. 15) ("In reaching your verdict, do not consider what the punishment might be Your only job is to determine whether the government has proven him guilty or not.")).

Additionally, failure to grant the present petition would result in *further* violation of Mr. Trenkler's due process rights, as the law provides no other remedy to correct this plain and fundamental error and restore the right afforded to him at the time of sentencing.⁵ See, e.g., *Barrett*, 178 F.3d at 57 (Petition for a writ of *coram nobis* should be granted where "barring [the] petition" would "present . . . constitutional difficulties."); see generally *Marbury v. Madison*, 5 U.S. 137, 163 (1803) ("[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded.' The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.") (internal citation omitted, emphasis added.)

As for Mr. Trenkler's Eighth Amendment rights, "[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 (11th Cir. 2002)

⁵ As discussed, the First Circuit has already ruled that both *mandamus* relief and section 2255 relief are unavailable to Mr. Trenkler in this case.

(internal citation omitted); accord *Ralph v. Blackburn*, 590 F.2d 1335, 1338 (5th Cir. 1979) (“[T]he eighth amendment bars a prison sentence beyond the legislatively created maximum.”). Mr. Trenkler’s life sentence exceeds the maximum that the Court was statutorily authorized to impose. As such, allowing it to stand would violate the prohibition against cruel and unusual punishment.

In short, the error in this case is plain, fundamental, and violates at least three of Mr. Trenkler’s constitutional rights, making it ripe for correction by writ of *coram nobis*. See, e.g., *Barrett*, 178 F.3d at 52, 56 (Writs of *coram nobis* remain available to federal prisoners still in custody, e.g., where “serious constitutional questions” are raised).

2. Mr. Trenkler “did not earlier seek relief” from the illegal sentence, because the error was not previously reasonably discoverable.

Mr. Trenkler had no reasonable opportunity to raise this issue prior to the time he first discovered it in 2004, after reading about a similar error discovered by the judge years after the conviction in another case. While, in hindsight, it may be tempting to point a finger at Mr. Trenkler’s trial counsel for not discovering the error, the fact remains that neither the Court nor the Government were aware of, or were able to discover, the correct statute at the time either. The fact also remains that, through no fault of his own, Mr. Trenkler is now confined to prison for the rest of his life on an illegal sentence imposed without due process of law. That, by definition, amounts to a complete miscarriage of justice, no matter how you slice it. The bottom line is that, were the error reasonably discoverable at the time of sentencing, *someone*—Mr. Trenkler’s counsel, the Court, or the Government (who, as discussed, affirmatively told the Court that a life term was mandatory)—would have caught it and corrected it. To the extent that Mr. Trenkler’s trial counsel nevertheless should have caught the error, his failure to do so, resulting in the utter deprivation of Mr. Trenkler’s liberty in violation of his statutory and

constitutional rights, constitutes ineffective assistance of counsel that is now only correctable through the requested writs.

The circumstances and timing of the amendments to the statutes further explain why Mr. Trenkler did not earlier seek relief for the error. Barely six months after he was sentenced, Congress amended section 844 to remove all reference to section 34, and amended section 34 to remove the right to a jury on the life sentence issue. Thus, short of an “apple falling” on new counsel’s head inspiring him to consult the sentencing statutes in the first weeks of his appointment, the sentencing error was buried and hidden by the amendments to the relevant statutes until 2004, when Mr. Trenkler read about Judge Wolf’s correction of a similar error in *United States v. Barone*. As soon as he discovered the similar error in his case, Mr. Trenkler was swift and diligent in contacting his attorneys, prompting his petition for a writ of mandamus in the First Circuit, his subsequent petition for a writ of certiorari (which was denied in June 2005), and his letter to this Court.

3. Mr. Trenkler “continues to suffer significant collateral consequences” from the illegal sentence.

Needless to say, Mr. Trenkler, who is now serving two illegal life sentences due to the sentencing error, “continues to suffer significant collateral consequences” from the error. Were it not for the error, Mr. Trenkler’s sentence would necessarily have been less than life. *See, e.g., United States v. Martin*, 63 F.3d 1422, 1433-34 (7th Cir. 1995) (Under section 34, “[i]f the jury does not so direct [a life sentence], the sentence is limited to a term of years” and “that term of years must be less than life.”). Thus, this final requirement for the granting of the writ of *coram nobis* is unquestionably met.

C. In the Alternative, a Writ of *Audita Querela* Should Be Granted to Correct the Illegal Sentence.

The writ of *audita querela*, like the writ of *coram nobis*, serves to prevent the

enforcement of a judgment “which would be contrary to justice, either because of matters arising subsequent to its rendition, or because of prior existing defenses that were not available” to the petitioner because of “circumstances over which [he] . . . had no control.” 7 Am Jur 2d *Audita Querela* § 1. “*Audita querela* is available in criminal cases where there is a legal, as contrasted with an equitable, objection to a conviction that has arisen subsequent to the conviction and is not redressable pursuant to another post-conviction remedy.” *Id.*

As discussed, in this case, enforcing the illegal life sentences would be “contrary to justice,” because it exceeds the statutory Court-imposed maximum that existed at the time, and deprives Mr. Trenkler of his Fifth, Sixth, and Eighth Amendment rights. Further, while the equities here of course dictate in favor of granting the requested relief, this petition is at heart a “legal objection” to the life sentence, as the error was, and is, objectively a plain error of law. Because the error is “not redressable” by other post-conviction remedies, and Mr. Trenkler could not have reasonably raised it earlier, due to “circumstances over which [he] . . . had no control,” a writ of *audita querela* should be granted to correct the error in addition, or in the alternative, to the writ of *coram nobis*. *Id.*

III. CONCLUSION

Mr. Trenkler continues to suffer manifest injustice and serious constitutional injury due to the plain and fundamental legal error committed by the Court in sentencing him to a life term without endorsement by a jury. As no other remedies are available to him, and the requirements of each are met, Mr. Trenkler respectfully requests that the Court grant a writ of *coram nobis* and/or a writ of *audita querela* to vacate and correct his sentence.

At this time, Mr. Trenkler also respectfully requests that the undersigned counsel be formally appointed to represent him in this matter, and that further briefing be permitted upon such appointment to expand upon the issues in this motion and petition.

Respectfully Submitted,

ALFRED TRENKLER,

By his Attorneys

/s/ Joan M. Griffin

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Dated: November 6, 2006

CERTIFICATE OF SERVICE

I, Joan M. Griffin, counsel for Defendant Alfred Trenkler, hereby certify that on November 6, 2006, a true copy of the above document was served upon all counsel of record for the other parties by ECF/ mailing.

/s/ Joan M. Griffin

Joan M. Griffin (BBO# 549522)