No. 00-722

In the Supreme Court of the United States

OCIE MILLS AND CAREY MILLS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether an allegation that a jury based its verdict on evidence extrinsic to the trial alleges an error that constitutes a ground for vacating a criminal conviction under a writ of coram nobis.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-10) is reported at 221 F.3d 1201. The order of the district court (Pet. App. 11-17) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 8, 2000. The petition for a writ of certiorari was filed on November 3, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A jury in the Northern District of Florida convicted petitioners on five counts of discharging pollutants into the waterways of the United States without a permit, in violation of provisions of the Clean Water Act, 33 U.S.C. 1311(a), 1319(c), and on one count of illegally excavating a canal into the waterways of the United States, in violation of Sections 10 and 12 of the Rivers and Harbors Act of 1899, 33 U.S.C. 403, 406. The district court sentenced petitioners each to 21 months' incarceration, followed by one year of supervised release. The court of appeals affirmed on appeal. Petitioners also filed an unsuccessful motion pursuant to 28 U.S.C. 2255 to challenge their convictions. Petitioners completed their terms of imprisonment on November 21, 1990, and their terms of supervised release on November 21, 1991. They then filed the instant petition for a writ of error coram nobis, alleging that the jurors in their original criminal trial had relied on extrinsic evidence. The district court held that such relief was available on their claim, but it granted the government's motion to certify the question for interlocutory appeal pursuant to 28 U.S.C. 1292(b). The court of appeals reversed, holding that coram nobis is not available for petitioners' claim.

1. The writ of coram nobis is an ancient writ available at common law to correct errors discovered after the conclusion of trial proceedings. *United States* v. *Morgan*, 346 U.S. 502, 507-510 (1953). By rule, the writ has been abolished in federal civil cases. Fed. R. Civ. P. 60(b). In *Morgan*, however, this Court held that Rule 60(b) is not applicable to criminal cases, 346 U.S. at 505-506 n.4, and that federal courts may issue writs of coram nobis pursuant to the All Writs Act, 28 U.S.C.

1651(a), under certain circumstances in some criminal cases, 346 U.S. at 512. Such circumstances, however, are exceedingly rare. See *Carlisle* v. *United States*, 517 U.S. 416, 429 (1996) (noting that "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") (quoting *United States* v. *Smith*, 331 U.S. 469, 475 n.4 (1947)).

2. Petitioners acquired two parcels of property in Santa Rosa County, Florida, adjacent to the Gulf of Mexico. In 1985, prior to that acquisition, the United States Army Corps of Engineers had determined that much of one of the lots was a wetland. The Corps had ordered the owner of the property to stop filling the site in preparation for some construction and either to restore the property or to seek an after-the-fact permit. Petitioners then acquired the unrestored property, "with full knowledge of the problems surrounding its partial designation as wetlands." *Mills* v. *United States*, 36 F.3d 1052, 1054 (11th Cir. 1994), cert. denied, 514 U.S. 1112 (1995). Petitioners themselves then deposited fill material on the site, despite having received two additional cease and desist letters. They also impermissibly enlarged an existing drainage ditch. *Ibid.*

3. Petitioners were found guilty after a jury trial of five violations of the Clean Water Act and one violation of the Rivers and Harbors Act of 1899. They were each fined $5,000 and sentenced to 21 months' imprisonment, to be followed by one year of supervised release. The court of appeals summarily affirmed their convictions and sentences. *United States* v. *Mills*, 904 F.2d 713 (11th Cir. 1990) (Table). See 36 F.3d at 1054.

While they were on supervised release, petitioners filed a motion under 28 U.S.C. 2255, asserting that their convictions were invalid because Congress had uncon-

stitutionally delegated legislative powers to the Corps of Engineers, they were selectively prosecuted for exercising their First Amendment rights, the trial court had violated the Due Process Clause when it prevented them from pursuing an estoppel defense at trial, and the property had not been a wetland when they added soil fill to it. 36 F.3d at 1054-1055. The district court denied relief. *United States* v. *Mills*, 817 F. Supp. 1546 (N.D. Fla. 1993). The court of appeals affirmed. 36 F.3d 1057. This Court denied certiorari. *Mills* v. *United States*, 514 U.S. 1112 (1995). On November 21, 1991, during the pendency of petitioners' Section 2255 motion, they completed their terms of supervised release. Gov't C.A. Br. 6.

2. In April 1996, petitioners filed a petition for a writ of error coram nobis seeking to vacate their convictions. The basis for the petition was an attached affidavit from one of the jurors from the 1989 trial, who had contacted petitioner Ocie Mills after seeing him air his grievances against the government in a television program. The affidavit of the juror stated that the foreman of the jury had provided the jury with information about petitioners' prior behavior that was extrinsic to the trial. Pet. App. 3.

The government's response to the coram nobis petition argued that the petition did not allege the type of error that is a ground for relief under the writ of coram nobis. The government pointed out that in *United States* v. *Mayer*, 235 U.S. 55 (1914), this Court held that coram nobis is available only "in those cases where errors were of the most fundamental character," and that such errors did not include "cases of * * * the misbehavior or partiality of jurors," such as was alleged by petitioners. *Id.* at 69. The district court, without discussing *Mayer*, rejected the government's request to

dismiss the petition. Pet. App. 11-17. The court then certified its order for interlocutory appeal pursuant to 28 U.S.C. 1292(b).

The Eleventh Circuit accepted the appeal and reversed the district court's order. Pet. App. 1-10. The court explained that in *Mayer*, this Court had "held that the proper remedy '[i]n cases of prejudicial misconduct in the course of trial, the misbehavior or partiality of jurors, and newly discovered evidence' is 'by motion for a new trial.'" *Id.* at 7 (quoting *Mayer*, 235 U.S. at 69). The court noted that "[s]ubsequent controlling opinions," including this Court's decision in *United States* v. *Morgan*, 346 U.S. 502, 512-513 (1954), "have treated *Mayer* as the source of the applicable rule governing the circumstances under which coram nobis relief is available." Pet. App. 7. Under that rule, petitioners' claims, which were indistinguishable from some of the claims that the Court in *Mayer* held were insufficient to make out a claim for coram nobis, did not warrant relief.

The court of appeals recognized, as petitioners argued, that this Court in *Mayer* had rested its decision on two grounds—first, that the nature of the claim does not warrant a writ of coram nobis and, second, that the defendant in that case had deprived the district court of jurisdiction over the case by taking an appeal prior to seeking coram nobis relief in the district court. But, the court held, this Court's two grounds for its decision in *Mayer* were "independent, each alone sufficient to dispose of the case." Pet. App. 10. Thus, this Court's "holding in *Mayer* that [the defendant's] appeal of his conviction deprived the district court of jurisdiction did not affect its separate holding that [the defendant] had failed to allege error of a fundamental character such as would have warranted the pursuit of coram nobis relief

at common law." *Ibid.* The court stated that petitioners' argument that "juror misconduct [is] an error of the most fundamental character" such that coram nobis could be warranted is, "as a theoretical proposition, * * * not without persuasiveness," *id.* at 8, but the court held that it was foreclosed by *Mayer*.

ARGUMENT

The decision of the court of appeals was correct, and it does not conflict with any decision of this Court or any other court of appeals. Accordingly, further review is not warranted.

1. Petitioners contend (Pet. 6) that they satisfy the requirements for a writ of coram nobis as set forth in *Morgan*. In *Morgan*, this Court held that federal courts were authorized to issue writs of coram nobis when the following elements are present: (1) the alleged error is "of the most fundamental character," (2) "no other remedy [is] available," and (3) "sound reasons exist[] for failure to seek appropriate earlier relief." 346 U.S. at 512. Applying those standards, the Court held that the defendant in *Morgan*, who had been tried without counsel and without waiving his right to counsel, had alleged an error "of the most fundamental character," and that coram nobis was accordingly available. *Id.* at 512-513.

Petitioners claim (Pet. 9) that, because a jury's consideration of extrinsic evidence violates the Sixth Amendment right to trial by an impartial jury, their complaint's allegations that the jury considered extrinsic evidence alleges an error "of the most fundamental character" under *Morgan*. That claim is, however, foreclosed by *Mayer*. This Court recognized in *Mayer* that coram nobis is available, if at all, only for claims "of the most fundamental character," and it held that "the

misbehavior or partiality of jurors" is not such an error. 235 U.S. at 69. Nothing in *Morgan*, which adopted the *Mayer* formulation that coram nobis is available only for claims "of the most fundamental character," is inconsistent with that holding. 346 U.S. at 512. Petitioner's suggestion that *Morgan* overruled *Mayer sub silentio*, and thereby opened the door for defendants to seek to have their convictions invalidated on a wide variety of claims years after their sentences have been discharged and their direct and collateral attacks on their sentences have been rejected, is mistaken.*

2. Post-*Morgan* decisions of this Court and the courts of appeals confirm that *Morgan* did not overrule *Mayer sub silentio*. Those decisions, like the decision of the court of appeals in this case, have continued to treat *Mayer* as a source of controlling authority on the availability of coram nobis relief. See, *e.g.*, *Carlisle*, 517 U.S. at 429; *United States* v. *Addonizio*, 442 U.S. 178, 186 (1979); *Foont* v. *United States*, 93 F.3d 76, 78 (2d Cir. 1996); *Lowery* v. *United States*, 956 F.2d 227, 230 (11th Cir. 1992) (per curiam); *United States* v. *Michaud*, 925 F.2d 37, 39 (1st Cir. 1991); *Hirabayashi* v. *United States*, 828 F.2d 591, 604 (9th Cir. 1987), *Flippins* v. *United States*, 747 F.2d 1089, 1091 (6th Cir. 1984) (per curiam); *Granville* v. *United States*, 613 F.2d 125, 126 n.1 (5th Cir. 1980) (per curiam); *Owensby* v. *United*

* Indeed, even if petitioners' claim were not foreclosed by *Mayer*, there would still be no merit to their claim (Pet. 9) that the error they allege must be cognizable in coram nobis because it is "no less important" than the error in *Morgan*. The error involved in *Morgan*, deprivation of the right to counsel, is "a unique constitutional defect" so fundamental that it has "jurisdictional significance." *Custis* v. *United States*, 511 U.S. 485, 496, 494 (1994). This Court has never held that the same can be said of claims of trial error like those alleged by petitioners.

States, 353 F.2d 412, 416 (10th Cir. 1965), cert. denied, 383 U.S. 962 (1966); *Bateman* v. *United States*, 277 F.2d 65, 67 (8th Cir. 1960).

3. Maintaining the narrow scope of the writ of coram nobis, as described in *Mayer*, *Morgan*, and their progeny, upholds important principles at the core of our criminal justice system. As this Court has explained, "'[i]nroads on the concept of finality tend to undermine confidence in the integrity of our procedures' and inevitably delay and impair the orderly administration of justice." *Custis* v. *United States*, 511 U.S. 485, 497 (1994) (quoting *Addonizio*, 442 U.S. at 184 n.11); see also *Moody* v. *United States*, 874 F.2d 1575, 1577 (11th Cir. 1989) (noting that expanding the scope of coram nobis "would prolong litigation once concluded, thus thwarting society's compelling interest in the finality of criminal convictions") (citing *Morgan*, 346 U.S. at 511), cert. denied, 493 U.S. 1081 (1990). Petitioners' contention that the scope of coram nobis should be expanded to apply here would undermine the finality of criminal convictions as well as the sanctity of jury deliberations.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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