No. 16-1045

In the Supreme Court of the United States

KEN NOWLIN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner is entitled to coram nobis relief on his claim that the government failed to prove that the organization involved in his bribery offense under 18 U.S.C. 666 received more than $10,000 in federal "benefits" within the meaning of the statute.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-4) is not published in the *Federal Reporter* but is reprinted at 667 Fed. Appx. 512. The opinion of the district court (Pet. App. 5-33) is reported at 81 F. Supp. 3d 517. A prior opinion of the court of appeals is not published in the *Federal Reporter* but is reprinted at 294 Fed. Appx. 933.

JURISDICTION

The judgment of the court of appeals was entered on July 28, 2016. A petition for rehearing was denied on November 29, 2016 (Pet. App. 34-35). The petition for a writ of certiorari was filed on February 27, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Northern District of Mississippi, petitioner was convicted of conspiring to commit federal-funds bribery (18 U.S.C. 666), in violation of 18 U.S.C. 371. Judgment 1. Petitioner was sentenced to 30 months of imprisonment, to be followed by two years of supervised release. *Id.* at 2-3. He was also ordered to pay more than $275,000 in restitution. *Id.* at 4. The court of appeals affirmed. 294 Fed. Appx. 933.

Petitioner subsequently filed a motion to vacate his sentence under 28 U.S.C. 2255, which the district court denied. Gov't C.A. Br. at 4. Petitioner filed a writ of error coram nobis in the district court. The district court denied the writ, Pet. App. 5-33, and the court of appeals affirmed, *id.* at 1-4.

1. a. Petitioner was a long-time insurance broker who specialized in brokering health care plans to various business and government entities. Pet. App. 6-7. Co-conspirator Gary Massey was a local insurance agent who brokered his clients' health care plans through petitioner. *Id.* at 6. Before seeking election to the Board of Supervisors in Lafayette County, Mississippi, in 1994, Massey was the local agent who sold Lafayette County its employee health plan. *Ibid.* Massey received two-thirds of the 12% commission on the face amount of the premium, *i.e.*, eight percent, while petitioner received the remaining one-third, *i.e.*, four percent. *Ibid.* Massey won the local election and took office in January 1995. *Ibid.*

Before Massey took office, petitioner and Massey "discussed the fact that Massey could not sit on the Board and receive commissions as the agent for the county's health insurance coverage." Pet. App. 6.

"Massey's portion of the commission on the Lafayette County plan was at that time about $11,000 per month." *Ibid.* Petitioner and Massey "agreed that Massey would continue to receive money equal to his commission, but they would call it a 'consulting fee' since he could not receive the commission directly." *Id.* at 7. In order to effect this arrangement, petitioner became "the sole agent of record on the Lafayette County Plan" and received the entire 12% commission from the insurance company. *Ibid.* Massey then "receive[d] his 8% commission from [petitioner]" rather than from the insurance company. *Ibid.*

When the Lafayette County health insurance plan's premium later increased, Massey demanded a corresponding increase of $3,000 per month in his "consulting fee," to "match his share" of the increased premium. Pet. App. 7-8. Petitioner later testified that he paid the increased consulting fee because "Massey was threatening to take the Lafayette County health care contract as well as others and move them to a different company," which would have deprived petitioner of his portion of the commissions. *Id.* at 8. Petitioner and Massey "made approximately $827,000 in commissions between January 1996 and mid-2004" from the Lafayette County health care plan. *Ibid.* When the county selected a new insurer in 2004, the premium for the county's health insurance coverage went down substantially. Gov't C.A. Br. 9-10.

b. In May 2007, a grand jury sitting in the Northern District of Mississippi returned a 41-count indictment charging petitioner and Massey with various offenses related to the bribery conspiracy. Pet. App. 5. Pursuant to a plea agreement with the government, petitioner testified before the grand jury in June 2007. That same

day, the grand jury returned a 53-count superseding indictment charging both petitioner and Massey. *Ibid.*

Count 1 charged petitioner and Massey with conspiring to violate 18 U.S.C. 666 through the corrupt payment of the health insurance commission payments, in violation of 18 U.S.C. 371. Superseding Indictment 1-6. Section 666 makes it a crime to offer a bribe to an agent of an "organization, government or agency [that] receives, in any one year period, benefits in excess of $10,000 under a Federal program involving * * * Federal assistance" if the payor intends to influence the agent "in connection with any business, transaction, or series of transactions of such organization * * * involving anything of value of $5,000 or more." 18 U.S.C. 666(a) and (b). Count 1 alleged that "Lafayette County, Mississippi, received benefits in excess of $10,000 in each one year period herein under a federal program of federal assistance." Superseding Indictment 1.

Petitioner and Massey were also charged with 26 substantive violations of Section 666, and with 26 associated money-laundering offenses. Superseding Indictment 6-30. Each of the 26 substantive Section 666 counts specified that Massey was "an agent of a local government, that is, an elected member of the Lafayette County Board of Supervisors, a political subdivision of the State of Mississippi, which received Federal program benefits in excess of $10,000" for each pertinent one-year period. *Ibid.* All of the substantive counts corresponded to alleged overt acts supporting the Count 1 conspiracy charge. See *id.* at 5-6.

In July 2007, pursuant to a plea agreement, petitioner pleaded guilty to Count 1 of the superseding indictment. Pet. App. 5. At the plea hearing, there was no discussion of the federal program or programs

through which Lafayette County had received federal funds. See 7/27/07 Plea Tr. (Plea Tr.) 7-9. Petitioner was sentenced to 30 months of imprisonment, to be followed by two years of supervised release. Judgment 2-3. He was also ordered to pay $274,942.79 in restitution. *Id.* at 4. Petitioner appealed his sentence, and the court of appeals affirmed. 294 Fed. Appx. 933.

2. In December 2009, petitioner filed a motion to vacate his sentence under 28 U.S.C. 2255, asserting that he had received ineffective assistance of counsel based on his attorney's alleged failure to pursue several avenues of defense. D. Ct. Doc. 81, at 1-36 (Dec. 29, 2009). Petitioner did not argue that the government had failed to prove that Massey was an agent of an organization that had received more than $10,000 in federal funds. *Ibid.* The district court denied the Section 2255 motion, stating that petitioner's various assertions regarding purportedly valid defenses that his attorney had failed to pursue were "undermined by [petitioner's] testimony before the Grand Jury, the contents of various documents he signed under penalty of perjury, and his testimony at the change of plea hearing." D. Ct. Doc. 123, at 7 (Mar. 31, 2013).

3. a. In October 2013, after petitioner had completed his sentence of imprisonment as well as his term of supervised release, petitioner filed a motion for a writ of error coram nobis. D. Ct. Doc. 127 (Oct. 11, 2013). Relying principally on *United States* v. *Whitfield*, 590 F.3d 325 (5th Cir. 2009), cert. denied, 562 U.S. 833 (2010), petitioner argued that his "charged bribery conduct is indisputably beyond the 'jurisdictional reach' of [Section] 666, since the charged bribery conduct to influence a supervisor's decision regarding the Lafayette County

Employees Health Insurance contract was not 'connected to' and did not have a 'nexus' with jurisdictionally requisite Lafayette County federal program funds." D. Ct. Doc. 127, at 4.

The district court denied petitioner's motion. Pet. App. 5-33. The court noted that coram nobis is an extraordinary remedy available only if (1) "the ground for relief involves fundamental error; (2) no other judicial remedy * * * is currently available; (3) the defendant can show valid reasons for failing to seek relief earlier; and (4) as a result of the conviction, the convicted person is suffering or threatened with adverse collateral consequences." *Id.* at 16.[1] After stating that petitioner had "not * * * shown why he did not seek relief earlier," *ibid.*, the district court denied petitioner's claim on the merits.

The district court recounted that "[t]he gravamen of [petitioner's] argument is that, under *Whitfield*, *supra*, the government's failure to link his conduct to the federal funds received by the Lafayette County Board of Supervisors is fatal to the court's exercise of subject matter jurisdiction." Pet. App. 29 (emphasis omitted). The court explained that "Fifth Circuit precedent, including *Whitfield*, precludes [petitioner's] argument, as the nexus to establish subject matter jurisdiction must be between *his conduct* and *the agency* receiving federal funds, not his conduct and the funds, themselves." *Ibid.* (citing *Whitfield*, 590 F.3d at 345). Here, "[t]he federal funds went to Lafayette County, the agency.

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[1] The district court determined that petitioner's loss of civil rights, such as his right to keep and bear arms as well as his right to vote, demonstrated "sufficient adverse consequences * * * to support the instant petition for a writ of *coram nobis*." Pet. App. 16.

[Petitioner's] conduct was selling employee health insurance coverage to Lafayette County, the agency, and sending the premiums to Gary Massey (a member of the Lafayette County Board of Supervisors) in contravention of Mississippi law." *Ibid.* (emphasis omitted). The court concluded that "[t]here could hardly be a clearer nexus (a business transaction) between [petitioner's] conduct and Lafayette County, Mississippi." *Id.* at 29-30.

b. The court of appeals affirmed in an unpublished, per curiam opinion. Pet. App. 1-4.[2] The court explained that "[p]etitioner's argument that the court lacked subject matter jurisdiction is without merit because a direct nexus between the criminal conduct and the federal funds is not a jurisdictional element of a [Section] 666 offense." *Id.* at 3 (citing *Sabri* v. *United States*, 541 U.S. 600, 604 (2004)). Like the district court, the court of appeals emphasized that there need only "be a nexus between the bribery conduct and the agency receiving the federal funds." *Ibid.* (citing *Salinas* v. *United States*, 522 U.S. 52, 56-57 (1997); *United States* v. *Phillips*, 219 F.3d 404, 413-414 (5th Cir. 2000)).

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[2] The court of appeals granted petitioner's motion to supplement the record with an affidavit from Lafayette County Administrator Joseph Johnson. Pet. App. 2. That affidavit stated in pertinent part that "[t]he funding for Lafayette County employee health insurance contracts does not involve federal program funds"; that "the Lafayette County Supervisors['] decisions regarding Lafayette County health insurance contracts are not connected to other [Lafayette] county business or transactions that do include funding from federal programs"; and that "Lafayette County health insurance selection is not related to federal program funds." Mot. to Supplement R. 16.

ARGUMENT

Petitioner contends (Pet. 23-37), for the first time in this Court, that he is entitled to coram nobis relief because the court of appeals "fail[ed] to require actual proof" that bribe-taker Massey was an agent of an organization that received federal "benefits" in excess of $10,000. Pet. iii. Citing *United States* v. *McLean*, 802 F.3d 1228 (11th Cir. 2015), petitioner appears primarily to contend (*e.g.*, Pet. 26-31) that the government failed to present proof that the federal funds received by Lafayette County constituted federal "benefits" within the meaning of Section 666, and that the Fifth Circuit's decision in this case is in conflict with *McLean*. The challenge that petitioner raises here is different from the claim that was presented to and passed on by the lower courts. And even if petitioner had raised his current claim below, he would not be entitled to coram nobis relief in light of his guilty plea and multiple failures to challenge his conviction earlier based on the argument he now raises. Further review is not warranted.

1. a. The federal-funds bribery statute, 18 U.S.C. 666, prohibits the paying of bribes to, or the acceptance of bribes by, "state, local, and tribal officials of entities that receive at least $10,000 in federal funds." *Sabri* v. *United States*, 541 U.S. 600, 602 (2004). Section 666 "was designed to extend federal bribery prohibitions to bribes offered to state and local officials employed by agencies receiving federal funds." *Id.* at 607 (quoting *Salinas* v. *United States*, 522 U.S. 52, 58 (1997)). The statutory language reflects "Congress' expansive, unambiguous intent to ensure the integrity of organizations participating in federal assistance programs."

Fischer v. *United States*, 529 U.S. 667, 678 (2000). Consistent with that broad purpose, Section 666 applies to any "agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof," 18 U.S.C. 666(a)(1) and (2), if "the organization, government, or agency receives in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance," 18 U.S.C. 666(b).

In rejecting petitioner's claim for coram nobis relief, the courts below correctly held that "a direct nexus between the criminal conduct and the federal funds is not a jurisdictional element of a [Section] 666 offense." Pet. App. 3; see *id.* at 29-30. That ruling is consistent with this Court's precedents. See *Sabri*, 541 U.S. at 604-606 (holding that Section 666 is facially constitutional despite the fact that it "fails to require proof of any connection between a bribe or kickback and some federal money"); *Salinas*, 522 U.S. at 56-57 (holding that the government is not required to trace the federal money to the corrupted business or transaction itself).

b. In this Court, petitioner does not appear to renew the contention he raised below that the government was required to prove a direct relationship between the federal funds and the payment of the health insurance premiums for county employees. He instead faults the lower courts for failing to consider "whether the government had presented any proof that there were in fact identifiable federal program funds benefits received by the agency in excess of $10,000 to support [Section] 666(b) subject matter jurisdiction." Pet. 18 (emphasis omitted). Citing the Eleventh Circuit's decision in *McLean*, 802 F.3d at 1229, petitioner appears to argue

(Pet. 31-33) that the government failed to prove that the federal funds received by Lafayette County constituted federal "benefits" within the meaning of Section 666. In *McLean*, a case involving an organization that was the indirect recipient of federal funds, the Eleventh Circuit relied on *Fischer* in holding that the government must prove at trial that the federal program under which federal funds were provided had a "sufficiently comprehensive 'structure, operation, and purpose, to merit characterization of the funds as benefits under [Section] 666(b)." 802 F.3d at 1243 (quoting *United States* v. *Edgar*, 304 F.3d 1320, 1327 (11th Cir. 2002), cert. denied, 537 U.S. 1078 (2002), and 537 U.S. 1132 (2003)).[3]

In the courts below, however, petitioner did not raise that contention or cite the Eleventh Circuit's decision in *McLean*. The lower courts therefore did not address whether Section 666 contains such a requirement or whether it was satisfied here. There is no reason for this Court to depart from its usual practice of declining to review questions that were not pressed or passed upon below. *Duignan* v. *United States*, 274 U.S. 195,

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[3] The court of appeals' decision here does not conflict with the Eleventh Circuit's decision in *McLean*. Unlike the defendant in *McLean*, petitioner pleaded guilty and thereby "admit[ed] all the material facts alleged in the pleading," 1A Charles Alan Wright & Andrew D. Leipold, *Federal Practice and Procedure* § 172, at 163 (4th ed. 2008), including the fact that "Lafayette County * * * received benefits in excess of $10,000 * * * under a federal program of federal assistance" each year during the relevant time period, Superseding Indictment 1. Because petitioner admitted the truth of all facts alleged in the indictment, the government was not required to produce additional evidence to establish the truth of those allegations. The Eleventh Circuit's decision in *McLean*—which addressed what proof is required at trial to establish that an organization received federal benefits—does not suggest otherwise.

200 (1927) ("This Court sits as a court of review. It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed.").

2. In any event, petitioner is not entitled to coram nobis relief on the ground he now seeks to raise before this Court. A court may grant post-conviction relief pursuant to a writ of coram nobis only for errors "of the most fundamental character," and only when "sound reasons exist[] for failure to seek appropriate earlier relief." *United States* v. *Morgan*, 346 U.S. 502, 512 (1954) (quoting *United States* v. *Mayer*, 235 U.S. 55, 69 (1914)); see *id.* at 510-511; see also *United States* v. *Denedo*, 556 U.S. 904, 911 (2009). "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 action to achieve justice." *Morgan*, 346 U.S. at 511; see *Denedo*, 556 U.S. at 916 ("No doubt, judgment finality is not to be lightly cast aside; and courts must be cautious so that the extraordinary remedy of *coram nobis* issues only in extreme cases.").

Petitioner's challenge does not allege a fundamental error. Contrary to his assertions (*e.g.*, Pet. 3-4), petitioner's challenge is not an attack on the subject-matter jurisdiction of the district court, but instead a challenge to the factual basis of his guilty plea, which is not a basis for coram nobis relief. And whether framed as a challenge to subject-matter jurisdiction or to the factual basis of his guilty plea, petitioner's argument lacks merit. Finally, petitioner's multiple prior failures to challenge his conviction on this ground independently preclude his current collateral attack.

a. Contrary to petitioner's assertion (Pet. 3-4), his current challenge does not implicate the subject-matter jurisdiction of the district court that accepted his guilty plea and entered his conviction. The federal district courts are vested with original jurisdiction over "all offenses against the laws of the United States." 18 U.S.C. 3231; see *United States* v. *Cotton*, 535 U.S. 625, 630-631 (2002) ("[A] district court has jurisdiction of all crimes cognizable under the authority of the United States.") (citation and internal quotation marks omitted). Because the indictment charged petitioner with a federal criminal offense, the district court had subject-matter jurisdiction over the criminal case.

Section 666's requirement that the agency housing the bribe-taker receive in excess of $10,000 in federal benefits does not limit the subject-matter jurisdiction of the district court but simply describes an element of the substantive crime. See *United States* v. *Miranda*, 780 F.3d 1185, 1195 (D.C. Cir. 2015) (discussing distinction between "a so-called 'jurisdictional element,'" which refers only to the "legislative 'jurisdiction' of Congress," and a limitation on the subject-matter jurisdiction of the federal courts); *United States* v. *Lacey*, 569 F.3d 319, 323 (7th Cir.) (noting that "[a] 'jurisdictional element' is simply an element of a federal crime" and is "not jurisdictional in the sense that it affects a court's subject matter jurisdiction") (citation omitted), cert. denied, 558 U.S. 948 (2009). In *Arbaugh* v. *Y & H Corp.*, 546 U.S. 500 (2006), this Court emphasized that a substantive limitation within the text of a federal statute should not be treated as a "jurisdictional" limit affecting the ability of a district court to hear the case unless Congress "clearly states" that the limitation is jurisdictional. *Id.* at 515-516.

Section 666 does not state, let alone state clearly, that a district court's subject-matter jurisdiction over a Section 666 prosecution turns on the agency's receipt of more than $10,000 in federal benefits. Section 666 does not use the word "jurisdiction," nor does it otherwise indicate that its federal-benefits requirement is a limitation on the set of cases that district courts may hear. Cf. *Miranda*, 780 F.3d at 1195 ("[W]hen Congress establishes a so-called 'jurisdictional element' addressing the reach of its legislative authority, Congress does not use the term 'jurisdiction' in the statute."). Nor is this a case in which a long historical practice treats the limitation in question as jurisdictional. Cf. *Bowles* v. *Russell*, 551 U.S. 205, 210 (2007) (concluding that time limits for filing notices of appeal in federal civil cases should be viewed as jurisdictional in light of the Court's "longstanding treatment of statutory time limits for taking an appeal as jurisdictional"). Rather than implicating the district court's subject-matter jurisdiction, petitioner's argument goes to the adequacy of the factual basis for his guilty plea. That is not the type of extraordinary claim that justifies coram nobis relief.

b. However framed, petitioner's challenge lacks merit. Petitioner pleaded guilty to Count 1 of the indictment. Judgment 1. A plea of guilty is an admission of all the elements and material facts of the criminal charge alleged in an indictment. See *United States* v. *Broce*, 488 U.S. 563, 569 (1989) ("A plea of guilty and the ensuing conviction comprehend all of the factual and legal elements necessary to sustain a binding, final judgment of guilt and a lawful sentence."); *McCarthy* v. *United States*, 394 U.S. 459, 466 (1969) (a guilty plea "is an admission of all the elements of a formal criminal charge"). Thus, a guilty plea "is more than a voluntary

confession made in open court. It also serves as a stipulation that no proof by the prosecution need be advanced .... It supplies both evidence and verdict, ending controversy." *Boykin* v. *Alabama*, 395 U.S. 238, 242-243 n.4 (1969) (citation omitted).

Petitioner's criminal indictment alleged, with respect to Count 1, that "Lafayette County, Mississippi, received benefits in excess of $10,000 in each one year period herein under a federal program of federal assistance." Superseding Indictment 1. By acknowledging that he had committed the offense charged in that count, petitioner admitted that his bribes involved an organization that received "in excess of $10,000" in federal "benefits" within the meaning of 18 U.S.C. 666(b). See Plea Tr. 7-8, 12, 21. No further proof on that element was necessary. In these circumstances, the extraordinary remedy of coram nobis relief is not justified.

To the extent petitioner bases his request for a writ of error coram nobis on the ground that he is actually innocent of the Section 666 offense, that is a stringent standard that requires petitioner to demonstrate factual innocence, not merely legal error. See generally *Bousley* v. *United States*, 523 U.S. 614, 623-624 (1998). Petitioner has offered no evidence to disprove the indictment's allegation that, during the pertinent time periods, Lafayette County received more than $10,000 in federal "benefits" within the meaning of Section 666.

Petitioner primarily relies (Pet. 30, 32, 35-36) on the affidavit from the Lafayette County Administrator that the court of appeals allowed (see note 2, *supra*) as a supplement to the record on appeal. But that affidavit simply establishes that federal funds were not used to fund the Lafayette County health premiums. See Pet. 13-14 (quoting affidavit). As the lower courts correctly

held, no such nexus is required under Section 666. Pet. App. 3-4 (citing *Salinas*, 522 U.S. at 56-57); see *id.* at 29-30.[4] The affidavit does not establish that the government would be unable to prove that the pertinent organization received more than $10,000 in federal "benefits" within the meaning of Section 666. The unsupported, outside-the-record assertions at the conclusion of the petition (see Pet. 36) likewise do not cast doubt on the government's ability to prove that element of the statutory offense.

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[4] Contrary to petitioner's contention (Pet. 34), the Fifth Circuit's decision here does not conflict with that court's prior decision in *United States* v *Whitfield*, 590 F.3d 325 (2009), cert. denied, 562 U.S. 833 (2010). The question before the court in *Whitfield* was whether the defendant judges were acting as agents of the Mississippi Administrative Office of the Courts (AOC)—the agency that had received federal funds—when they committed the bribery offense. *Id.* at 344-347. Although the court assumed that the defendants were agents of AOC when they performed functions such as "hir[ing] chambers staff that were paid at the expense of the AOC," it concluded that they were not acting as agents of the AOC when they rendered judicial opinions. *Id.* at 345. That holding turned on the language of Section 666(a)(1)(B), which prohibits an agent from "corruptly solicit[ing] or demand[ing]" a bribe "in connection with any business" of the relevant government agency. 18 U.S.C. 666(a)(1)(B); see 590 F.3d at 345. Because the judicial decisions at issue were not the AOC's "business," the court concluded that the bribes associated with those decisions were not "in connection with" any business of the AOC. 590 F.3d at 345-347; *id.* at 346 ("[I]nsofar as [the defendants] may have been agents of the AOC, their role as such had nothing to do with their capacity as judicial decisionmakers."). Here, in contrast, "[t]he federal funds went to Lafayette, County, the agency," Pet. App. 29, and the business of Lafayette County and its Board of Supervisors included payment of the health-insurance premiums. In any event, an intra-circuit conflict would not merit this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

c. Finally, coram nobis relief is not warranted here because petitioner has not shown that "sound reasons exist[] for [his] failure to seek appropriate earlier relief." *Morgan*, 346 U.S. at 512; see Pet. App. 16. Petitioner did not raise his current claim on direct appeal of his conviction or in his motion to vacate his sentence under 28 U.S.C. 2255.[5] Indeed, even in the present coram nobis proceedings, petitioner did not raise his current challenge in either the district court or the court of appeals. See pp. 9-11, *supra*. And petitioner has not even attempted to justify his prior defaults. Petitioner's failure to raise his current challenge in a timely fashion provides an additional reason to deny review.

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[5] To the extent that petitioner's claim is simply a challenge to the factual basis of his guilty plea, such a claim would not be cognizable in a Section 2255 proceeding. The factual-basis requirement is not constitutionally based, but comes from Rule 11(b)(3) of the Federal Rules of Criminal Procedure. See, *e.g.*, *Higgason* v. *Clark*, 984 F.2d 203, 208 (7th Cir.) (Rule 11's factual-basis requirement is not constitutionally compelled), cert. denied, 508 U.S. 977 (1993). This Court has held that alleged violations of Rule 11's plea-colloquy requirements (like nearly all alleged violations of *statutory* or *rule-based* rights in a criminal proceeding) cannot be raised in a collateral attack under Section 2255. See *United States* v. *Timmreck*, 441 U.S. 780, 783 (1979).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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