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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. SANTOS PETER MURILLO, Defendant-Appellant.	No. 21-30106 D.C. No. 2:05-cr-02118-SAB-1 MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of Washington
Stanley A. Bastian, Chief District Judge, Presiding

Argued and Submitted October 3, 2022
Seattle, Washington

Before: W. FLETCHER, BENNETT, and SUNG, Circuit Judges.

Appellant Santos Murillo appeals the district court's order granting in part his petition for a writ of error coram nobis. The district court granted the writ as to Murillo's 18 U.S.C. § 922(g) felon in possession of a firearm conviction but did not afford any relief as to Murillo's conviction for possession of a firearm in furtherance of a drug-trafficking crime under 18 U.S.C. § 924(c). We have

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

jurisdiction pursuant to 28 U.S.C. § 1291. In the interests of justice, we vacate the judgment of the district court and remand for consideration in the first instance of Appellant's petition as to his § 924(c) conviction.

In 1998, Murillo pleaded guilty in Washington state court to harassment and to unlawful possession of a firearm in the second degree, both "Class C felonies." Each carried a maximum sentence of five years' imprisonment. However, under Washington's mandatory sentencing guidelines, the actual maximum sentence Murillo could face on either charge was twelve months' imprisonment. Murillo was sentenced to ten months' imprisonment on each charge, to be served concurrently.

In 2004, after serving his sentence for his 1998 convictions, Murillo was arrested and charged in the Eastern District of Washington with being a felon in possession of a firearm based on his 1998 Washington state convictions. *See* § 922(g)(1). Murillo argued that the indictment should be dismissed because he had not been convicted of any crimes for which he could have been punished by a term exceeding one year. The district court agreed and dismissed the indictment. This court reversed, holding that Murillo was a felon because he faced a statutory maximum sentence exceeding one year. *See United States v. Murillo*, 422 F.3d 1152, 1155 (9th Cir. 2005), *recognized as overruled by United States v. Valencia-Mendoza*, 912 F.3d 1215 (9th Cir. 2019).

The case was remanded to the district court, but the charge was dismissed due to speedy trial issues. In September 2005, Murillo was arrested again at a traffic stop; a search of his vehicle incident to the arrest yielded a firearm, methamphetamine, and cash. Murillo was then charged with three new federal crimes: being a felon in possession of a firearm, possessing a firearm in furtherance of a drug-trafficking crime, and possessing with intent to distribute 50–150 grams of methamphetamine. And he was re-indicted on the felon-in-possession charge from 2004 that had been dismissed.

In October 2006, Murillo entered into a global plea agreement covering all four charges. Murillo pleaded guilty to one of the § 922(g) felon-in-possession charges and to the § 924(c) possession of a firearm in furtherance of a drug-trafficking crime charge.[1] He was sentenced to sixty months' imprisonment on the § 924(c) count and fifty-one months' imprisonment on the § 922(g) count to be served consecutively, followed by three years of supervised release.

In 2019, the law governing § 922(g) prosecutions changed. This court held that a Washington conviction carrying a maximum mandatory guideline sentence of twelve months or less is not a predicate felony. *See Valencia-Mendoza*, 912

[1] The government agreed to dismiss the other § 922(g) charge and the drug charge.

F.3d at 1222.[2] Thus, a defendant similarly situated to Murillo could no longer be convicted of being a felon in possession.

In July 2020, after completing his sentence for the convictions at issue, Murillo petitioned pro se under 28 U.S.C. § 2255 for a writ of error coram nobis. A petition for a writ of error coram nobis "affords a remedy to attack a conviction when the petitioner has served his sentence and is no longer in custody." *Est. of McKinney v. United States*, 71 F.3d 779, 781 (9th Cir. 1995) (citation omitted).[3] "[T]he writ provides a remedy for those suffering from the lingering collateral consequences of an unconstitutional or unlawful conviction based on errors of fact and egregious legal errors." *Id.* (citation and internal quotation marks omitted). A court may treat a petition for a writ of error coram nobis like a habeas petition so long as any differences between the forms of the petitions do not affect the case. *See Chaidez v. United States*, 568 U.S. 342, 345 n.1 (2013) (assuming without deciding that, under the facts of the case, there was no meaningful difference

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[2] The same year, the Supreme Court held that a defendant could be convicted under § 922(g) only if he knew both that he possessed a firearm and that he belonged to a category of people prohibited from possessing firearms. *See Rehaif v. United States*, 139 S. Ct. 2191, 2194 (2019).

[3] To qualify for a writ of error coram nobis, "the petitioner must establish four requirements: (1) the unavailability of a more usual remedy; (2) valid reasons for the delay in challenging the conviction; (3) adverse consequences from the conviction sufficient to satisfy Article III's case-and-controversy requirement; and (4) an error of the most fundamental character." *United States v. Kroytor*, 977 F.3d 957, 961 (9th Cir. 2020) (cleaned up).

between a coram nobis petition and a habeas petition). We review a denial of a petition for a writ of error coram nobis de novo. *See United States v. Chan*, 792 F.3d 1151, 1153 (9th Cir. 2015).

In his petition, Murillo asked the district court to "allow him to withdraw his guilty plea" (which covered both charges), "vacate his sentence," and "order a new trial." He claimed he pleaded guilty after "[his] attorney told [him] that due to all the charges stacked against [him, he] needed to plea[d] guilty because [he] was looking at 27 years." Murillo argued that his "plea of guilty" was "involuntary" because he "did not understand the essential elements of the [§ 922(g)] offense to which [he] pleaded guilty," citing *Valencia-Mendoza* and *Rehaif*. Murillo argued that "[b]ecause [his] plea was the result of a global resolution[,] it should affect the outcome of the whole plea bargain." On that basis, he asked the court "to vacate [his] conviction of 922g1 and 924c1a and allow [him] to withdraw [his] guilty plea," which he argued he "didn't make . . . knowingly and intelligently."[4]

After Murillo filed his pro se petition, the district court appointed the Federal Defenders of Eastern Washington and Idaho to represent him. Inconsistent with Murillo's petition, the substantive briefing submitted by Murillo's new counsel

[4] Although Murillo has already served his sentence for the § 924(c) count, he has since been convicted of both drug trafficking and a second § 924(c) count. Because of his prior § 924(c) conviction, Murillo's second § 924(c) conviction carries a mandatory 25-year sentence, which he is now serving.

challenged *only* the § 922(g) conviction and sought no relief as to the § 924(c) count.[5]

Understandably, the district court addressed only the § 922(g) count, granting Murillo's petition as to that count. The district court did not substantively address the § 924(c) count.[6] The district court directed the parties to brief whether it should enter an amended judgment and, if so, what information should be adjusted. The parties jointly recommended that "18 U.S.C. § 924(c)(1)(A) should be the only listed count of conviction," and recommended similar changes to

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[5] "This Court Should Grant Mr. Murillo's Petition … Because he is Actually Innocent of the Crime he Challenges." Reply & Mem. in Supp. of Writ of Error Coram Nobis at 1, *United States v. Murillo*, 2:05-cr-02118-SAB-1 (E.D. Wash. 2021), ECF No. 212. "Mr. Murillo's writ is focused on a single conviction—the 18 U.S.C. § 922(g)" conviction. *Id.* "The fact that Mr. Murillo's judgment also addresses an unrelated conviction does not preclude his right to relief." *Id.* at 10. "The government is wrong to challenge Petitioner Murillo's modest claim for relief." *Id.* at 17. "[The court] can . . . address that wrong in some modest way by entering a new judgement . . . that deletes the conviction for Count Two of the Indictment. . . . In the interests of justice and fairness, Petitioner . . . requests this Court do just that." *Id.* at 17–18.

[6] The district court did not indicate that it understood Appellant's request to include withdrawal of the entire guilty plea. In the introduction to its order, the district court observed that Murillo "request[ed] that the Court vacate his conviction for felon in possession of a firearm, arguing that he was actually innocent of the charge under new caselaw," while not mentioning his request to vacate his guilty plea—which also covered the § 924(c) conviction. The district court also stated that "Defendant is only seeking the writ with regards to his felon in possession charge, so it is irrelevant whether *Rehaif* and *Valencia-Mendoza* have any bearing on the charge of possession of a firearm in furtherance of a drug trafficking crime."

reflect that Murillo was no longer convicted or sentenced on the § 922(g) count.[7] The court followed the joint recommendation of the parties and amended the judgment accordingly.

In the interests of justice, we vacate the judgment of the district court and remand for consideration in the first instance of Murillo's petition for writ of error coram nobis as to his § 924(c) conviction. As described above, and notwithstanding Murillo's counsel's characterization before the district court, Murillo's pro se petition clearly challenged his entire plea—including his plea to the § 924(c) count.

The government acknowledges that "[t]he district court had a foundation to grant" coram nobis relief for the § 922(g) count (and it did not cross-appeal). But the government argues that the district court *did* consider and reject Murillo's coram nobis claim as to the § 924(c) count. It claims that the district court properly did so "presumably in light of all of the surrounding facts," and that the district court was "fully aware of the nature of the global plea agreement." But the district court's order makes clear that it did not "consider and reject" the coram nobis claim as to the § 924(c) count.[8]

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[7] *See* Joint Resp. to Ct. Order Regarding the Entry of an Am. J., *United States v. Murillo*, 2:05-cr-02118-SAB-1 (E.D. Wash. 2021), ECF No. 214.

[8] There is, admittedly, some ambiguity in the district court's order. But, fairly read, the district court addressed the claims as appointed counsel presented them and granted Murillo the exact relief his appointed counsel requested.

The government alternatively argues that the district court *could* have denied Murillo's motion to vacate the § 924(c) count for various reasons. And the government argues that Murillo did not satisfy the requirements for the "highly unusual remedy" of coram nobis. *Chan*, 792 F.3d at 1153. Accordingly, we leave to the district court whether the relief Murillo seeks is available to him or warranted and express no view on the merits of his claim.

VACATED AND REMANDED.