ORAL ARGUMENT NOT YET SCHEDULED

No. 17-3064

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

FRASER VERRUSIO,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, D. CT. NO. 1:09-CR-00064 (HON. BERYL A. HOWELL)

BRIEF AND ADDENDUM FOR THE UNITED STATES

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Cir. R. 28(a)(1), undersigned counsel certifies as follows:

A. Parties and Amici

The parties appearing in the district court were the United States of America as plaintiff and Fraser Verrusio as defendant. The parties appearing in this Court on appeal are the United States as appellee and Verrusio as appellant. There are no amici or intervenors.

B. Rulings Under Review

Verrusio is appealing the orders of the district court, dated April 21, 2017, and June 19, 2017 (Hon. Beryl A. Howell), denying his motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255, and, in the alternative, his petition for a writ of error *coram nobis*. *United States v. Verrusio*, 2017 WL 1437055 (D.D.C. Apr. 21, 2017); *United States v. Verrusio*, 2017 WL 2634638 (D.D.C. June 19, 2017).

C. Related Cases

This case was previously before this Court on direct appeal. *United States v. Fraser Verrusio*, No. 11-3080.

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STATUTES AND REGULATIONS

The relevant statutory provisions are reproduced in the addendum to appellant's brief and the addendum to this brief.

STATEMENT OF JURISDICTION

Defendant-appellant Fraser Verrusio appeals from the district court's order denying his motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255 and, in the alternative, his petition for a writ of error *coram nobis*. The district court (Howell, C.J.) had jurisdiction under 28 U.S.C. §§ 2255(a) and 1331. It entered judgment on April 21, 2017, Supp. App. 22 (DE 178), and denied Verrusio's motion for reconsideration on June 19, 2017, Supp. App. 22 (DE 183).[1] Verrusio filed a timely notice of appeal on August 16, 2017. Supp. App. 22 (DE 185); *see* Fed. R. App. P. 4(a). The district court granted a certificate of appealability on September 8, 2017. Supp. App. 22-23 (9/8/17 Minute Order). This Court has jurisdiction under 28 U.S.C. §§ 2253(c), 2255(d), and 1291.

STATEMENT OF THE ISSUES

1. Whether Verrusio can obtain relief on his motion to vacate his sentence under 28 U.S.C. § 2255 after his sentence has expired.

2. Whether Verrusio is entitled to a writ of error *coram nobis* on his claim that his conviction for making a false statement, in violation of 18 U.S.C. § 1001,

[1] "DE" refers to the docket entries in the district court." "Br." refers to Verrusio's brief. "App." refers to Verrusio's appendix. "Supp. App." refers to the government's supplemental appendix.

was tainted by evidence pertaining to counts that he alleges are no longer valid in light of *McDonnell v. United States*, 136 S. Ct. 2355 (2016).

STATEMENT OF THE CASE

A. Procedural History

Following a jury trial, Verrusio was convicted of conspiring to obtain illegal gratuities, in violation of 18 U.S.C. § 371; accepting an illegal gratuity, in violation of 18 U.S.C. §§ 201(c)(1)(B) and 2; and making and causing to be made a materially false statement, in violation of 18 U.S.C. §§ 1001(a)(2), (c)(1), and 2. Supp. App. 40-41. The district court sentenced him to one day of imprisonment, to be followed by two years of supervised release. Supp. App. 42-43. Verrusio is no longer under supervision.

Verrusio appealed his convictions, and this Court affirmed. *United States v. Verrusio*, 762 F.3d 1 (D.C. Cir. 2014). The Court denied Verrusio's petition for rehearing en banc, and the Supreme Court denied his petition for a writ of certiorari. *Verrusio v. United States*, 135 S. Ct. 2911 (2015).

On June 29, 2016, Verrusio moved to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255, or, in the alternative, for a writ of error *coram nobis*, claiming that his convictions are invalid in light of the Supreme Court's decision in *McDonnell v. United States*, 136 S. Ct. 2355 (2016). Supp. App. 19 (DE 162). The district court denied the petition, *United States v. Verrusio*, 2017 WL

1437055 (D.D.C. Apr. 21, 2017), and denied Verrusio's motion for reconsideration, *United States v. Verrusio*, 2017 WL 2634638 (D.D.C. June 19, 2017). It subsequently granted his motion for a certificate of appealability. Supp. App. 22-23 (9/8/17 Minute Order).

This appeal followed.

B. Relevant Facts

1. Verrusio accepts an all-expenses-paid trip to attend a World Series game in New York from a company and its lobbyists, assists them in their efforts to obtain favorable legislation, and does not disclose the gift on his financial disclosure statement.

Viewed in the light most favorable to the verdict, the evidence established the following.

Verrusio was the Policy Director for the Committee on Transportation and Infrastructure in the House of Representatives ("Transportation Committee"). *Verrusio*, 762 F.3d at 6. His responsibilities included advising the Committee and its chair on legislative strategies and policy. *Ibid.*

The Transportation Committee had responsibility over the federal highway act, which required reauthorization every six years and was set to lapse at the end of 2003. *Verrusio*, 762 F.3d at 6. On the Senate side, responsibility for the highway bill was vested in the Committee on the Environment and Public Works ("EPW" Committee). *Ibid.* Trevor Blackann was a legislative assistant to

the chair of the EPW subcommittee that had primary responsibility for drafting the Senate version of the bill. *Ibid.*

United Rentals, a nationwide equipment rental company, had an interest in the provisions of the highway bill and hired lobbyists Todd Boulanger and James Hirni to press the company's agenda. *Verrusio*, 762 F.3d at 6. The lobbyists, in consultation with their United Rentals point-of-contact, Todd Ehrlich, devised a legislative strategy that included inserting three amendments into the bill that would favor the company's rental business. *Ibid.*

The lobbyists first approached Blackann with their legislative proposals. *Verrusio*, 762 F.3d at 6-7. Blackann, in turn, discussed them with Verrusio, who he knew was working with the lobbyists on the same set of amendments. *Id.* at 7. Anticipating that there would be opposition to the United Rentals amendments, the two staffers agreed that they should pursue an "airmail" strategy, in which they would wait until "the last possible minute legislatively to insert the [rental preference] provisions." *Ibid.* (quoting App. 60). Blackann told Boulanger and Hirni that he and Verrusio both supported the airmail strategy. *Ibid.*

In October 2003, Ehrlich told Boulanger that he had tickets to the first game of the World Series in New York, and the two, along with Hirni, decided they should invite Blackann and Verrusio because "they were in positions to be

helpful . . . specifically" with "[t]he United Rentals' amendments that we were seeking to include in the highway bill." Supp. App. 54-55; *see also* Supp. App. 47, 56 (Boulanger knew Verrusio "was close to the chairman" of the Transportation Committee and hoped "[t]o influence" Verrusio "to do some things for our clients").

Verrusio and Blackann accepted the invitation, and Hirni told them that United Rentals would cover the costs. *Verrusio*, 762 F.3d at 7. In addition to providing the tickets to the World Series, Ehrlich and Hirni paid for the hotel, dinner, a chauffeured car, baseball jerseys, and drinks, tee shirts, and lap dances at a strip club. *Id.* at 7-8. The total cost of Verrusio's share of the trip was $1,259.77. *Id.* at 8.

Upon his return from New York, Hirni told Boulanger that "he came away [from the trip] thinking that [Verrusio] was going to be helpful." App. 34. Over the course of the next few months, Verrusio continued to communicate with the lobbyists about helping to push the proposed amendments. *See*, *e.g.*, App. 132-33 (Verrusio told Hirni that Boulanger's proposed legislative text "need[ed] a lot more work for anyone to be able to help with progress"); App. 134-35 (after Blackann helped get the United Rentals amendments into the Senate bill, Verrusio provided information to Hirni about "the likelihood of the Senate language working in the House," "when the House was going to act, and

who the key players on the committee . . . would be"); App. 137 (Verrusio suggested a letter-writing campaign and provided specific "advice and counsel" and "guidance on how to move forward in the process"); Supp. App. 49 (Hirni told Vivian Moeglein, a staffer to another congressman on the Transportation Committee, that Verrusio had requested from Hirni "the language plus what we would want in the perfect world" and that Hirni was "resending [Verrusio] the language in the Senate bill with changes which would represent the 100 percent victory for [United Rentals]"); App. 141 (Hirni told Moeglein that "I have spoken to [Verrusio] and he is good to go," meaning that Verrusio was "going to be helpful with our legislative asks"); Supp. App. 50 (Verrusio told Boulanger that the markup on the bill was coming up and that they were "[s]till hard at it"); Supp. App. 50-51 (Verrusio emailed Boulanger that the bill was "[f]ar from a total mess. No question there are issues, but we still feel good.").

Despite Verrusio's optimism, the opposition to the amendments remained strong, and Blackann advised Boulanger and Hirni not to pursue the amendments in the House. *Verrusio*, 762 F.3d at 9. Because the language was still in the Senate bill, they hoped to prevail at the Senate-House conference. *Ibid.* Verrusio attended the "preconference" meeting in which Blackann, as the Senate designee, presented the United Rentals amendments to the House. *Ibid.* Ultimately, as a result of the opposition, United Rentals told its lobbyists that it

was no longer interested in pursuing the amendments, and the Senate provisions were stripped by the conference committee. *Ibid.*; Supp. App. 52.

Verrusio was required to file an annual financial disclosure statement that included information about gifts from private parties (including travel-related expenses provided for the employee's personal benefit), as well as travel payments and reimbursements for travel on official business. *Verrusio*, 762 F.3d at 9. In June 2004, he submitted his 2003 financial disclosure report; he answered "yes" to the preliminary question that asked about reportable gifts, but he left blank the corresponding schedule (Schedule VI) that required the filer to provide the details. *Id.* at 9-10; App. 179. He listed several trips on the schedule that pertained to official travel (Schedule VII), but he did not include the New York trip there either. *Verrusio*, 762 F.3d at 10. When a House Ethics Committee attorney, Paul Lewis, followed up on Verrusio's filing, Verrusio stated that he should have responded "no" to the preliminary question about reportable gifts. *Ibid.* Although Lewis twice asked Verrusio to amend his disclosure statement, Verrusio never did so. *Ibid.*

In 2008, FBI Special Agent James Harless interviewed Verrusio in connection with the FBI investigation of Jack Abramoff's lobbying activities. *Verrusio*, 762 F.3d at 10. After first denying that he went on the New York trip, Verrusio admitted that "he was asked to go because Ehrlich and Hirni wanted

to get something done on the United Rentals agenda." Supp. App. 58. Verrusio also told the agent that the New York trip "served no official purpose," that Verrusio "knew he should have" disclosed the trip but had not done so, and that "for him to have included the trip in the disclosure form . . . he would have had to have misrepresented what the trip actually was, meaning he would have had to have said it was an . . . official trip when, in fact, it wasn't an official trip." Supp. App. 58, 60.

2. Verrusio is charged with conspiring to obtain illegal gratuities, accepting an illegal gratuity, and making a materially false statement on his financial disclosure report; a jury convicts him; and this Court affirms.

A grand jury returned a superseding indictment charging Verrusio with conspiring to obtain illegal gratuities, in violation of 18 U.S.C. § 371 (Count One); accepting an illegal gratuity, in violation of 18 U.S.C. § 201(c) (Count Two); and making and causing to be made a materially false statement, in violation of 18 U.S.C. § 1001 (Count Three). *Verrusio*, 762 F.3d at 10-11. Count Two alleged that Verrusio accepted a trip to New York "for and because of his official assistance provided and to be provided to [United Rentals'] efforts to secure favorable amendments to the Federal Highway Bill": "to wit [among other types of "official assistance"] influencing the language of the Federal Highway Bill." *Ibid.* Count Three alleged that Verrusio falsely certified that the statements on his disclosure form were true when he knew that they were

"untrue, incomplete, and incorrect" in that he failed to report the World Series trip and related gifts. Supp. App. 37-39.

At trial, Blackann, Boulanger, Hirni, and Ehrlich testified about the events described above. *Verrusio*, 762 F.3d at 6. They all admitted that the New York trip was not for official business and that its purpose instead was "to influence the Congressional staff for legislation." App. 154 (Hirni); *see also* App. 61-62 (Blackann knew that he and Verrusio were invited "because of who we worked for, where we worked"); Supp. App. 56 (Boulanger hoped "[t]o influence" Verrusio "to do some things for our clients"). In addition, House Ethics Committee staff attorney Lewis testified about Verrusio's financial disclosure statement, and Agent Harless testified about his interview with Verrusio. *Verrusio*, 762 F.3d at 10.

Verrusio subpoenaed Vivian Moeglein, the former legislative director for Congressman John Boozman, and Moeglein asserted her privilege under the Speech or Debate Clause and moved to quash the subpoena. The district court granted the motion. *Verrusio*, 762 F.3d at 23.

The district court's charge to the jury on Count Two incorporated the statutory definitions and reflected the decisions in *United States v. Sun-Diamond Growers of California*, 526 U.S. 398 (1999), and *Valdes v. United States*, 475 F.3d 1319 (D.C. Cir. 2007) (en banc). Supp. App. 63-64. The court instructed that

"[s]tanding alone, providing gifts of meals, entertainment, tickets and the like to public officials is not a crime, even if the gifts are provided by someone seeking to curry favor or influence with those officials." Supp. App. 64. The court elaborated as follows:

> It is not illegal for a lobbyist to give a thing of value to a public official merely to cultivate a relationship or to build a reservoir of goodwill that might ultimately affect one or more unspecified acts now or in the future. The fact that gifts or hospitality might make a public official willing to take a lobbyist's telephone call or might provide the lobbyist greater access to the official's appointment schedule is not enough by itself to demonstrate either the lobbyist's intent to provide illegal gratuities or the public official's intent to accept illegal gratuities. Therefore, you cannot find that a lobbyist provided illegal gratuities to Mr. Verrusio or that Mr. Verrusio accepted illegal gratuities if you find that the intent was limited only to the cultivation of a business or political relationship.

Supp. App. 64; *see also ibid.* ("[I]t is not enough to show that the defendant accepted the gratuity simply because of his position."). The court also quoted the statutory definition of "official act" and added that the five terms in Section 201(a)(3) ("question, matter, cause, proceeding or controversy") "refer to a class of questions or matters whose answer or disposition is determined by the Government." *Ibid.* It repeated that "[m]ere favoritism, evidenced by a public official's willingness to take a lobbyist's telephone call to answer general questions, or to meet with a lobbyist, is not an official act" and that the jury must find that Verrusio "accepted the thing or things of value for or because of a specific official act he performed or was to perform." *Ibid.*

The jury convicted on all counts. *Verrusio*, 762 F.3d at 11.

On appeal, Verrusio contended that (1) the district court erred by denying his pretrial motion to dismiss Count Two because the indictment failed to allege an "official act"; (2) the evidence was insufficient on Counts One and Two because it failed to prove "an official act" and on Count Three because it did not prove that Verrusio made a material false statement on his financial disclosure statement; and (3) the district court committed reversible error by excluding a defense exhibit (the instructions for completing the travel schedule on the financial disclosure report) and by quashing the subpoena for Moeglein's testimony. *Verrusio*, 762 F.3d at 11, 21-22. This Court rejected each of those arguments.

As to the "official act" claims, this Court held that the indictment sufficiently alleged an official act, noting that "one of the official acts specified in Count Two was assisting in United Rentals' 'efforts to secure favorable amendments to the Federal Highway Bill.'" *Verrusio*, 762 F.3d at 14 (quoting Supp. App. 35 ¶ 28). The evidence also sufficiently proved that the World Series trip was offered for the purpose of "influencing the language of the federal highway bill" and that Verrusio "accepted the gift knowing it was being given" for this reason. *Id.* at 16-19.

The Court next concluded that the evidence sufficiently established that Verrusio should have reported the World Series trip as a gift and that the omission was material. *Verrusio*, 762 F.3d at 19-21. Significantly, Verrusio admitted "'that he knew he should have' disclosed the trip, and further admitted that it 'wasn't an official trip.'" *Id.* at 20 (quoting Supp. App. 60). Although the Court concluded that the district court should have admitted the defense exhibit that contained the instructions for completing the travel schedule of the financial disclosure form, the error was harmless in light of the exhibits that were admitted that enabled the jury to consider – and reject – Verrusio's argument that the trip was not a gift but instead was travel in connection with his official duties. *Id.* at 21-22. The added import of the instructions was also "minimal" because Verrusio as well as three of the witnesses (Blackann, Hirni, and Ehrlich) testified that the trip was not "related to official duties at all." *Id.* at 22 (internal quotation marks and citations to the record omitted).

Finally, the Court rejected Verrusio's argument that the district court erred by quashing his subpoena to Vivian Moeglein. *Verrusio*, 762 F.3d at 23. It concluded that Verrusio waived his claim that the Speech or Debate Clause is "absolute." *Ibid.* Furthermore, even if the argument was merely forfeited, it still failed on plain-error review because Verrusio had not established that any error was plain. *Ibid.* The Court also rejected Verrusio's contention that the district

court should have dismissed the indictment because of Moeglein's unavailability because her testimony was not "material." *Id.* at 23-24.

3. The district court denies Verrusio's post-conviction petition.

On June 27, 2016, the Supreme Court decided *McDonnell*, which addressed "the proper interpretation of the term 'official act'" in the context of a prosecution for honest-services fraud and Hobbs Act extortion violations. 136 S. Ct. at 2367 (citation omitted). The Court stated that "an 'official act' is a decision or action on a 'question, matter, cause, suit, proceeding or controversy.'" *Id.* at 2371, and established a two-part test to meet that definition. First, "[t]he 'question, matter, cause, suit, proceeding or controversy' must involve a formal exercise of governmental power that is similar in nature to a lawsuit before a court, a determination before an agency, or a hearing before a committee." *Id.* at 2372. Second "[t]o qualify as an 'official act,' the public official must make a decision or take an action on that 'question, matter, cause, suit, proceeding or controversy,' or agree to do so." *Ibid.* The Court clarified that the "decision or action may include using his official position to exert pressure on another official to perform an 'official act,' or to advise another official, knowing or intending that such advice will form the basis for an 'official act' by another official." *Ibid.*

Following the Supreme Court's decision in *McDonnell*, Verrusio filed a motion to vacate his convictions pursuant to 28 U.S.C. § 2255 or, in the alternative, for a writ of error *coram nobis*, claiming that he did not receive a gratuity for or because of an "official act," as defined in *McDonnell*. *Verrusio*, 2017 WL 1437055. The district court denied the Section 2255 motion because Verrusio was not "in custody." *See id.* at *7 ("Not a single case supports a departure from clear Supreme Court and D.C. Circuit precedent holding that after a defendant serves his sentence, he is no longer 'in custody' and a court may not grant a *habeas* petition brought under § 2255.").

The court also concluded that Verrusio was not entitled to *coram nobis* relief. *Verrusio*, 2017 WL 1437055, at *9-*11. "Assuming, without deciding" that Verrusio suffers "'adverse consequences'" from his convictions, the court stated that Verrusio "still cannot 'satisfy the case or controversy requirement of Article III' because the defendant cannot show that a favorable decision would redress his alleged injuries." *Id.* at *9. That was so, the court explained, because Verrusio's *McDonnell* argument pertained only to his convictions on Counts One and Two, and the false-statement conviction on Count Three "would remain intact, along with all its encumbrances under both State and Federal law." *Id.* at *10. Thus, "because the civil disabilities of which the defendant complains would not be eliminated by a favorable decision, [the district court] is powerless

to redress the defendant's alleged injury, lacks subject-matter jurisdiction over the defendant's claims, and, thus, must dismiss the action." *Id.* at *11.

Verrusio filed a motion for reconsideration, asking the district court to reconsider its conclusion that he did not have standing to petition for a writ of error *coram nobis* and its finding that he had not satisfied the "adverse consequences" prong of the *coram nobis* test. *Verrusio*, 2017 WL 2634638, at *1. As to the first, the court reaffirmed its prior reasoning and explained that, even if the "adverse consequences" prong is a "'merits' question" as Verrusio contended, rather than a "'jurisdictional' one," the result would be the same because "a favorable decision" would not eliminate the claimed adverse consequences. *Id.*at *4-*5.

The court also rejected Verrusio's argument that, if Counts One and Two were reversed, then Count Three must also be reversed because prejudicial spillover from evidence on the reversed counts infected the jury's consideration of the false-statement charge. It initially noted that Verrusio's "prejudicial spillover" claim was not timely raised because he presented it for the first time in his motion for reconsideration. *Verrusio*, 2017 WL 2634638, at *5. It also explained that "it is not at all clear" that "prejudicial spillover" should be considered in a petition for *coram nobis* relief because the remedy would be expungement of the conviction, where if he had raised (and prevailed) on that

claim on direct appeal or on collateral review, he would have only been entitled to a new trial. *Id.* at *6. Finally, after reviewing the evidence, the court concluded that Verrusio had not shown that there was any prejudicial spillover from Counts One and Two to Count Three. *Id.* at *6-*9.

C. Rulings Under Review

The rulings under review are the district court's denial of Verrusio's motion to vacate his convictions under Section 2255, *Verrusio*, 2017 WL 1437055; its denial of his petition for a writ of error *coram nobis*, *id.*; and its denial of Verrusio's motion for reconsideration, *Verrusio*, 2017 WL 2634638.

SUMMARY OF ARGUMENT

1. The district court correctly denied Verrusio's motion to vacate his convictions under Section 2255 because he was not "in custody" at the time he filed the motion. Contrary to Verrusio's argument, the collateral consequences he continues to suffer, such as the deprivation of his right to vote or to possess firearms, do not suffice to establish the "in custody" requirement. He has not cited any decision that supports his claim, and the Supreme Court has rejected it. *See Maleng v. Cook*, 490 U.S. 488 (1989) (per curiam).

2. Verrusio is not entitled to a writ of error *coram nobis*. Even if he were to prevail on his claim that his convictions on the gratuity counts must be vacated in light of *McDonnell v. United States*, 136 S. Ct. 2355 (2016), he would still face

the adverse consequences he complains of because he remains validly convicted on Count Three. Verrusio's claims of error as to his Count Three conviction also do not satisfy the *coram nobis* test. Because his prejudicial-spillover argument is not dependent on the Court's ruling in *McDonnell*, Verrusio has not shown that he could not have challenged his conviction earlier. Thus, he could have moved for a severance of the counts pursuant to Fed. R. Crim. P. 14 and could have argued to the district court and this Court on direct appeal that reversal of Counts One and Two required reversal of Count Three as well.

Verrusio also has not established that prejudicial spillover existed. Most of the evidence on the gratuity counts would have been admissible in a separate trial on Count Three to establish that the New York trip was a gift. In addition, even if his acceptance of the gift was not illegal, it was still unethical, as Verrusio admitted to Agent Harless, and helped explain his motive in concealing the trip on his financial disclosure report. Even if some of the evidence would have been inadmissible, Verrusio has not shown that it was prejudicial. The evidence supporting his conviction on Count Three was strong: Verrusio admitted all the elements of the offense; other witnesses testified that the trip was not for official business; and Verrusio did not report the trip on the travel portion of his disclosure statement. Nor was the spillover evidence that Verrusio identifies the type of inflammatory testimony that would prevent a jury from making the

straightforward determination of whether he made a materially false statement on his financial disclosure report. The district court's instruction that the jury should consider each count separately further minimized the risk of unfair prejudice.

Finally, Verrusio has not demonstrated that he suffered an error of "fundamental character." *United States v. Morgan*, 346 U.S. 502, 512 (1954) (internal quotation marks omitted). He cannot show that he was convicted for conduct that is not a crime, and he admitted all of the elements of the offense. Accordingly, the district court correctly denied Verrusio's petition to vacate his convictions.

ARGUMENT

I. Verrusio Was Not "In Custody" For Purposes Of Challenging His Convictions Under Section 2255.

Verrusio asserts (Br. 34-38) that he was "in custody" when he filed his Section 2255 motion. Although he does not deny that he is no longer in physical custody or under supervision, he contends that the collateral consequences from his convictions suffice to establish the "in custody" requirement for relief under Section 2255. He is wrong.

A. Standard of Review

This Court reviews the district court's dismissal of Verrusio's Section 2255 motion *de novo*. *United States v. Palmer*, 296 F.3d 1135, 1141 (D.C. Cir. 2002).

B. The District Court Correctly Held That Verrusio Was Not "In Custody."

Section 2255 authorizes "[a] prisoner in custody under sentence of a court established by Act of Congress" to challenge his conviction "upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States." 28 U.S.C. § 2255; *see* Rule 1 of the Section 2255 rules. While the jurisdictional "in custody" requirement is not limited to physical restraint, *see Maleng v. Cook*, 490 U.S. 488, 491 (1989) (per curiam), habeas corpus is "a remedy for severe restraints on individual liberty," *Hensley v. Municipal Court*, 411 U.S. 345, 351 (1973), and a prisoner must still challenge the fact of custody in order to seek a writ of habeas corpus. *See Heflin v. United States*, 358 U.S. 415, 421 (1959) (Stewart, J., concurring) (Section 2255 was intended to maintain "the basic principle of habeas corpus that relief is available only to one entitled to be released from custody"); *Carafas v. LaVallee*, 391 U.S. 234, 238 (1968) (requirement that an applicant be "in custody" when he files a petition for habeas corpus "is required not only by the repeated references in the statute, but also by the history of the great writ") (footnote omitted).[2] Thus, in order to file a Section 2255 motion, a prisoner must not only suffer from a severe restraint

[2] The "in custody" requirement has the same meaning in Section 2255 as it has for Section 2254 habeas corpus applications. *Heflin*, 358 U.S. at 421 (Stewart, J., concurring).

on his liberty, but also must challenge the legality of that restraint, *i.e.*, the prisoner must claim that the restraint is "in violation of the Constitution or laws of the United States." 28 U.S.C. § 2255(a).

In *Maleng*, the Supreme Court squarely held that collateral consequences from a conviction for which the sentence has "*fully expired*" do not satisfy the "in custody" requirement. 490 U.S. at 491-92 (emphasis in original). The Court explained that "a contrary ruling would mean that a petitioner whose sentence has completely expired could nonetheless challenge the conviction for which it was imposed at any time on federal habeas." *Id.* at 492. Because "criminal convictions can carry a wide variety of consequences other than conviction and sentencing," *Padilla v. Kentucky*, 559 U.S. 356, 376 (2010) (Alito, J., concurring), Verrusio's rule "would read the 'in custody' requirement out of the statute." *Maleng*, 490 U.S. at 492.

The courts of appeals have uniformly held that the "in custody" requirement is not satisfied by collateral consequences that follow from criminal convictions. *See*, *e.g.*, *Vega v. Schneiderman*, 861 F.3d 72, 75-76 (2d Cir. 2017) (order of protection against petitioner did not satisfy "in custody" requirement); *Parker v. Darby*, 599 F. App'x 348, 350 (10th Cir. 2015) (unpublished) (loss of right to vote, run for office, and obtain employment as a teacher "are only collateral consequences of [petitioner's] earlier conviction and, without more,

are not sufficient to render an individual 'in custody'"); *Wilson v. Flaherty*, 689 F.3d 332, 337-38 (4th Cir. 2012) (SORNA registration requirements do not place sex offender "in custody"); *Resendiz v. Kovensky*, 416 F.3d 952, 956 (9th Cir. 2005) (immigration consequences are "collateral consequences" that do not render an individual "in custody" for purposes of § 2254 review), *abrogated on other grounds by Chaidez v. United State*s, 568 U.S. 342 (2013); *Ginsberg v. Abrams*, 702 F.2d 48, 49 (2d Cir. 1983) (per curiam) (petitioner's removal from the bench, revocation of his license to practice law, and disqualification as a real estate broker and insurance agent did not satisfy the custody requirement). Likewise, the courts of appeals have held that financial penalties, which do not impose a "severe restraint" on individual liberty, cannot be challenged through a Section 2255 motion. *See*, *e.g.*, *United States v. Bernard*, 351 F.3d 360, 361 (8th Cir. 2003) (holding that challenge to restitution order is not cognizable under Section 2255); *Kaminski v. United States*, 339 F.3d 84, 87-88 (2d Cir. 2003) (same); *United States v. Thiele*, 314 F.3d 399, 401-02 (9th Cir. 2002) (same).

Verrusio does not cite any case that supports his argument that the collateral consequences he faces satisfy Section 2255's "in custody" requirement. Instead, he asks this Court to "examine" the issue anew in light of the "recent increase in the use and severity of collateral consequences in the criminal context." Br. 36 (internal quotation marks omitted). This Court must

reject Verrusio's invitation. *See Ali v. Rumsfeld*, 649 F.3d 762, 776 (D.C. Cir. 2011) (rejecting plaintiffs' request to ignore a Supreme Court decision, stating that "[w]e can no more ignore Supreme Court precedent than could the district court"). Despite Verrusio's contention (Br. 35) that the 30-year-old decision in *Maleng* did not "expressly" address collateral consequences such as those he alleges here, the Court did not hitch its ruling to the type of collateral consequence at issue, and its decision is still binding.

II. The District Court Correctly Denied Verrusio's Request For *Coram Nobis* Relief.

Verrusio contends (Br. 38-57) that he is entitled to *coram nobis* relief because spillover evidence from the allegedly invalid convictions on Counts One and Two affected the jury's verdict on Count Three. That claim lacks merit.

A. Standard Of Review

Although it does not appear that this Court has explicitly addressed the standard of review of denials of petitions for *coram nobis* relief in a reported decision, other courts of appeals have reviewed findings of fact for clear error and legal conclusions *de novo*. *See*, *e.g.*, *United States v. Castro-Taveras*, 841 F.3d 34, 38-39 (1st Cir. 2016); *United States v. Wilkozek*, 822 F.3d 364, 368 (7th Cir. 2016). Some courts have added that they review the district court's ultimate decision for abuse of discretion. *Bereano v. United States*, 706 F.3d 568, 575 (4th Cir. 2013); *Santos-Sanchez v. United States*, 548 F.3d 327, 330 (5th Cir. 2008),

vacated on other grounds by Padilla v. Kentucky, 559 U.S. 356 (2010); *United States v. Mandanici*, 205 F.3d 519, 524 (2d Cir. 2000); *Alikhani v. United States*, 200 F.3d 732, 734 (11th Cir. 2000) (per curiam).

B. Verrusio Is Not Entitled To A Writ Of Error *Coram Nobis*.

A court may grant post-conviction relief pursuant to a writ of *coram nobis* only for errors "of the most fundamental character." *United States v. Morgan*, 346 U.S. 502, 512 (1954) (quoting *United States v. Mayer*, 235 U.S. 55, 69 (1914)); *see id.* at 510-11; *see also United States v. Denedo*, 556 U.S. 904, 911 (2009). In particular, to ensure "that finality is not at risk in a great number of cases," the availability of the writ is limited to "'extraordinary' cases presenting circumstances compelling its use 'to achieve justice.'" *Denedo*, 556 U.S. at 911 (quoting *Morgan*, 346 U.S. at 511); *see id.* 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."). Even then, *coram nobis* relief is available only where "sound reasons exist[] for failure to seek appropriate earlier relief." *Morgan*, 346 U.S. at 512; *see Denedo*, 556 U.S. at 911.

Courts have distilled those principles into a multi-part test. *See, e.g.*, *Bereano*, 706 F.3d at 576; *Murray v. United States*, 704 F.3d 23, 29 (1st Cir. 2013); *cf. United States v. Newman*, 805 F.3d 1143, 1146 (D.C. Cir. 2015) (citing *United States v. Riedl*, 496 F.3d 1003, 1006 (9th Cir. 2007), and *United States v. Faison*,

956 F. Supp. 2d 267, 269 (D.D.C. 2013)). A petitioner must show that "(1) a more usual remedy is not available; (2) valid reasons exist for not attacking the conviction earlier; (3) adverse consequences exist from the conviction sufficient to satisfy the case or controversy requirement of Article III; and (4) the error is of the most fundamental character." *Faison*, 956 F. Supp. 2d at 269 (quoting *United States v. Hansen*, 906 F. Supp. 688, 692-93 (D.D.C. 1995)).

Even assuming Verrusio satisfies the first requirement, he fails under the three others. First, there is no reason why Verrusio could not have challenged his conviction on the false-statement count on the ground alleged here. For example, he could have argued – but did not – that he was entitled to a severance under Fed. R. Crim. P. 14. In addition, although he repeatedly challenged the sufficiency of the "official act" evidence at trial, he never argued that reversal of his conviction on Count Three was required if the district court granted his motion for judgment of acquittal on Counts One and Two or the court of appeals reversed those convictions.[3] Because Verrusio's claim here was available all along, he has not shown that "sound reasons," *Morgan*, 346 U.S. at 512, excuse

[3] On direct appeal, Verrusio stated in his reply brief (Reply Br. at 14) that "the government does not dispute that a judgment of acquittal on Count 2 would require a new trial on Counts 1 and 3." The government did not "dispute" that claim as to Count Three because Verrusio did not make it in his opening brief. Nonetheless, that (unsupported) contention demonstrates that Verrusio could have raised his "prejudicial spillover" claim earlier.

his belated request for relief. *See United States v. McCord*, 509 F.2d 334, 341 (D.C. Cir. 1974) (denying petition for *coram nobis* where appellant had not identified any error "not correctible on direct appeal"); *Faison*, 956 F. Supp. 2d at 272 ("a writ of *coram nobis* is only appropriate when claims could not have been raised by direct appeal, . . . and *coram nobis* is not a substitute for appeal") (internal quotations marks and citations omitted). For the same reasons, Verrusio cannot relitigate via a petition for a writ of error *coram nobis* the district court's non-*McDonnell*-related rulings excluding a defense exhibit and quashing the subpoena for Moeglein's testimony because he *did* challenge those below and this Court rejected them. *Verrusio*, 762 F.3d at 21-23; *see Calvert v. United States*, 351 F. App'x 475, 476 (2d Cir. 2009) (unpublished) ("as we have already decided appellant's speedy trial claim in his direct appeal, that claim cannot be relitigated").

Next, Verrusio cannot satisfy the "case or controversy" requirement because, even if he prevails on his *McDonnell* claim, he will still face the alleged adverse consequences from his conviction on Count Three. To get around that bar, Verrusio argues that reversal of the gratuity convictions also requires

reversal of the false-statement conviction due to "prejudicial spillover." Verrusio is wrong both legally and factually.[4]

To begin, Verrusio never addresses the *coram nobis* standard and instead presses his claim as if he were on direct appeal. For example, he argues that, in evaluating claims of prejudicial spillover, "'courts have applied a test somewhat favorable to the defendant'" and that "[c]ourts have reversed convictions unless they can conclude that an improper conviction on certain counts did not influence the jury's decision to convict on others." Br. 39; *see also id.* at 40-41 (criticizing the district court's focus on the sufficiency of the evidence and arguing that the proper focus is whether "a defendant would have a better chance of defending himself at a re-trial"). While all of that may have been correct if this case were on direct appeal, those principles do not apply where, as here, Verrusio is seeking the "extraordinary remedy" of *coram nobis*. *Morgan*, 346 U.S. at 511; *see United States v. Rhines*, 640 F.3d 69, 71 (3d Cir. 2011) (per curiam) ("A court's jurisdiction to grant [*coram nobis*] relief is of limited scope, and the standard for obtaining it is more stringent than that applicable on direct

[4] As the district court noted, Verrusio's prejudicial spillover argument, first raised in a motion for reconsideration under Fed. R. Civ. P. 59(e), was not timely. *See Verrusio,* 2017 WL 2634638, at *5. Because the district court went on to consider the merits, the issue is preserved for appellate review. *See District of Columbia v. Doe*, 611 F.3d 888, 896 (D.C. Cir. 2010).

appeal."); *United States v. George*, 676 F.3d 249, 258 (1st Cir. 2012) (noting that "[t]he further a case progresses through the remedial steps available to a criminal defendant, the stiffer the requirements for vacating a final judgment" and that "[t]he writ of error *coram nobis* lies at the far end of this continuum"). And, because earlier proceedings are presumptively correct, the burden is on Verrusio to show that this one was not. *Morgan*, 346 U.S. at 512.

Moreover, as the district court noted, 2017 WL 2634638, at *6, it is not clear that *coram nobis* relief would ever be appropriate to remedy the error alleged here. If prejudicial spillover is timely raised on direct appeal, the remedy is a new trial. *See*, *e.g.*, *United States v. Wright*, 665 F.3d 560, 577 (3d Cir. 2012). On the other hand, a successful *coram nobis* petition usually results in expungement of the conviction without ever relitigating a defendant's guilt and is reserved for errors "of the most fundamental character." *Mayer*, 235 U.S. at 69. For that reason, "[a]n error which could be remedied by a new trial . . . does not normally come within the writ." *United States v. Stoneman*, 870 F.2d 102, 106 (3d Cir. 1989). Verrusio implicitly recognizes the remedy discrepancy; he asks that his convictions be vacated – the only way in which he may regain the rights he complains that he has lost as a convicted felon – yet seeks reconsideration of this Court's evidentiary rulings because "on a re-trial" those questions "would likely have to be re-visited depending on the government's evidence." Br. 54-55; *see*

also Br. 50 (asking the Court to "consider whether the government would be permitted to use the same characterizations [of the evidence] at a second trial"); Br. 52 (stating that "it is appropriate" for this Court to reconsider its ruling on whether the exclusion of a defense exhibit was harmless because the prejudicial spillover question, "at its heart, is asking whether the defendant would have a better chance of defending himself against the remaining charges at a re-trial").

Verrusio's prejudicial-spillover argument also fails on the merits. The "prejudicial spillover" doctrine recognizes that, in certain cases where a defendant has been tried on multiple counts and his conviction on one of those counts is reversed on a ground that requires dismissal of that count, retrial may be required on other counts because of prejudicial spillover from evidence introduced in support of the dismissed count. *See*, *e.g.*, *United States v. Richardson*, 161 F.3d 728, 734 (D.C. Cir. 1998); *United States v. Cross*, 308 F.3d 308, 317 (3d Cir. 2002); *United States v. Rooney*, 37 F.3d 847, 855 (2d Cir. 1994). Reversal is not required, however, unless the allegedly prejudicial evidence "would not have been admitted but for the dismissed charges." *United States v. Prosperi*, 201 F.3d 1335, 1345 (11th Cir. 2000); *see Cross*, 308 F.3d at 317; *United States v. Edwards*, 303 F.3d 606, 639-40 (5th Cir. 2002); *Rooney*, 37 F.3d at 855-56. If evidence used to prove the dismissed count would not have been admissible to prove a remaining count (*i.e.*, "spillover" evidence), then the question is whether it was

prejudicial (*i.e.*, "whether it affected adversely the verdict on the remaining count"). *Cross*, 308 F.3d at 317; *see also*, *e.g.*, *United States v. Lazarenko*, 564 F.3d 1026, 1043 (9th Cir. 2009) (the "defendant must show compelling prejudice") (internal quotation marks omitted); *United States v. Vebeliunas*, 76 F.3d 1283, 1293-94 (2d Cir. 1996) (same); *Callanan v. United States*, 881 F.2d 229, 236 (6th Cir. 1989) (same); *cf. United States v. Lane*, 474 U.S. 438, 449 (1986) ("[A]n error involving misjoinder affects substantial rights and requires reversal only if the misjoinder results in actual prejudice because it had substantial and injurious effect or influence in determining the jury's verdict.") (internal quotation marks omitted).

Verrusio cannot get past the first step of the prejudicial spillover analysis. *See Cross*, 308 F.3d at 317 (if the evidence on the overturned count would have been admissible to prove the remaining count, then prejudicial spillover cannot occur and the analysis ends). Virtually all of the evidence admitted on the gratuity counts would still have been admissible if the government had proceeded only on the false-statement count. The evidence pertaining to the events leading up to the New York trip as well as the trip itself was relevant to whether the trip should have been reported as a gift,[5] whether Hirni and United

[5] Verrusio contends (Br. 48) that Blackann and Hirni offered "improper expert testimony" about whether Verrusio should have disclosed the trip. That

Rentals were the source of the gift, and whether the value of the gift exceeded the reporting threshold. In addition, Verrusio's acceptance of the gift from Ehrlich and the lobbyists who had business before the Transportation Committee, even if merely unethical rather than illegal, nonetheless helped explain Verrusio's motive in concealing the trip on his financial disclosure report. *See* Supp. App. 59-60 (Verrusio admitted that "it did not look good" that a lobbyist and his client, who had business before the Transportation Committee, took Verrusio on an all-expenses-paid trip to New York for the World Series and that the trip "would not have passed the scrutiny of the Ethics Office"). *See*, *e.g.*, *United States v. Schneider*, 801 F.3d 186, 199-201 (3d Cir. 2015) (evidence that pertained to count that was subsequently dismissed was also admissible on count of conviction because it "spoke to [defendant's] purpose" in committing the crime); *Prosperi*, 201 F.3d at 1345-47 (evidence of defendant's deceptive conduct, which pertained to dismissed counts, was also admissible to show defendant's intent to deceive in count of conviction).

Even if some of the evidence would have been inadmissible, Verrusio has not shown that the jury was prejudiced by its admission. First, contrary to Verrusio (Br. 42-46), the evidence of his guilt was "exceedingly strong." *Verrusio*,

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argument has nothing to do with his "prejudicial spillover" claim since the evidence directly pertains to Count Three.

2017 WL 2634638, at *9; *see*, *e.g.*, *Cross*, 308 F.3d at 326 (stating that it was "'highly probable' that the superfluous evidence made no difference in the ultimate verdict of the jury" because "[t]he evidence supporting the [remaining] count was overwhelming"); *Prosperi*, 201 F.3d at 1347 (no unfair prejudice because, among other factors, "evidence supporting the [remaining] counts was substantial"); *Lane*, 474 U.S. at 450 (in finding harmless error from misjoinder of defendants, Court considered the overwhelming evidence of guilt). Verrusio himself admitted that he was aware of the reporting requirements, that he knew that they were important, and that he knew he should have reported the trip. Supp. App. 59-60. His failure to file an amended report after he changed his response to the question about gifts ("'gifts' section should be checked 'no,'" App. 190), despite Lewis's requests that he do so, additionally supported the inference that the trip's omission on the report was intentional. Furthermore, his defense that the trip was official travel rather than a gift was contradicted by the testimony of Hirni, Blackann, and Ehrlich, *see Verrusio*, 762 F.3d at 22, and was fatally undermined by Verrusio's own admission that it "wasn't an official trip" and by his failure to report it as official travel on the applicable financial disclosure schedule. *Id.* at 20.

Contending that "[t]he government's case was weak" (Br. 42), Verrusio repeats the arguments that the jury, the district court, and this Court all rejected

below. *See* Supp. App. 65-76 (defense summation); Supp. App. 78-82 (district court's denial of motion for judgment of acquittal and for new trial); *Verrusio*, 762 F.3d at 19-23. They fare no better here. Thus, whether Verrusio failed to disclose the trip because it "was criminal and illegal," Br. 42, or because "it would not have passed the scrutiny of the Ethics Office," Supp. App. 60, the evidence amply demonstrated that the trip was a gift that Verrusio was required to report.

The evidence also was not "of such an inflammatory nature that it would have tended to incite or arouse the jury into convicting [Verrusio] on the remaining count[]." *Vebeliunas*, 76 F.3d at 1294 (internal quotation marks omitted). *See Prosperi*, 201 F.3d at 1346-47 (evidence of defendant's "other misdeeds, all of the 'white collar' variety, is not the type that would ordinarily inflame or prejudice a jury"). Verrusio's arguments to the contrary are unavailing. For example, he labels (Br. 47-48) as "inflammatory" portions of Blackann's and Boulanger's testimony that mentioned Jack Abramoff or described other illegal gifts that had nothing to do with United Rentals or the New York trip. Because that testimony did not implicate Verrusio in criminal activity, it was not "so inflammatory as to prevent the jury from making the straightforward determination" of whether Verrusio committed the offense

charged in Count Three.[6] *Verrusio*, 2017 WL 2634638, at *8. Similarly, Blackann's brief mention of the "gift limits" in the context of describing why a staffer should not accept gifts ("[e]ven if perfectly fine . . . you just shouldn't take gifts, accept gifts from people with whom you're doing business," App. 62) was also not "inflammatory," which probably explains why Verrusio did not object to the testimony below. Moreover, there is no support for Verrusio's contention (Br. 48) that Blackann's testimony "could have misled the jury into thinking that the receipt of anything from lobbyists was improper, including travel" when the district court repeatedly instructed the jury that "[i]t is not illegal for a lobbyist to give a thing of value to a public official" for the purposes of cultivating a relationship and the like. Supp. App. 64. And it is even more farfetched to assume that a hotel manager's description of his New York hotel's "flat-screen televisions and designer omelets" "incite[d] the jury" against Verrusio, Br. 48, so as to make a difference on the Count Three verdict.

[6] This case is unlike *United States v. Jones*, 16 F.3d 487 (2d Cir. 1994), on which Verrusio relies. Br. 49-50. In that case, the court of appeals found prejudicial spillover on the non-dismissed charges from evidence used to obtain a later-reversed felon-in-possession conviction because the evidence that the defendant was a convicted felon "was of the inflammatory sort that may have swayed the jury to convict him of the other charges." *Id.* at 493. Here, the jury was not told anything like that about Verrusio, and the "criminal activities" (Br. 49) of the witnesses against him likely would have been elicited in any event to undermine their credibility.

Any possible spillover from evidence that was relevant only to the gratuity charges was also minimized by the district court's instructions: the jurors were told to "consider each offense and the evidence which applies to it separately"; "return separate verdicts as to each count"; and not allow a verdict on any count to "influence [their] verdict as to any other count." Supp. App. 62; *see Cross*, 308 F.3d at 327 (rejecting prejudicial spillover claim in part because "the District Court admonished the jury that it was not to convict [the defendants] on one of the charged offenses merely because it found them guilty of the other, and 'juries are presumed to follow their instructions'") (quoting *Zafiro v. United States*, 506 U.S. 534, 541 (1993)) (internal quotation marks omitted); *Lane*, 474 U.S. at 450 (taking into account limiting instruction in harmlessness analysis). Verrusio argues (Br. 55) that such instructions are not "a guarantee" against prejudicial spillover, but in light of the nature of the evidence and the straightforward case against Verrusio on Count Three, there is no reason to reject the presumption that jurors follow a court's limiting instructions. *Cf. United States v. Celis*, 608 F.3d 818, 845 (D.C. Cir. 2010) (per curiam) (noting presumption and concluding that limiting instruction "cured any possible risk of prejudice" from joinder of defendants) (internal quotation marks omitted).

Finally, Verrusio fails to meet the fourth requirement for *coram nobis* relief because he does not allege an error "of the most fundamental character."

Morgan, 346 U.S. at 512 (internal quotation marks omitted). Verrusio was not improperly convicted: a jury found him guilty of conduct that was, and remains, criminal, and his admissions by themselves satisfy each of the elements of the offense. For the reasons discussed above, his garden-variety evidentiary challenge likely would have failed even on direct appeal. *See Bereano*, 706 F.3d at 577 ("an appellant who would not be entitled to relief on direct appeal could never be entitled to the extraordinary writ of *coram nobis*"); *see also George*, 676 F.3d at 258 ("an error 'of the most fundamental character' . . . must denote something more than an error simpliciter") (quoting *Morgan*, 346 U.S. at 512). We are not aware of any court that has granted *coram nobis* relief for a claim like Verrusio's, nor has he cited any. *See George*, 676 F.3d at 254 ("Given the [Supreme] Court's evident concerns [about the risks to finality], it is not surprising that successful petitions for *coram nobis* are hen's-teeth rare."). In short, Verrusio has not overcome the presumption that he was properly convicted on Count Three, and this Court should affirm the district court's ruling denying his petition for a writ of error *coram nobis*.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's orders.

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ADDENDUM

TABLE OF CONTENTS

RULES GOVERNING SECTION 2255 PROCEEDINGS FOR THE UNITED STATES DISTRICT COURTS

(EFFECTIVE FEBRUARY 1, 1977, AS AMENDED TO FEBRUARY 1, 2010)

Rule

Rule 1. Scope

These rules govern a motion filed in a United States district court under 28 U.S.C. § 2255 by:

(a) a person in custody under a judgment of that court who seeks a determination that:

(1) the judgment violates the Constitution or laws of the United States;

(2) the court lacked jurisdiction to enter the judgment;

(3) the sentence exceeded the maximum allowed by law; or

(4) the judgment or sentence is otherwise subject to collateral review; and

(b) a person in custody under a judgment of a state court or another federal court, and subject to future custody under a judgment of the district court, who seeks a determination that:

(1) future custody under a judgment of the district court would violate the Constitution or laws of the United States;

(2) the district court lacked jurisdiction to enter the judgment;

(3) the district court's sentence exceeded the maximum allowed by law; or

(4) the district court's judgment or sentence is otherwise subject to collateral review.

Rule 2. The Motion

(a) Applying for Relief. The application must be in the form of a motion to vacate, set aside, or correct the sentence.

(b) Form. The motion must:

(1) specify all the grounds for relief available to the moving party;

(2) state the facts supporting each ground;

(3) state the relief requested;

(4) be printed, typewritten, or legibly handwritten; and

(5) be signed under penalty of perjury by the movant or by a person authorized to sign it for the movant.