PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-7144

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

BROOKS PRENTICE LESANE,

Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. Terrence W. Boyle, District Judge. (5:02-cr-00206-BO-1)

Argued: May 3, 2022 Decided: July 14, 2022

Before KING and WYNN, Circuit Judges, and FLOYD, Senior Circuit Judge.

Reversed and remanded by published opinion. Judge King wrote the opinion, in which Judge Wynn and Senior Judge Floyd joined.

ARGUED: Jaclyn Lee Tarlton, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Raleigh, North Carolina, for Appellant. Lauren Ashley Miller Golden, OFFICE OF THE UNITED STATES ATTORNEY, Raleigh, North Carolina, for Appellee. **ON BRIEF:** G. Alan DuBois, Federal Public Defender, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Raleigh, North Carolina, for Appellant. Robert J. Higdon, Jr., United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Raleigh, North Carolina, for Appellee.

KING, Circuit Judge:

Brooks Prentice Lesane appeals from the denial by the district court for the Eastern District of North Carolina of his petition for a writ of coram nobis. *See United States v. Lesane*, No. 5:02-cr-00206 (E.D.N.C. July 21, 2020), ECF No. 39 (the "Denial Order").[1] By his petition, Lesane sought vacatur of his 2003 conviction in that court for being a felon in possession of a firearm, in contravention of 18 U.S.C. § 922(g)(1). The basis for Lesane's coram nobis petition is primarily our 2011 decision in *United States v. Simmons*, pursuant to which neither of the North Carolina criminal offenses underlying his 2003 firearm conviction qualifies as a felony. *See* 649 F.3d 237 (4th Cir. 2011) (en banc). Even though *Simmons* has rendered it clear and undisputed that Lesane is actually innocent of the § 922(g)(1) offense, the district court denied his coram nobis petition, ruling that Lesane failed to explain why he had not challenged the 2003 conviction in a more timely fashion. In this appeal, we conclude that coram nobis relief is warranted and required to achieve justice. We therefore reverse and remand for an award of coram nobis relief.

I.

A.

In August 2002, Lesane was indicted in the Eastern District of North Carolina for possessing a firearm after having been convicted of a crime punishable by imprisonment

[1] Lesane labelled his coram nobis petition a "motion," as did the district court. We use the customary term "petition" in referring to Lesane's request for coram nobis relief.

for a term exceeding one year (that is, a felony), in violation of 18 U.S.C. § 922(g)(1). Two months later, in October 2002, Lesane pleaded guilty to that offense. In May 2003, the district court sentenced Lesane to 70 months in prison, to be followed by three years of supervised release, plus a $100 special assessment.

On July 28, 2008, Lesane completed his prison sentence and began to serve his term of supervised release. On December 17, 2009, however, the district court revoked supervision and committed Lesane to custody for 24 more months. Lesane finally completed his sentence on the 2003 firearm conviction on November 28, 2011.

B.

On August 17, 2011, about three months before Lesane completed his sentence on the 2003 firearm conviction, our en banc Court decided *United States v. Simmons*. Prior to *Simmons*, we had relied on a rule enunciated in our 2005 decision in *United States v. Harp* to determine whether a North Carolina criminal offense qualifies as a felony under federal law. *See* 406 F.3d 242 (4th Cir. 2005). *Harp* required a court to determine if "*any* defendant charged with that crime could receive a sentence of more than one year." *Id.* at 246.

Relying on intervening Supreme Court precedent, our *Simmons* decision overruled *Harp* and adopted an individualized approach to assessing whether a North Carolina offense constitutes a felony under federal law. *Simmons* explained that a court's determination of such an issue must be based on whether the defendant himself could have "receive[d] a sentence exceeding one year's imprisonment." *See* 649 F.3d at 244. Two years after *Simmons* — and about 21 months after Lesane completed his sentence on his

2003 firearm conviction — we ruled in August 2013 that *Simmons* applies retroactively to cases on collateral review. *See Miller v. United States*, 735 F.3d 141 (4th Cir. 2013).

C.

In December 2019, Lesane was indicted in the Eastern District of North Carolina on multiple federal charges. Pursuant to a plea agreement with the United States Attorney, Lesane pleaded guilty to some of those charges. In June 2020, the district court sentenced Lesane as a career offender to an aggregate of 156 months in prison, plus three years of supervised release. Lesane appealed to this Court in July 2020. Before Lesane filed his appellate brief, the government moved to dismiss Lesane's appeal based on an appeal waiver contained in the plea agreement. In January 2022, we granted the government's motion, dismissing Lesane's appeal as barred by the appeal waiver.

While Lesane's 2019 proceedings were pending, his counsel in that case identified his 2003 firearm conviction and determined that it was invalid under *Simmons*.[2] On May 13, 2020, Lesane filed his coram nobis petition in the district court, seeking to vacate the 2003 conviction. In response, the government commendably conceded that, in the wake of *Simmons*, neither of Lesane's underlying North Carolina offenses qualifies as a felony under federal law.[3] Lesane is therefore actually innocent of the § 922(g)(1) offense of

[2] In this appeal, Lesane contends that his 2003 firearm conviction improperly impacted his sentence in the 2019 proceedings. Because we dismissed Lesane's appeal from that sentence as barred by the appeal waiver, we did not reach the merits of that contention.

[3] Lesane's two North Carolina offenses — possession of cocaine and larceny — each carried a maximum sentence of 10 months. Those offenses are therefore not felonies (Continued)

which he was convicted in 2003. That fact notwithstanding, the government opposed Lesane's coram nobis petition. By its opposition, the government first alleged that Lesane failed to explain why he had not interposed an earlier challenge to his 2003 conviction. Second, the government asserted that Lesane had failed to show any adverse consequences flowing from the 2003 conviction that are sufficient to satisfy Article III's case or controversy requirement.

By its Denial Order of July 21, 2020, the district court rejected Lesane's coram nobis petition. To assess that petition, the court recognized as applicable the four-prong framework we have used in recent coram nobis decisions. That framework requires satisfaction of the following requirements:

> (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.

See Denial Order 2 (quoting *United States v. Akinsade*, 686 F.3d 248, 252 (4th Cir. 2012)). The Denial Order relied solely on the second prong of the applicable framework. More specifically, the Denial Order ruled that Lesane failed to explain why he had not challenged his 2003 firearm conviction earlier, and as soon as *Simmons* was decided in 2011. Lesane timely noted this appeal, and we possess jurisdiction pursuant to 28 U.S.C. § 1291.

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under *Simmons*, and neither could have been used as a predicate for Lesane's 2003 firearm conviction.

II.

The question presented in this appeal is simple: whether Lesane's 2003 conviction for an offense he did not commit should be vacated. In assessing the Denial Order, we review the district court's factual findings for clear error, its rulings on questions of law de novo, and its ultimate decision to deny the coram nobis writ for abuse of discretion. *See Bereano v. United States*, 706 F.3d 568, 575 (4th Cir. 2013). Of course, a court abuses its discretion by committing an error of law. *See United States v. Bartko*, 728 F.3d 327, 338 (4th Cir. 2013).

We begin our analysis by briefly reviewing some history of the ancient writ of coram nobis. We then identify the applicable legal principles. Finally, we apply those principles to Lesane's appeal.

A.

The writ of coram nobis traces its origins to the King's Bench and the Court of Common Pleas, and it dates at least to the Sixteenth Century. *See United States v. Denedo*, 556 U.S. 904, 910 (2009). In England, the prescribed method of appeal was by writ of error. Two such writs were the writ of error generally and the writ of error coram nobis. The former was typically used where the alleged error was of law, and the latter was invoked when the alleged error was of fact. *See United States v. Bush*, 888 F.2d 1145, 1146-47 (7th Cir. 1989).

Traditionally, coram nobis "was allowed without limitation of time" where alleged errors of fact impacted the "validity and regularity of the judgment." *See United States v. Morgan*, 346 U.S. 502, 507 (1954) (internal quotation marks omitted). The coram nobis

writ was used in both civil and criminal cases. *Id.* And it was often used to correct technical or clerical errors. *See Denedo*, 556 U.S. at 911. Other situations where coram nobis relief was granted included cases where the defendant was an infant not properly represented by a guardian, where the common law disability of coverture existed, or where the defendant was insane at the time of trial. *See* Richard B. Amandes, *Coram Nobis — Panacea or Carcinoma*, 7 Hastings L.J. 48, 49 (1955). A defendant was obliged to seek coram nobis relief from the same court — and preferably from the judge before whom the defendant was tried, as that judge would know the case best. *Id.* Moreover, the alleged error "had to be unknown to the court at the time of the trial, not appear on the record, and not be negligently concealed by the defendant." *Id.*

The writ of coram nobis migrated to the United States together with the English common law. Nevertheless, except for "an occasional case in one or two of the southern states, little mention is made of coram nobis after the early 1880's." *See* Amandes, *supra*, at 50. When coram nobis did surface, the writ was used in both state and federal courts and in both civil and criminal matters. *See Morgan*, 346 U.S. at 507-08. With the creation of other mechanisms for correcting factual and clerical mistakes, however, the coram nobis writ became increasingly rare, until the Federal Rules of Civil Procedure — promulgated in 1938 — explicitly abolished coram nobis in civil actions. *See* Fed. R. Civ. P. 60(e); David Wolitz, *The Stigma of Conviction: Coram Nobis, Civil Disabilities, and the Right to Clear One's Name*, 2009 B.Y.U. L. Rev. 1277, 1284 (2009). As to criminal cases, the availability of the coram nobis remedy remained uncertain, "and neither the promulgation of the Federal Rules of Criminal Procedure in 1946 nor the adoption of [the] federal

'statutory habeas' [corpus remedy] in 1948" helped clarify that matter. Wolitz, *supra*, at 1284.

In its seminal *United States v. Morgan* decision in 1954, the Supreme Court resolved the issue of whether a federal district court possesses the power to issue a writ of coram nobis and vacate a criminal conviction after the sentence has been served. *See* 346 U.S. 502, 506, 513 (1954). The *Morgan* Court ruled that the district courts possess such authority, which derives from the All Writs section of the Judicial Code, 28 U.S.C. § 1651(a). *Id*. at 506.

With respect to the scope of the coram nobis writ, the Supreme Court has confirmed that "in its modern iteration coram nobis is broader than its common-law predecessor." *See Denedo*, 556 U.S. at 911. And the Court has further explained that the coram nobis writ "can issue to redress a fundamental error," such as, for example, the deprivation of counsel in violation of the Sixth Amendment. *Id.*

B.

In addition to ruling that the district courts are entitled to issue writs of coram nobis to vacate convictions after sentences have been served, the *Morgan* decision identified the foundational requirements of the writ. As *Morgan* made clear, the "[c]ontinuation 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." *See* 346 U.S. at 511. Furthermore, the extraordinary remedy of coram nobis may not issue when an alternative remedy, such as habeas corpus, is available. *Id.* at 512.

Those coram nobis requirements identified in *Morgan* — extraordinary circumstances compelling relief to achieve justice, plus the unavailability of an alternative remedy — have been applied by our Court. In 1988, we explained in *United States v. Mandel*, one of our earlier coram nobis decisions, that the writ should be granted only when the error is "of the most fundamental character" and no other remedy is available. *See* 862 F.2d 1067, 1075 (4th Cir. 1988) (internal quotation marks omitted). Although the *Mandel* majority did not explicitly identify the now-applicable four requirements of coram nobis, the dissenting opinion did so. *Id*. at 1077 (Hall, J., dissenting). That framework has been adhered to in our circuit post-*Mandel*, and it contains four prongs:

> (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.

See, e.g., *United States v. Akinsade*, 686 F.3d 248, 252 (4th Cir. 2012). The applicable coram nobis framework was recognized by the district court in its Denial Order, and the contentions on appeal relate to two of the four prongs: the second and third. We focus on the requirements for coram nobis relief in a situation where the coram nobis petitioner seeks to vacate a conviction of which he is actually innocent.

1.

To begin, it is important to understand the rationale for limiting the use of the coram nobis writ. The primary reason, of course, is to preserve the finality of judgments. As our Judge Hall emphasized in his *Mandel* dissent, "[a]ll collateral attacks significantly, and detrimentally, impact on society's interest in the finality of criminal convictions." *See* 862

F.2d at 1076 (Hall, J., dissenting). Analogizing coram nobis to habeas corpus, he explained:

> Inroads on the concept of finality tend to undermine confidence in the integrity of our procedures. Moreover, increased volume of judicial work associated with the processing of collateral attacks inevitably impairs and delays the orderly administration of justice. Because there is no limit on the time when a collateral attack may be made, evidentiary hearings are often inconclusive and retrials may be impossible if the attack is successful.

Id. (quoting *United States v. Addonizio*, 442 U.S. 178, 184 n. 11 (1979)).

We recognize that the values of finality, judicial economy, and the expeditious administration of justice are all important. But also of great importance are two other recognized values — justice itself, and accuracy. After all, not much can be said for a criminal justice system that finally, promptly, and cheaply — but erroneously — convicts innocent persons. And, in a collateral proceeding such as habeas corpus, or in a coram nobis proceeding, those interests can be in competition. That is because certain coram nobis proceedings that focus on fundamental errors — e.g., ineffective assistance of counsel — may resemble relitigation of a matter that has been adjudicated.

In a clear case of actual innocence, however, extensive relitigation is not required, the judicial resources to be expended are minimal, and the delay factor is insignificant. The interests of justice and accuracy, on the other hand, are exceptionally strong in those circumstances. As the Supreme Court recognized in *Morgan*, "[i]n behalf of the unfortunates, federal courts should act in doing justice if the record makes plain a right to relief." *See* 346 U.S. at 505. Consistent therewith, we have emphasized — in a habeas corpus proceeding involving an actual innocence claim similar to Lesane's — that "[j]ust

as the criminal justice system must see the guilty convicted and sentenced to a just punishment, so too it must ferret out and vacate improper convictions." *See United States v. Adams*, 814 F.3d 178, 185 (4th Cir. 2016).[4]

In other words, there is very little good reason for maintaining an invalid criminal conviction on a person's record. As one commentator astutely observed, the injustice resulting from an invalid conviction "is not a concern only to the individual who bears its brunt; it is a major failure of a justice system." *See* Wolitz, *supra*, at 1324. A court's failure to vacate such a conviction will not inspire confidence in the criminal justice system. And the government's opposition to such a petition can be perplexing. The prosecution's interest, after all, "is not that it shall win a case, but that justice shall be done." *See Berger v. United States*, 295 U.S. 78, 88 (1935).

2.

With those principles in mind, we turn to the analytical framework that the district court applied to Lesane's coram nobis petition. We first examine the origin of that framework in our circuit. We then discuss how that framework applies when the coram nobis petitioner is actually innocent of the challenged conviction.

[4] In the context of denying coram nobis relief, "[i]t is hard to overstate the basic injustice here: the state prosecutes you, convicts you, imprisons or otherwise punishes you, all on a misreading of the criminal statute, and then the court refuses to vacate the conviction because" you waited too long, or because you are not suffering from a sufficiently serious injury. *See* Wolitz, *supra*, at 1324.

a.

As explained above, one of our earliest and most significant decisions concerning coram nobis relief — the *Mandel* case — did not explicitly utilize the four-prong framework, unlike the dissent in that decision.[5] In *Mandel*, the petitioners were charged with multiple counts of mail fraud, in contravention of 18 U.S.C. § 1341, plus racketeering, in violation of 18 U.S.C. § 1961. *See* 862 F.2d at 1068. The trial court instructed the jury that "[a] citizen's right to have his Government conducted honestly and impartially and to the faithful and loyal services of public officials, are things of value whose fraudulent deprivation may fall within the meaning of scheme to defraud as used in the mail fraud statute." *Id.* at 1070. And the sole theory of the prosecution, as presented to the jury, authorized the conviction of former Governor Mandel, and his codefendants, for defrauding the citizens of Maryland of the honest and faithful services of Mandel himself. *Id.* at 1073-74. The jury then convicted Mandel and his codefendants of mail fraud and racketeering. *Id.* at 1070.

Ten years later, the Supreme Court decided *McNally v. United States*, which upended *Mandel* by ruling that the mail fraud statute, 18 U.S.C. § 1341, does not cover schemes to defraud people of their intangible rights, such as the right to honest government. *See* 483 U.S. 350, 352, 361 (1987). Based on *McNall*y, the *Mandel* majority resolved that the coram nobis petitioners "were convicted for conduct we now know is not within the

[5] In another early opinion analyzing the coram nobis writ — *Mathis v. United States* in 1966 — our Court also did not expressly apply the four-prong framework for assessing a coram nobis petition. *See* 369 F.2d 43 (4th Cir. 1966).

reach of § 1341." *See Mandel*, 862 F.2d at 1072 (internal quotation marks omitted). As our friend Judge Widener related in *Mandel*, "[w]e follow the Second Circuit, which . . . has specifically allowed the granting of a writ of error coram nobis in light of a retroactive dispositive change in the law of mail fraud." *Id.* (citing *United States v. Travers*, 514 F.2d 1171 (2d Cir. 1974)). His majority opinion then explained that

> it is clear to us that if this case were before us on direct appeal we would be required to overturn all the convictions. The issue here, however, is whether coram nobis relief is appropriate in this case. We think that it is required in order to achieve justice.

Id. at 1074. The *Mandel* Court thus vacated the mail fraud convictions entered 10 years earlier. *Id.* Additionally, it vacated the racketeering convictions because they were premised solely on the mail fraud offenses. *Id.*

Judge Hall's dissenting opinion, on the other hand, emphasized that Governor Mandel's conduct — taking bribes totalling about $380,000 — was yet criminal, and that if the jury had been instructed on a proper alternative theory, Mandel and his codefendants would have been convicted. *See Mandel*, 862 F.2d at 1078-79 (Hall, J., dissenting). The dissent distinguished the Second Circuit's decision, explaining that, in *Travers*, "the intervening change in law left no grounds for sustaining the conviction." *Id.* at 1077. Judge Hall emphasized that — unlike the *Mandel* prosecution — the situation in *Travers* was such that justice "clearly" compelled issuance of coram nobis relief "because Travers had committed no crime." *Id.*

The circumstances of this appeal are somewhat analogous to those described in *Mandel*, in that Lesane was convicted of conduct that the relevant statute does not

criminalize. But a material difference between *Mandel* and the present case is that Lesane's conduct was not criminal under any theory, while the conduct of the defendants in *Mandel* may well have been criminal under an alternative theory. Unlike the situation in *Mandel*, Lesane's actual innocence is clear and undisputed.

Two other significant decisions of our Court that have addressed the coram nobis remedy — applying the four-prong framework — also did not deal with actual innocence. In *Akinsade*, we faced a situation where the petitioner sought coram nobis relief based on ineffective assistance of counsel. *See* 686 F.3d at 250. And our decision in *Bereano v. United States* dealt with a situation where a general verdict of guilty rested on two alternative theories of prosecution — one that was valid and another that was constitutionally invalid. *See* 706 F.3d at 575-77. The circumstances of Lesane's case, by contrast, present a simple and undisputed case of actual innocence, which we have not heretofore addressed.

b.

With that background, we examine the prongs of the four-prong framework and their application in a situation where the coram nobis petitioner is actually innocent of the challenged conviction. The first prong requires that a more usual remedy be unavailable, and the fourth prong mandates that the error be "of the most fundamental character." *See Akinsade*, 686 F.3d at 252. Both those prongs are foundational. *See Morgan*, 346 U.S. at 511-12; *Mandel*, 862 F.2d at 1075.

The third prong similarily needs little explanation. It requires a showing of adverse consequences stemming from the challenged conviction, sufficient to satisfy the case or

controversy requirement of Article III. *See Akinsade*, 686 F.3d at 252. To be sure, the necessity of satisfying the Article III requirement cannot be doubted in any case, including in the context of coram nobis.[6]

Finally, the second prong requires the petitioner to have valid reasons for not pursuing an earlier attack on his conviction. *See Akinsade*, 686 F.3d at 252. That requirement — essentially one of timeliness — compensates for the fact that there is no applicable statute of limitations for initiating a coram nobis petition. And that requirement aims to preserve the finality of judgments and encourage promptness on the part of a coram nobis petitioner. In an actual innocence case, the second prong thus places the burden of showing timeliness — or explaining the lack thereof — on a petitioner who has fully served his sentence for a crime he did not commit.

Assessing the timeliness requirement in the context of actual innocence, we view the special treatment accorded actual innocence in habeas corpus proceedings as being instructive. The Supreme Court recently recognized that "actual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar . . . or, as in this case, expiration of the statute of limitations." *See McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013). In its *McQuiggin* decision, the Court ruled that AEDPA's statute of limitations can be overcome by a showing of actual

[6] We have no reason to interpret the adverse consequences prong to require more than what is required by Article III. Our precedent supports that position. *See Mathis v. United States*, 369 F.2d 43, 48 (4th Cir. 1966) (explaining that "it would be anomalous at this date to read into coram nobis a stringent requirement that the petitioner show a 'present adverse effect'").

innocence. *Id.* Nevertheless, the Court deemed relevant the existence of unjustified delay in the petitioner's efforts to obtain habeas corpus relief based on a showing of actual innocence. As the Court explained, "a federal habeas court, faced with an actual-innocence gateway claim, should count unjustifiable delay on a habeas petitioner's part, not as an absolute barrier to relief, but as a factor in determining whether actual innocence has been reliably shown." *Id.* at 387.

The Supreme Court's approach to an "unjustifiable delay" in pursuing habeas corpus relief based on actual innocence should also inform our analysis of the timeliness requirement for coram nobis proceedings where the petitioner is actually innocent. And we are satisfied that, when a coram nobis petitioner presents a persuasive claim of actual innocence, a failure to explain a lack of effort in seeking relief earlier can be relevant, but will not categorically preclude the writ. Moreover, if the petitioner is clearly innocent of the offense being challenged, untimeliness should not ordinarily bar relief.

C.

We next assess Lesane's coram nobis petition under the guiding principles we have outlined. As explained, the parties — Lesane and the government — do not dispute that Lesane is actually innocent of his 2003 firearm conviction. And they also do not dispute that Lesane satisfies the first and fourth requirements of the coram nobis writ — again, the unavailability of a more usual remedy and the "most fundamental character" of the error. On the first prong, there is no other remedy available to Lesane, in that he has fully served his sentence and can no longer pursue habeas corpus relief. And on the fourth prong, it is difficult to imagine an error of a more fundamental character than a conviction for an

offense the person did not commit. *See, e.g.*, *McQuiggin*, 569 U.S. at 392 (explaining that fundamental miscarriage of justice occurs when innocent person is convicted). We therefore focus on the only other requirements of coram nobis relief: timeliness (the second) and adverse consequences (the third).

1.

As for the second prong, the Denial Order ruled that Lesane failed to show valid reasons for not making an earlier attack on his 2003 firearm conviction. Because this is a clear case of actual innocence, however, a delayed coram nobis petition should not ordinarily bar relief. We therefore evaluate two related points: first, the impact of Lesane's failure to seek habeas corpus relief when he was in custody on his 2003 conviction; and second, the impact of Lesane's delay in pursuing coram nobis relief after completion of that sentence.

a.

The district court concluded that Lesane failed to explain why he had not sought habeas corpus relief between August 17, 2011 — when *Simmons* was decided — and November 29, 2012, when Lesane was released from custody. Having reviewed the record and the parties' contentions, we are satisfied that the court erred in that assessment.

First, the district court erred in finding that Lesane completed his sentence for his 2003 firearm conviction on November 29, 2012. It is clear that the district court revoked Lesane's supervised release on December 17, 2009, and sentenced Lesane to 24 more months of imprisonment. Lesane would therefore have served his sentence by December 17, 2011, at the latest. And he actually completed his sentence on November 28, 2011.

The government erroneously advised both the district court and this Court that Lesane was not released from prison until November 29, 2012 — about 21 months after we decided *Simmons*. What the government failed to tell us is that the November 29, 2012 release date related to misdemeanor offenses that had nothing to do with Lesane's 2003 firearm conviction. To confuse matters further, the government emphasized in its appellate brief that Lesane was yet on supervised release — albeit for those unrelated misdemeanors — on November 28, 2013, three months after the *Miller* decision made *Simmons* retroactive. The relevance of that information to Lesane's 2003 conviction or to his coram nobis petition is unclear. The goal of providing it, however, seems apparent: to argue that, after *Simmons* was rendered, Lesane actually had 21 months — not just three months — to seek habeas corpus relief. But obviously, Lesane could not have properly filed a habeas corpus petition to vacate his 2003 conviction after he had fully served his sentence on that conviction, even if he was in custody for a different offense. *See Maleng v. Cook*, 490 U.S. 488, 490-91 (1989) (recognizing that "the habeas petitioner [is required to] be 'in custody' under the conviction or sentence under attack at the time his petition is filed").

Second, the district court erred in its conclusion that Lesane should have sought habeas corpus relief as soon as we decided *Simmons* in 2011, which was three months before he completed his sentence on the 2003 firearm conviction. Again, the rule of *Simmons* was not made retroactive to cases on collateral review until our August 2013 decision in *Miller*. And that ruling was made some 21 months after Lesane had completed his sentence on his 2003 conviction. Lesane was therefore never entitled to habeas corpus relief based on the *Simmons* rule, in that he was no longer in custody when that rule was

made retroactive by *Miller*. And it would hardly be fair to deny Lesane coram nobis relief because of his failure to initiate a doomed habeas corpus petition during the final three months of his sentence on the 2003 conviction.

b.

Additionally, the Denial Order asserted — and the government insists — that Lesane could have pursued coram nobis relief at an earlier date. Lesane was, after all, released eight years before he filed his coram nobis petition.[7] In analyzing the final prong, our decision in *Akinsade* is instructive. There, we vacated a nine-year old conviction by awarding coram nobis relief. *See United States v. Akinsade*, 686 F.3d 248, 256 (4th Cir. 2012). And while the *Akinsade* petitioner could have sought relief based on his ineffective assistance of counsel claim much sooner, we recognized that he had no reason to do so until it became clear — years later — that his challenged conviction placed him at a serious risk of deportation. *Id.* at 252. Similarly here, Lesane did not have a specific reason to challenge his 2003 firearm conviction prior to his 2019 criminal proceedings, in which — as he contends — that conviction was being used to enhance his sentence. *See supra* note 2.

The government correctly emphasizes that Lesane's 2003 firearm conviction was not his only experience with the criminal justice system. It points to Lesane's 2012 misdemeanor conviction in the Western District of Virginia and his 2016 guilty plea to a

[7] Importantly, although the government faults Lesane for the delay, it does not maintain that it suffered any harm therefrom.

felony assault in North Carolina. And it argues that Lesane's counsel in those cases should have identified for Lesane that his 2003 conviction was invalid. The gist of the government's argument, then, is that it is now too late for innocence to be recognized. Lesane, in response, explains that those subsequent offenses are unrelated and irrelevant in his current proceedings, and that his 2003 conviction did not come to the attention of his lawyer until it was being used to enhance his sentence in his 2019 proceedings.

Having considered the competing contentions, we have no reason to rule against Lesane on the second coram nobis prong. In an ideal world, of course, Lesane would have promptly identified the *Simmons* and *Miller* decisions, as well as their impact on his 2003 firearm conviction, and he would have filed his coram nobis petition soon after *Miller* was rendered. We also recognize that, in the ideal world, Lesane would not have been invalidly convicted in 2003. We are therefore satisfied that the second coram nobis requirement does not bar relief.

2.

Finally, we assess the government's alternative contention that we should affirm the Denial Order because Lesane has failed to show that he satisfies the third coram nobis prong. The government insists in that regard that Lesane has not suffered adverse consequences sufficient to satisfy the case or controversy requirement of Article III, as a result of having a felony conviction on his record for a crime he did not commit. The government is incorrect.

The Supreme Court has recognized, in the context of coram nobis proceedings, that "the results of the conviction may persist. Subsequent convictions may carry heavier

penalties, civil rights may be affected." *See Morgan*, 346 U.S. at 512-13 (citing *Fiswick v. United States*, 329 U.S. 211, 222 (1946)). In this circuit, we have found the third prong satisfied where the invalid conviction resulted in a threat of deportation, *see Akinsade*, 686 F.3d at 252, and where the challenged conviction led to a disbarment, *see Bereano*, 706 F.3d at 576. Those consequences are very serious, but there is no precedent suggesting that lesser consequences should fail to satisfy the Article III case or controversy requirement. In fact, Judge Widener believed in *Mandel* that simply being "branded as criminals" was sufficiently serious. *See* 862 F.2d at 1075. Moreover, the government has not offered any precedent — and we have found none — where we have ruled against a coram nobis petitioner based on a failure to show adverse consequences from a challenged conviction.

Nevertheless, the government argued before us that Lesane cannot show adverse consequences from his 2003 firearm conviction because he has other convictions on his record. In other words, the government suggests that, because Lesane has a criminal record, it should not make any difference that one of his convictions is for a crime he did not commit. We will not endorse that proposition.

In any event, Lesane does not contend that his adverse consequences stem from being labeled a "criminal" in the abstract. He argues that his 2003 firearm conviction

adversely impacted the sentence he received in his 2019 proceedings.[8] We need not resolve Lesane's contention regarding the impact of his 2003 conviction in the 2019 proceedings. But the possibility that a conviction for a crime that Lesane did not commit impacted his subsequent sentence — or will affect a sentence in some future case — is sufficient to satisfy the third coram nobis prong.

Our reasoning is supported in spades by the Ninth Circuit's important decision in *Hirabayashi v. United States*, 828 F.2d 591 (9th Cir. 1987). There, an American citizen of Japanese ancestry sought coram nobis relief based on newly discovered evidence of government misconduct, asking for vacatur of misdemeanor convictions for violating orders imposed by the government during World War II that required Japanese-Americans to follow strict curfews and report to civilian control stations. *Id.* at 592-93. The government — 40 years after World War II — opposed Hirabayashi's petition for coram nobis relief, asserting that he failed to show adverse consequences from those convictions sufficient to satisfy the case or controversy requirement of Article III. *Id.* at 605.

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[8] For purposes of his sentence in the 2019 proceedings, Lesane's 2003 firearm conviction was scored as being worth three criminal history points. Lesane contends in this appeal that if he

> were to prevail on his argument that he should not have been sentenced as a career offender in that case and his conviction in this case were vacated, his criminal history category in that case would go from VI to IV and his advisory guideline range would drop from 151 to 188 months to fifty-seven to seventy-one months.

See Br. of Appellant 11. If that proposition is accurate, the United States Attorney may be obliged, pursuant to *Berger v. United States*, to take remedial action. *See* 295 U.S. 78, 88 (1935).

Remarkably, when Hirabayashi filed his coram nobis petition, he was a university professor, and it did not appear that his wartime convictions had seriously impacted his post-war life. *Id.* at 592. But the court of appeals soundly rejected the government's contentions. Approaching the Article III issue as one of mootness, the court explained that there is a presumption that collateral consequences flow from any criminal conviction. *Id.* at 606. And it recognized that "'a criminal case is moot only if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction.'" *Id.* (quoting *Sibron v. New York*, 392 U.S. 40, 57 (1968)).

We are persuaded by the sound reasoning of the Ninth Circuit. And we are also satisfied that the possibility that Lesane's invalid 2003 firearm conviction has actually impacted his sentence in the 2019 proceedings — or will affect a future one — is sufficient to satisfy the third coram nobis prong.[9]

* * *

Our analysis thus leads us to conclude that Lesane has satisfied the requirements for coram nobis relief and that the district court abused its discretion in denying the writ. We emphasize that an essential purpose of the coram nobis remedy, as Judge Widener explained in *Mandel*, is to "achieve justice." *See* 862 F.2d at 1074. In order to achieve

[9] We also observe that Lesane's sentence on the 2003 firearm conviction included a $100 special assessment. We need not and do not decide whether that fact alone satisfies the third prong of the coram nobis framework. We acknowledge, however, that in the context of standing — which requires a demonstration of actual injury — at least one of our sister circuits has ruled that such a special assessment establishes standing to pursue habeas corpus relief where the petitioner's success on the merits would not impact the length of incarceration. *See Dhinsa v. Krueger,* 917 F.3d 70, 73 (2d Cir. 2019).

justice in this situation — where it is clear that the coram nobis petitioner is actually innocent, yet spent several years in custody for an offense he did not commit — we are obliged to set the record straight.

III.

Pursuant to the foregoing, we reverse the judgment of the district court and remand for an award of coram nobis relief.

REVERSED AND REMANDED