No. 18-10089

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DAVID NOSAL,
Defendant-Appellant.

On appeal from the United States District Court
for the Northern District of California

District Court Case No. CR 08-0237 EMC
The Honorable Edward M. Chen
United States District Judge

APPELLANT'S REPLY BRIEF

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I.

INTRODUCTION

The government's argument rests precariously upon numerous misguided impressions and misinterpretations of the case. For instance, on nearly every page, the government describes the sentence imposed by the District Court as "below-Guidelines." While this is superficially true, the government fails to acknowledge the ambiguity and malleability of the Guidelines as applied to the present case. Calculating the Guidelines range was hardly a routine matter for the parties below; they argued at length, over the course of many months and many briefs, about the proper loss calculation. Indeed, despite the government's best efforts to show otherwise, there was never proof that Nosal reaped any tangible gain from these claimed thefts. In the end, the Guidelines calculation was essentially arbitrary, and the District Court's decision to impose a one-year-and-one-day sentence was, in some sense, a rejection of the Guidelines' significance, as applied to this case.

Another major fallacy permeating the government's brief is the insistence that the situation presented here is easily comparable to other cases. Nosal agrees with the government that there is little authority directly on point, but that's to be expected considering the rarity with which a situation like Nosal's would arise in the courts. This is a case of first impression, but that should in no way undermine the importance of Nosal's claims.

The government's position is one of denial and avoidance of the real issues. Contrary to the government's contorted interpretation of the District Court's sentencing analysis, general deterrence was the only real consideration in that court's imposition of a custodial sentence. The government's refusal to investigate Korn-Ferry's acts—its willful blindness in the face of these accusations—totally undercuts the District Court's general deterrence approach. The government's irresponsible approach to Korn-Ferry's criminal activity illustrates the preferential treatment that Korn-Ferry receives. This sort of approach to justice should be roundly rejected by any reviewing Court, including this one.

II.

ARGUMENT

A. The government's continued insistence that Nosal is categorically ineligible for Coram Nobis relief because he has not served his sentence is wrong; no other remedy was available.

The primary thrust of the government's argument is that, at the time Nosal filed his petition, he was precluded from seeking a writ of error *coram nobis* because he had not yet completed his sentence. As Nosal pointed out, however, that is a misreading of the law. To obtain *coram nobis* relief, a defendant must show only that no other more ordinary remedy remains available. As a practical matter, there are very few sets of procedural circumstances that would give rise to such a situation, and the most common one is clearly following the completion of

one's sentence. But Nosal's case presents a very unique set of facts—perhaps one of the only other conceivable procedural positions that would give rise to the need for *coram nobis*.

The government misleadingly cites authority to suggest that there is only one situation in which *coram nobis* relief is available. For example, the government asserts "*Coram nobis* relief is available only to a petitioner who 'has served his sentence *and* is no longer in custody.'" *Govt. Ans. Brief* at 12 (quoting *Estate of McKinney v. United States*, 71 F.3d 779, 781 (9th Cir. 1995). The government's use of the word "only" is unsupported by the actual citation: "The writ of error *coram nobis* affords a remedy to attack a conviction when the petitioner has served his sentence and is no longer in custody." *McKinney*, 71 F.3d at 781. The language employed in *McKinney* does not limit *coram nobis* to such situations in which the petitioner has completed his or her sentence; it merely establishes that specific application of the writ. The government cites a handful of other cases ostensibly for the same proposition, but while all of these cases reaffirm the principle that *coram nobis* is available to petitioners who have completed their sentences, none of the cases contain language purporting to *limit* coram nobis *to only those situations*. *See United States v. Chan*, No. 16-55469, 2018 WL 1835321 (9th Cir. Apr. 18, 2018) (unpublished); *United States v. Monreal*, 301 F.3d 1127 (9th Cir. 2002); *Matus-Leva v. United States*, 287 F.3d 758 (9th Cir. 2002); *United States v.*

Mett, 65 F.3d 1531 (9th Cir. 1995); *Telink, Inc. v. United States*, 24 F.3d 42 (9th Cir. 1994); *Hirabayashi v. United States*, 828 F.2d 591 (9th Cir. 1987); *United States v. Brown*, 413 F.2d 878 (9th Cir. 1969).

The government also cites *United States v. Span*, 75 F.3d 1383, 1386 n. 5 (9th Cir. 1996) for the proposition that Nosal could have filed a habeas petition pursuant to *28 U.S.C. §2255* before he surrendered to the U.S. Marshal to begin serving his custodial sentence. The government did not previously make this argument before the District Court, but in any event, it is equally unavailing. In *Span*, the defendants were sentenced to probation, which the Ninth Circuit held met the "in custody" requirement of *section 2255*. *Id*. As such, the Ninth Circuit construed the defendants' *coram nobis* petition as a habeas petition. *Id*. at 1386 ("Coram nobis relief is available only if, inter alia, "a more usual remedy is not available." *Hirabayashi v. United States*, 828 F.2d 591, 604 (9th Cir. 1987). In this case a more usual remedy, under section 2255, is available. We thus convert the Spans' *coram nobis* petition into a section 2255 petition.") Nosal's case is different in that his sentence was not yet imposed at the time he filed his petition for writ of error *coram nobis*. Moreover, to the extent the District Court had the authority to "convert" his *coram nobis* petition to a *section 2255* petition, it did not do so, and the government made no request to that effect.

B. Contrary to the government's position, Nosal meets all the requirements for *coram nobis* relief.

1. At the time he filed his petition, Nosal had no other means of obtaining relief; the rarity of the circumstances of the present case should support relief, not serve as a means to deny it.

Practically speaking, the use of *coram nobis* relief is generally going to be confined to cases in which the defendant has served his or her sentence, but as stated above, there is nothing written into the doctrinal foundation for the writ that so limits it. The reason it has historically been employed after defendants have completed their sentences is due to the requirement that the defendant must not have available to them a "more usual remedy." *Hirabayashi v. United States*, 828 F.2d 591, 604 (9th Cir. 1987). There are few procedural postures in which a defendant can find him or herself for which there are no other "more usual remedies" available. This case provides a rare alternative set of circumstances in which all of the requirements for *coram nobis* relief are met, despite the fact that the defendant has not served his sentence.[1]

[1] As Nosal previously pointed out, cases involving corporate defendants also contemplate *coram nobis* relief, notwithstanding the lack of a custodial sentence. *See e.g.*, *United States v. Mett*, 65 F.3d 1531 (9th Cir. 1996); *Polizzi v. United States*, 550 F.2d 1133, 1135 (9th Cir. 1976). The government rejects the analogy, but offers no means of distinguishing between the two situations, except to say that the present case involves an individual, whereas *Mett* and *Polizzi* relate to corporate defendants, which is integral to the point that Nosal was making, which is that there are situations in which *coram nobis* lies even in the absence of a custodial sentence.

The government insists that Nosal should have filed a petition for writ of habeas corpus; however, this position rests upon the fallacious premise that *coram nobis* is only available when the defendant has completed his or her sentence. At the time Nosal filed his petition, he was not in custody and, therefore, could not have filed a habeas petition. Furthermore, considering that the remedy he sought was relief from the custodial portion of the sentence, there was no reason why Nosal should be forced to wait until he began serving that sentence to challenge it. The only avenue for relief available to Nosal at the time was the writ of error *coram nobis* or other writ relief available pursuant to the All Writs Act (28 U.S.C. § 1651). Indeed, as the government observed in its brief, "'[C]ommon law writs such as . . . *coram nobis* survive only to the extent that they fill gaps in the current systems of postconviction relief.'" *Govt. Ans. Brief* at 17 (Quoting *Carrington v. United States*, 503 F.3d 888, 890 (9th Cir. 2007).) This case presents such a gap.

2. The government argues again that Nosal could have raised this issue earlier; however, the scope of Korn-Ferry's illegal acts was not known to Nosal until recently and remains obscure even today due to the government's inaction.

One of the persistent positions taken by the government is that Nosal could have raised this issue sooner and, in fact, did raise this issue at trial. First of all, to the extent that Nosal raised this general issue at trial, it pertained to a separate allegation of misconduct on Korn-Ferry's part. Nosal presented that earlier misconduct in an effort to contest his guilt during the trial—a totally different

objective than that for which Nosal raises the issue in these post-sentencing proceedings. Nosal's purpose for bringing his petition for writ of error *coram nobis* was to demonstrate that the District Court's general deterrence rationale for the sentence it imposed was flawed; he does not contend that Korn-Ferry's subsequent misconduct negates his conviction. Furthermore, there was no way to raise on direct appeal the specific issue Nosal presented in his petition because the post-sentencing conduct by Korn-Ferry had not yet come to light.

Perhaps the most astonishing aspect of the government's argument—and the most telling—is the fact that the government refuses to acknowledge that Korn-Ferry committed any illegal act—or even accept any responsibility for its failure to act, as the lone entity capable of investigating and prosecuting Korn-Ferry. Throughout these proceedings, the government persistently argues that the complaints filed by Spencer Stuart are only allegations and nothing more. *See e.g.*, *Govt. Ans. Brief* at 21 ("Allegations in a complaint are not evidence.") This underscores the government's hypocrisy.

Nosal understands that accusations made in a civil complaint are not, by themselves, sufficient to justify prosecution and conviction; however, only the government has the capacity and the resources to investigate these allegations and, if necessary, bring appropriate charges against Korn-Ferry. After all, the statute of limitations for these offenses has not yet run. Nosal's counsel attempted to obtain

more information about Spencer Stuart's claims, but was unable to do so because the cases were settled pursuant to non-disclosure agreements. The government's passivity in the face of Spencer Stuart's accusations is alarming. That the government would expend vast resources to prosecute an individual such as Nosal (despite the fact that there was no demonstrable showing of harm to Korn-Ferry or gain by Nosal due to Nosal's alleged conduct), but fail to so much as lift a finger to investigate a major multinational corporation like Korn-Ferry amid these accusations of decidedly more egregious conduct totally destroys any notion of general deterrence. How can general deterrence be a meaningful basis for sentencing a defendant if the government is going to blatantly ignore allegations as serious and seemingly provable as those made by Spencer Stuart?

3. The fundamental error Nosal seeks to correct is the erroneous rationale for the District Court's decision to impose a custodial sentence; the need for general deterrence is irrelevant when (1) Korn-Ferry—the "victim" in this case—commits the same acts and (2) the government not only turns a blind eye to Korn-Ferry's actions, but intentionally avoids investigating them while actively assisting Korn-Ferry in recovering restitution in this case.

The District Court primarily rejected Nosal's petition on the basis that it believed Nosal failed to demonstrate an "error of the most fundamental character" underlying his sentence. The government quotes the District Court for the proposition that, "Nosal's argument, carried 'to its logical conclusion,' was 'actually perverse': "The idea that if there is bad conduct [by] the victim, that that

should lessen the penalty paid by the perpetrator, and so everybody kind of gets off rather than everybody gets punished.'" *See Govt. Ans. Brief* at 19-20 (quoting ER 153). The District Court's reasoning would carry some weight but for the government's refusal to uphold its duty to investigate and prosecute similar crimes. To charge and convict one individual, while permitting corporations to operate lawlessly, is a bold exhibition of capriciousness on the part of the government.

When the District Court sentenced Nosal, it did so under the mistaken belief that the government would take seriously its responsibility to prosecute other similarly situated parties, just as it had done with Nosal. The general deterrent effect of a sentence is only effective if the laws are routinely and fairly enforced. This is the primary premise upon which the concept of general deterrence rests. Without ongoing enforcement of the law, general deterrence is a hollow concept.[2] Of course, had the government taken action to investigate and, if necessary, prosecute Korn-Ferry, Nosal's argument would be moot, but the government's own statements at the hearing before the District Court reveal that it has made no effort to explore these accusations to determine whether a prosecution is in order:

[2] The government misleadingly characterizes Nosal's argument as "an attack on the principle of general deterrence itself," and claims that Nosal referred to general deterrence as a "philosophical fallacy." *See Ans. Brief* at 23. This is a gross misstatement of Nosal's position. Clearly, a criminal sentence can, and often does, have some general deterrence value; however, under circumstances like those in the present case, where there is no assurance of routine and fair investigation and prosecution for similar crimes, attempting to achieve any sort of general deterrent effect is a futile gesture.

> The reality is the Government's not conceding criminal conduct in any way, shape, or form. We know very little about it. We know there was a civil case brought in 2016. It was settled very quickly -- 2017, rather, for conduct in 2016 -- that was settled very quickly. There was no referral to law enforcement by any party involved. That's pretty much all we know about that.

See ER 151:15-21. This is a clear admission by the government that it has taken no independent action to investigate the Spencer Stuart accusations. That is not a justifiable position for a prosecutor's office to take. If a prosecutor learns of potential criminal misconduct—especially if it's being perpetrated by a "victim" for whom the prosecutor is still working to obtain restitution—it has a duty to take action. The prosecutor's office cannot stay passive, waiting on a "referral to law enforcement."

The government goes to great lengths to explain the "special significance" that general deterrence considerations carry in the "white collar context." Again, Nosal has no quarrel with the basic concept of general deterrence and its role in all criminal sentencing, not just for white collar crimes. Indeed, the government cites case law emphasizing the incontestably prominent role that general deterrence plays in the criminal justice system. *See Ans. Brief* at 25 (quoting *United States v. Barker*, 771 F.2d 1362, 1368 (9th Cir. 1985). But as Nosal has repeatedly stated, the efficacy of general deterrence is dependent upon the government's prosecutorial role. The enforcement of the laws is the pillar holding the entire system up, and if the government ceases investigating and prosecuting criminal

activity, it collapses. The District Court imposed the custodial sentence in this case with the understanding—now proven to be demonstrably false—that the government would continue investigating and prosecuting other offenders for similar crimes.

Citing a statement made in a blogpost, the government contends that the failure of the sentence to deter Korn-Ferry's subsequent illegal actions suggests that the "sentence was too short, not too long." *See Govt. Ans. Brief* at 22. This is an absurd argument, for proportionality is an even more vital sentencing consideration than general deterrence. No doubt a more draconian sentence—e.g., 25 years, life in prison, the death penalty, etc.—could produce a more pronounced deterrent effect, but no one would contend that such sentences would be proportionate to the offense (not to mention they would violate the Eighth Amendment).

The government also argues that the District Court's reasoning did not purely revolve around the notion of general deterrence, but was also based on the need for retribution. Again, this misses the point. It is beyond dispute that, of the common philosophical justifications for punishment, two of them, specific deterrence and incapacitation, were not at issue, leaving only general deterrence, retribution, and rehabilitation. Obviously, there was also no rehabilitative rationale for imprisoning Nosal; both the court and the government agreed was not likely to

commit any crimes in the future, and any need for rehabilitation was accomplished through the imposition of 400 community service hours, an aspect of the sentence Nosal has never challenged.

To the extent the government sought retribution through the sentence, it achieved that goal through the imposition of a heavy fine. After all, if pecuniary penalties are sufficient to punish corporations that commit these same crimes, they should also be sufficient to punish an individual. It is wrong to subject Nosal, an individual, to both a fine and a prison sentence, meanwhile, a corporation that carries out a similar criminal act is subject only to a fine (or, in the case of Korn-Ferry's crimes against Spencer Stuart, no penalty at all). So, even assuming the government were correct about the court's invocation of retribution, it would still not necessitate sending Nosal to prison. Notably, Nosal did not seek, through the filing of his petition for writ, to remove all of the penalties imposed by the District Court; he sought only to have the court reconsider and vacate the prison sentence, which was specifically tied to the court's stated desire for general deterrence.

It is apparent in the record that general deterrence was the driving force behind the court's decision to impose a custodial sentence. The revelation that the government intentionally refused to investigate, let alone prosecute, Korn-Ferry demonstrates the empty promise of general deterrence in this case. The failure to investigate Korn-Ferry cannot be written off as a matter of prosecutorial discretion,

either. Had the government, upon learning about the Spencer Stuart complaints, actually sought additional information about the case and actively investigated it, then perhaps, it may have a basis to invoke the concept of prosecutorial discretion, depending on the nature of the evidence. But here, the government maintains that it knows nothing about the case aside from what is written in the complaints.[3]

At this time, Nosal has already served one-third of his prison sentence (approximately four months). During that time, he has missed his son's wedding and had to witness, from a distance and locked behind bars, as the rapid decline of his mother's health led to her admission into hospice care just last month.[4] These are heavy prices to pay for the offenses for which he was convicted—offenses for which Nosal received no measurable benefit and Korn-Ferry suffered no identifiable loss, other than time spent by employees investigating the "theft." Korn-Ferry, by contrast, instigated the flight of two high-ranking employees from Spencer Stuart, both of whom brought with them a wealth of confidential and proprietary information. Rather than be punished, those two individuals now hold

[3] Of course, another facet of Nosal's argument is his contention that the government has a *Brady* obligation to turn over any information it has related to Korn Ferry's illegal actions. The government continues to assert that it does not have any information about Korn Ferry. *See Govt. Ans. Brief* at 37-38. If this is true, it is only due to the government's willful blindness, and if it turns out that the government does, in fact, possess information regarding Korn Ferry's misconduct, then it would be a violation of *Brady*, as well as an act of sheer dishonesty.

[4] Doctors believe that Nosal's mother suffered a severe stroke; however, they cannot currently verify whether or not she had a stroke without subjecting her to an MRI, which the doctors have advised against at this time.

prominent positions with Korn-Ferry, and neither they, nor the company at large, have suffered any consequences whatsoever. And rather than investigate or prosecute Korn-Ferry, the government has instead continued to assist the company in obtaining restitution from Nosal. This series of events reflects a grave miscarriage of justice, an error of the most fundamental character, and, as such, should be rectified by this Court through the issuance of a writ of error *coram nobis*, or whatever other writ relief this Court may deem appropriate.

III.

CONCLUSION

For the foregoing reasons, this Court should remand the case to the District Court with orders to grant the writ and strike the custodial portion of Nosal's sentence.

Respectfully submitted,

Dated: July 18, 2018

By: /s/ Steven F. Gruel
STEVEN F. GRUEL, ESQ.
Attorney for Appellant
DAVID NOSAL

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