provision in the New York Criminal Code mandated that any subsequent repetition of that misdemeanant conduct (possession of burglary tools) by Sibron would thereafter be treated as a felony. 392 U.S. at 56 & at 48 fn. 5. That kind of specific legislative penalty enhancement is not present in this case. In contrast, the mere speculative possibility that "the sentence imposed in a future criminal proceeding, could be affected" not only by the underlying conduct (which a federal judge is always free to consider, see 18 U.S.C. § 3577), but additionally by the judgment of conviction, was recently reconsidered in Lane v. Williams, 455 U.S. 624, 632 (1982) and rejected over Justice Marshall's dissent on that very point, 455 U.S. at 637.

Furthermore, the record in this case shows that this conviction is not within the Sibron rule because it is not like "most criminal convictions" which we readily concede ordinarily entail adverse consequences. Most criminal convictions, however, either involve a felony with its concomitant loss of civil rights, or involve moral turpitude, or are malum in se, or involve statutory crimes which have not long ago been legislatively repealed and discredited. They do not commonly involve situations where the defendant marches into the police station demanding to be arrested for a regulatory violation in order to test its constitutionality in the Supreme Court.

3. Petitioner has the burden to rebut the presumption of regularity and to prove intentional government misconduct prior to conviction rendering his misdemeanor curfew violation irregular and void and precluding affirmance of his conviction on any ground.

The petitioner has the "heavy burden" of rebutting the presumption that the challenged proceedings were correct. United States v. Darnell, 716 F.2d at 481 n.5. See also INS v. Miranda 459 U.S. 14, 18 (1982) (presumption of regularity). Further, he must "demonstrate that but for fundamental errors committed a more favorable judgment would have been rendered." Id. The Supreme Court stated in United States v. Frady, 456 U.S. 152, 166 (1982), that "to obtain collateral relief a [petitioner] must clear a significantly higher hurdle than would exist on direct appeal," that is, the petitioner must satisfy the "cause and actual prejudice" standard. The controlling caselaw in this Circuit requires that coram nobis petitions be resolved in the same manner as habeas corpus proceedings. United States v. Taylor, 648 F.2d 565, 573 n. 25 (9th Cir.), cert. denied, 454 U.S. 866 (1981). Engle v. Isaac, 456 U.S. 107 (1982), clearly applies to similarly situated habeas corpus petitioners in this Circuit. Leiterman v. Rushen, 704 F.2d 442, 444 (9th Cir. 1983) (on habeas corpus, Engle v. Isaac requires "actual prejudice," i.e., some "causal nexus" between even a "massive [governmental] violation of due process" and the conviction); Magby v. Wawrzaszek, 741 F.2d 240, 244 (9th Cir.

1984) (on habeas corpus, petitioner who has shown no "cause" cannot raise a Miranda claim if he failed to raise the challenge at trial and had "the tools" to do so). Furthermore, the "cause" and "actual prejudice" tests must be satisfied independently and sequentially. Engle v. Isaac, 456 U.S. 107, 134 n. 43 (1982); United States ex rel. Devine v. DeRobertis, 754 F.2d 764, 768 (7th Cir. 1985) (on habeas corpus, the Court need not reach "actual prejudice" unless the petitioner has first established "cause"); Palmes v. Wainwright, 725 F.2d 1511, 1525-1526 (11th Cir.), cert. denied, 105 S.Ct. 227 (1984) (same); Williams v. Duckworth, 724 F.2d 1439, 1443 (7th Cir.), cert. denied, 105 S.Ct. 143 (1984) (same).

In addition, the doctrine of res judicata bars the petitioner from reopening his case simply to relitigate issues because his decision to disobey the statute in 1942 might have been more favorably treated in 1983. The Supreme Court in Federated Department Stores, Inc. v. Moitie, 452 U.S. 394, 401-02 (1981), stated in words equally applicable here :

> This court has long recognized that "[p]ublic policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties." Baldwin v. Traveling Men's Assn., 283 U.S. 522, 525 (1931).

The Court also stated, 452 U.S. at 398:

> . . . the res judicata consequences of a final . . . judgment on the merits [are not] altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case. Angel v. Bullington, 330 U.S. 183, 182 (1947); Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371 (1940); Wilson's Executor v. Dean, 121 U.S. 525, 534 (1887).

Current case law may or may not divest petitioner's Supreme Court decision (and the Mitchell v. Harmony, 54 U.S. (13 How.) 115, 134-5 (1851) line of cases) of any current stare decisis effect. But such subsequent rulings cannot redecide the earlier case for the particular individual who litigated and lost that earlier case. 3/

The recent opinion in Korematsu v. United States , 584 F. Supp. 1406 (N.D. Cal. 1984) ignored these impediments to coram nobis relief for two reasons. That court concluded that the government had waived various jurisdictional objections which that court implicitly held were waivable. (Exhibit 1 of Government's Exhibits to its Supplemental Points and Authorities (hereinafter "G.Ex.")). Those factual and legal circumstances -- even if true in that case (which we deny) -- are not true here. In addition, the Korematsu court stated that the Ninth Circuit decision in United States v. Taylor, 648 F.2d 565 (9th Cir.), cert. denied, 454 U.S. 866 (1981) permitted a district

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3/ Since petitioner argues that the Supreme Court erroneously decided the issues in his case, a reappraisal of those old legal rulings would necessarily constitute "a clear break with the past" and would have been nonretroactive. United States v. Johnson, 457 U.S. 537, 549 (1982). Thus, petitioner's conviction would not have been vulnerable to collateral attack on these grounds alleging "new case law" even if another litigant (such as Korematsu) not barred by the doctrine of res judicata had succeded in overturning the Hirabayashi case law in the very next term.

In other words, even if United States v. Korematsu, 323 U.S. 214 (1944) had been decided differently, that would not have helped this petitioner.

court to grant coram nobis relief even when "arguable prejudice" is not shown, therefore creating an exception to the well-established contrary rule laid down in United States v. Morgan, 346 U.S. 502 (1954) (G. Ex. 1, p.26).

The opinion in Korematsu misreads the Taylor opinion. The Taylor court stated that "...we address solely the issue of whether Taylor has demonstrated that he is entitled to a hearing and do not decide whether relief is warranted." 648 F.2d at 570. Taylor went on to cite Morgan and restate the general rule that coram nobis relief is only available "to correct errors of fact of such fundamental character as to render the proceeding itself irregular and invalid" Id. at n.14. Then the court stated that "Taylor's claim gives rise to the somber prospect that the Government committed a fraud on the court which ultimately worked a great prejudice to Taylor's case." 648 F.2d at 571 (emphasis added). In that context -- where great prejudice to the petitioner's case was at issue -- the Taylor court stated that a hearing on a coram nobis petition (not ultimate relief) could be premised on allegations of prosecutorial misconduct.

All of these predicates to the Taylor language were ignored by the Korematsu court which improperly relied on language in the opinion -- taken out of context -- as the basis for a new Ninth Circuit exception to the Morgan rule allowing ultimate coram nobis relief (not simply a hearing), when no actual prejudice has been proved. Moreover, even if this conclusion

were not contrary to the intent of the Taylor court, see 648 F.2d at 570 & n.14, it runs contrary to Morgan itself, as well as United States v. Hasting, 103 S.Ct. 1974 (1983) and United States v. Morrison, 449 U.S. 361, 365-367 (1981).

4. There is no obligation upon the government to initiate this collateral proceeding on petitioner's behalf.

Finally, even assuming arguendo that the government newly discovered some exculpatory material relevant to petitioner's case after his conviction had been affirmed by the Supreme Court, the government has no obligation to initiate this collateral proceeding on petitioner's behalf. Petitioner has cited no authority that the government must initiate collateral attacks whenever some evidence comes to light which might arguably be exculpatory.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I served by Express Mail upon Rodney Kawakami, counsel for petitioner, a copy of the Government's Memorandum of Law, this 8th day of June, 1985.

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