

**UNITED STATES COURT OF APPEALS  
FOR THE  
SECOND CIRCUIT**

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At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 25<sup>th</sup> day of April, two thousand eighteen.

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Eric A. Klein,

*Petitioner,*

v.

United States of America,

*Respondent.*

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**ORDER**

Docket Nos: 17-3804 (Lead)  
17-3820 (Con)

Petitioner, Eric A. Klein, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request as a motion for reconsideration, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the motion and petition are denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

The signature of Catherine O'Hagan Wolfe is written in cursive over a circular seal. The seal contains the text "UNITED STATES", "SECOND CIRCUIT", and "CITY OF NEW YORK" around a central emblem.

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S.D.N.Y. – N.Y.C.  
09-cv-10048  
Crotty, J.  
03-cr-813  
Sand, J.  
Cote, J.

United States Court of Appeals  
FOR THE  
SECOND CIRCUIT

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At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 20<sup>th</sup> day of February, two thousand eighteen.

Present:

Amalya L. Kearse,  
Debra Ann Livingston,  
*Circuit Judges,*  
Jeffrey Alker Meyer,\*  
*District Judge.*

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Eric A. Klein,

*Petitioner.*

v.

United States of America,

*Respondent.*

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17-3804 (L)  
17-3820 (Con)

In the proceeding docketed under 17-3804 (L), Petitioner moves for remand of the matter or, alternatively, vacatur of his conviction. That proceeding was the result of the district court's transfer to this Court of Petitioner's October 2017 proposed order to show cause and supporting affirmation challenging his 2005 criminal conviction; the district court held that the October 2017

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\* Judge Jeffrey Alker Meyer, of the United States District Court for the District of Connecticut, sitting by designation.

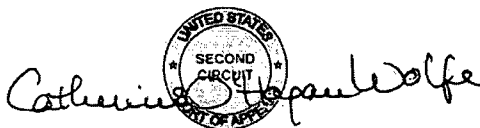
filing constituted a successive 28 U.S.C. § 2255 motion requiring this Court's leave before it could be filed in district court. Upon due consideration, it is hereby ORDERED that the motion for remand or vacatur of the conviction is DENIED. At the time Petitioner's papers were filed in the district court, he was no longer "in custody" for purposes of § 2255 jurisdiction. *See Scanio v. United States*, 37 F.3d 858, 860 (2d Cir. 1994). Thus, the October 2017 filing should not have been construed as seeking § 2255 relief. However, remand would be futile. Insofar as the October 2017 filing is construed as seeking coram nobis relief, it is meritless because the claims raised in the October 2017 filing were rejected by this Court in Petitioner's prior appeals or are barred because they should have been raised in his prior proceedings. *See Foont v. United States*, 93 F.3d 76, 78 (2d Cir. 1996) (stating that "[c]oram nobis is not a substitute for appeal").

In the proceeding docketed under 17-3820 (Con), Petitioner requests a writ of mandamus. Upon due consideration, it is hereby ORDERED that the petition is DENIED, for essentially the same reasons discussed above. *See Schlagenhauf v. Holder*, 379 U.S. 104, 110 (1964) (stating that a writ of mandamus "is not to be used as a substitute for appeal").

In 2013, this Court warned Petitioner "that the further filing of frivolous and/or vexatious motions or appeals in this Court relating to his 2005 conviction, his attorney's performance during the course of the underlying criminal proceedings, or his § 2255 proceedings, will result in the imposition of sanctions, including leave-to-file sanctions." 2d Cir. 12-4898, doc. 58 (Mot. Order) at 2; *see also Klein v. United States*, 692 F. App'x 657, 658-59 (2d Cir. 2017) (noting 2013 warning). Petitioner's present motion and petition continue his pattern of filing frivolous and vexatious papers in this Court. Accordingly, it is hereby ORDERED that Petitioner file a response within 30 days of the date of this order explaining why a leave-to-file sanction should not be imposed.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk of Court

The block contains a handwritten signature in cursive script that reads "Catherine O'Hagan Wolfe". To the right of the signature is the official seal of the United States Second Circuit Court of Appeals. The seal is circular with "UNITED STATES" at the top, "SECOND CIRCUIT" in the center, and "COURT OF APPEALS" at the bottom.

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

USDC SDNY  
DOCUMENT  
ELECTRONICALLY FILED  
DOC #:  
DATE FILED: 11-21-17

ERIC A. KLEIN,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

09 Civ. 10048 (PAC)

OPINION AND ORDER

HONORABLE PAUL A. CROTTY, United States District Judge:

Petitioner Eric A. Klein ("Klein"), *pro se*, moves for relief from his conviction. On July 8, 2005, a jury convicted Klein of wire fraud and conspiring to commit wire fraud. Klein was sentenced to a term of 51 months imprisonment and three years supervised release, and ordered to pay \$819,779 in restitution. Since his sentencing, Klein has filed numerous meritless appeals and dozens of baseless motions relating to his 2005 criminal conviction. The Court presumes familiarity with the facts as set forth in the October 17, 2012 Memorandum and Order, which denied Klein's 28 U.S.C. § 2255 petition, *see Klein v. United States*, No. 09 cv. 10048, 2012 WL 5177493 (S.D.N.Y. Oct. 2012), and the November 8, 2013 Memorandum and Order, which denied Klein's Rule 60(b) motion for reconsideration of that denial, *see Klein v. United States*, No. 09 cv. 10048, 2013 WL 5966889 (S.D.N.Y. Nov. 8, 2013).

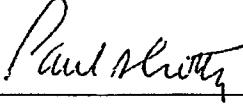
Currently before this Court is Klein's most recent attempt to relitigate his conviction, which he styles as a motion for an "order to show cause" rather than as a second or successive § 2255 petition. Dkt. No. 113. No Federal Rule of Civil Procedure authorizes such a motion in these circumstances. Rather, because Klein's motion challenges his conviction as being

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"imposed in violation of the Constitution or laws of the United States," the Court hereby construes it as a second or successive § 2255 petition and TRANSFERS it to the United States Court of Appeals for the Second Circuit for performance of its gatekeeping function. See 28 U.S.C. § 2255(a); *Whab v. United States*, 408 F.3d 116, 118 (2d Cir. 2005) ("[A] 'second or successive' petition for relief under § 2255 may not be filed in a district court, unless the petitioner first obtains the authorization of the court of appeals, certifying that the petition conforms to specified statutory requirements."); *Jiminian v. Nash*, 245 F.3d 144, 148 (2d Cir. 2001) ([W]hen presented with a [post-conviction motion] raising previously available claims appropriately the subject of a § 2255 motion, district courts should construe the petition as a second or successive § 2255 motion and transfer it to this Court for certification, so long as the prisoner had a prior § 2255 motion dismissed on the merits.").

Dated: New York, New York  
November 21, 2017

SO ORDERED

  
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PAUL A. CROTTY  
United States District Judge

Copy Mailed To:  
Eric A. Klein  
200 Knickerbocker Road  
Demarest, New Jersey 07627

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S.D.N.Y.-N.Y.C.  
09-cv-10048  
Sand, J.

United States Court of Appeals  
FOR THE  
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 14<sup>th</sup> day of April, two thousand eleven,

Present:

Ralph K. Winter,  
José A. Cabranes,  
Raymond J. Lohier, Jr.,  
*Circuit Judges.*

Eric A. Klein,

*Movant-Appellant,*

v.

United States of America,


*Respondent-Appellee.*

10-4686-pr

Appellant, *pro se*, moves for a certificate of appealability. Upon due consideration, it is hereby ORDERED that the motion is GRANTED. The district court erred in disposing of Appellant's motion filed pursuant to 28 U.S.C. § 2255 without reaching the merits because Appellant filed his motion while on supervised release and the subsequent termination of supervised release during the pendency of the motion did not render the motion moot or deprive the district court of jurisdiction to consider the merits. *See Carafas v. LaVallee*, 391 U.S. 234, 238-39 (1968) (holding that "once federal jurisdiction has attached . . . it is not defeated by the release of the [habeas] petitioner prior to the completion of proceedings on [the habeas] application"); *Scanio v. United States*, 37 F.3d 858, 860 (2d Cir. 1994) (federal court has jurisdiction to consider a 28 U.S.C. § 2255 motion filed when movant on supervised release). Accordingly, it is further ORDERED that the district court's order is VACATED to the extent that it disposed of Appellant's § 2255 motion and the case is REMANDED with instructions that the district court consider the merits of Appellant's § 2255 motion.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

  
Catherine O'Hagan Wolfe

SAO-LB

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EX.

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**Additional material  
from this filing is  
available in the  
Clerk's Office.**