

**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 Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 25th day of April, two thousand eighteen.

Eric A. Klein,

Petitioner,

v.

United States of America,

Respondent.

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

Catherine O'Hagan Wolfe



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

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 20th day of February, two thousand eighteen.

Present:

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

Eric A. Klein,

Petitioner.

v.

United States of America,

Respondent.

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

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

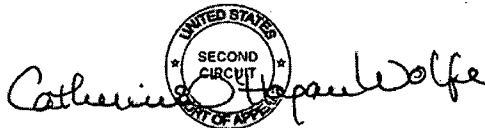
filing constituted a successive 28 U.S.C. § 2255 motion requiring this Court's leave before it could be filed in district court. Upon due consideration, it is hereby ORDERED that the motion for remand or vacatur of the conviction is DENIED. At the time Petitioner's papers were filed in the district court, 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". Overlaid on the signature is a circular official seal of the United States Court of Appeals for the Second Circuit. The seal features the words "UNITED STATES" at the top, "SECOND CIRCUIT" in the center, and "COURT OF APPEALS" at the bottom, with small stars on either side of the central text.

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