APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-13069
Non-Argument Calendar

D.C. Docket No. 8:17-cv-01314-VMC-MAP

CHARLES DANIEL MAYE,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

(April 25, 2019)

Before MARCUS, WILSON, and ROSENBAUM, Circuit Judges.

PER CURIAM:

Charles Daniel Maye, a convicted felon no longer serving a period of incarceration or supervised release, appeals the district court's order denying his petition

for a writ of *coram nobis*. On appeal, he argues that the court erred by denying his petition because his conduct of accessing a federal law enforcement database for non-law enforcement purposes did not constitute obtaining information that "exceeds authorized access" within the meaning of the Computer Fraud and Abuse Act (CFAA). We disagree and affirm.[1]

In 2004, a federal grand jury indicted Maye and his codefendant, Leroy Collins. The indictment charged Maye with violating the CFAA for unlawfully accessing the National Crime Information Center (NCIC) federal database, which is restricted to law enforcement officers for law enforcement purposes, in order to obtain information about Collins' paramours and provide that information to Collins. The indictment charged that Maye was authorized to access the NCIC database only for law enforcement purposes and that Maye had been trained in this regard, but that he unlawfully accessed the database to provide information to Collins, with whom he had an ongoing financial relationship.

A jury found Maye guilty of all charges. The district court sentenced Maye to 97 months' imprisonment, followed by 3 years' supervised release, and ordered him to pay a $15,000 fine. Maye filed a notice

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[1] Maye also petitions for an initial hearing en banc. An en banc hearing may be ordered where en banc consideration is necessary to secure or maintain uniformity of the court's decision; or the proceeding involves a question of exceptional importance. Fed. R. App. P. 35(a). Because this appeal does not satisfy those criterion, appellant's motion for initial hearing en banc is denied.

of appeal, which he then voluntarily dismissed. During his incarceration, Maye unsuccessfully filed several petitions for habeas corpus. When Maye filed the instant petition, he was no longer serving a period of incarceration or supervised release for his convictions.

We review a denial of *coram nobis* relief for abuse of discretion, keeping in mind that an error of law is a per se abuse of discretion. *Alikhani v. United States*, 200 F.3d 732, 734 (11th Cir. 2000) (per curiam). We review questions of subject matter jurisdiction de novo. *Goodman ex rel. Goodman v. Sipos*, 259 F.3d 1327, 1331 (11th Cir. 2001). We also review a district court's interpretation of a federal statute de novo. *Stansell, et al. v. Revolutionary Armed Forces of Colombia*, 704 F.3d 910, 914 (11th Cir. 2013) (per curiam).

"The writ of error *coram nobis* is an extraordinary remedy of last resort available only in compelling circumstances where necessary to achieve justice." *United States v. Mills*, 221 F.3d 1201, 1203 (11th Cir. 2000). The bar for *coram nobis* is high, and the writ may issue only when: (1) "there is and was no other available avenue of relief"; and (2) "the error involves a matter of fact of the most fundamental character which has not been put in issue or passed upon and which renders the proceeding itself irregular and invalid." *Alikhani*, 200 F.3d at 734 (quotations and citations omitted). A claim is not facially cognizable on *coram nobis* review if the defendant could have, but failed to, pursue the claim through other available avenues. *Id*. Furthermore, district courts may consider *coram nobis* petitions only when the petitioner presents sound

reasons for failing to seek relief earlier. *Mills*, 221 F.3d at 1204. We have stated that it is difficult to conceive of a situation in a federal criminal case today, given the availability of habeas review, where *coram nobis* relief would be necessary or appropriate. *Lowery v. United States*, 956 F.2d 227, 229 (11th Cir. 1992) (per curiam). But claims of jurisdictional error have historically been recognized as fundamental, so the doctrine of procedural default does not apply to such claims. *United States v. Peter*, 310 F.3d 709, 712–13 (11th Cir. 2002) (per curiam). Thus, a genuine claim that the district court lacked jurisdiction may be a proper ground for *coram nobis* relief as a matter of law. *See Alikhani*, 200 F.3d at 734.

The CFAA makes it a crime for any person to intentionally access a computer without authorization or in a manner that "exceeds authorized access" and thereby obtain information from any department or agency of the United States. 18 U.S.C. § 1030(a)(2)(B). The Act defines "exceeds authorized access" as "access[ing] a computer with authorization and [ ] us[ing] such access to obtain or alter information in the computer that the accessor is not entitled to obtain or alter." *Id.* § 1030(e)(6). In *United States v. Rodriguez*, we interpreted the phrase "exceeds authorized access" and determined that a Teleservice representative who obtained personal information from a database for non-business reasons—which violated an administrative policy that authorized the employee to use the database only for business reasons—exceeded his

authorized access under the CFAA. 628 F.3d 1258, 1263 (11th Cir. 2010).

"Under the well-established prior panel precedent rule . . . the holding of the first panel to address an issue is the law of this Circuit, thereby binding all subsequent panels unless and until the first panel's holding is overruled by the Court sitting *en banc* or by the Supreme Court." *Smith v. GTE Corp.*, 236 F.3d 1292, 1300 n.8 (11th Cir. 2001). We have categorically rejected any exception to the prior panel precedent rule based upon a perceived defect in the prior panel's reasoning or analysis as it relates to the law in existence at that time. *Id.* at 1303.

The issue on appeal—whether Maye stated a claim for *coram nobis* relief by asserting that his indictment did not charge a CFAA violation—potentially qualifies for *coram nobis* relief, as it alleges that the court lacked subject matter jurisdiction to convict him. But our holding in *Rodriguez* forecloses Maye's assertion that the conduct charged in his indictment did not violate the CFAA. *See Rodriguez*, 628 F.3d at 1263 (holding that an employee who accessed a database he was otherwise entitled to access for an improper purpose and in violation of administrative policy exceeded his authorized access under the CFAA); *see also Smith*, 236 F.3d at 1300 n.8, 1303. Because Maye only had authority to access the NCIC database for law enforcement purposes, his conduct of accessing the database for non-law enforcement purposes and misappropriating information from the database exceeded

his authorized authority under the CFAA. *See Rodriguez*, 628 F.3d at 1263. Accordingly, we affirm.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CHARLES DANIEL MAYE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Case No.
8:17-cv-1314-T-33MAP
8:04-cr-321-T-30MAP

ORDER

(Filed Feb. 16, 2018)

This Order analyses [sic] why Charles Daniel Maye is not entitled to a petition for writ of error *coram nobis*. Maye is represented by counsel.

PROCEDURAL HISTORY

A jury found Maye guilty of counts one, two, four, and five of the Superseding Indictment. Count one charged Maye with conspiracy to access a computer without authorization for private financial gain, in violation of 18 U.S.C. § 371. Count two changed Maye with accessing a National Crime Information Center (NCIC) computer without authorization, in violation of 18 U.S.C. §§ 1030(a)(2)(B) and (c)(2)(B) and (ii) and 18 U.S.C. § 2 (offense ending July 30, 1999). Count four charged Maye with accessing an NCIC computer without authorization in violation of 18 U.S.C.

§§ 1030(a)(2)(B) and (c)(2)(B) and (ii) and 18 U.S.C. § 2 (offense ending August 11, 2003). Count five charged May [sic] be [sic] making false statements in violation of 18 U.S.C. § 1001(a)(2). (Doc. cr-166).

On July 24, 2006, this Court sentenced Maye to 97 months incarceration and 36 months supervised release. The Court ordered him to pay a $15K fine. (*Id.*). Maye filed a notice of appeal (*Id*. at 168), which he voluntarily dismissed. (Id. at 177).

In his petition for *coram nobis*, Maye alleges that: (1) he is factually innocent; (2) a Ninth Circuit case, *Unite*d *States v. Nosal*, 676 F.3d 854 (9th Cir. 2012), contrary to binding Eleventh Circuit precedent, more appropriately applies to his conduct; and (3) 18 U.S.C. § 2722 preempted 18 U.S.C. § 1030.

Maye's arguments fail because he has not met his procedural or substantive burdens, and because he is factually and legally guilty.

Background Information related to the Criminal Charges

In December 2004, Maye, then a sworn deputy sheriff with the Hillsborough County Sheriff's Office, and codefendant Leroy Collins, were named in a five-count Superseding Indictment. The National Crime Information Center (NCIC) is a national computerized database maintained by the Federal Bureau of Investigation (FBI) and located in West Virginia. The NCIC database collects and maintains records related to

criminal histories of millions of people as well as persons and vehicles sought by law enforcement agencies nationwide. Access to the NCIC database is restricted to law enforcement officers authorized to access it for law enforcement purposes.

The United States assists states in maintaining similar records systems that are linked to, and part of, the NCIC system. Florida maintains such a system called the Florida Crime Information Center (FCIC). The Florida Department of Law Enforcement (FDLE), Division of Criminal Justice Information Services (CJIS), is the central repository for criminal history information for Florida. Collectively, the NCIC and FCIC databases, in addition to criminal history information, also contain private information including home address and social security number information.

State and local law enforcement agencies, including the Hillsborough County Sheriff's Office, are permitted under strict guidelines to access the NCIC database for law enforcement purposes. Those law enforcement agencies are required to control access to the NCIC database and to ensure that the NCIC database will be accessed only for lawful criminal justice purposes. Law enforcement operators who are permitted to access the NCIC database are trained regarding the strict requirements for the NCIC use.

Prior to April 1996, Maye completed numerous training sessions on the lawful uses of the NCIC database. He was a certified Limited Access Terminal

Operator, and was knowledgeable about the strict requirements for its use.

Law enforcement officers with the Hillsborough County Sheriff's Office could access the NCIC data base via computers located in their workplace or in patrol vehicles via mobile data terminals.

Collins was the owner of a migrant work camp located in Wimauma, Florida. From approximately 1996 through and including 2004, Maye collected rent for Collins from migrant workers living in the camp. Collins compensated Maye for this work. Maye had an ongoing financial relationship with Collins. (Doc cr-6).

The Grand Jury charged Maye with:

> 1. conspiracy to intentionally access a computer without authorization and in excess of authorization, to obtain information from a department or agency of the United States, for the purpose of private financial gain and in furtherance of criminal acts of extortion, in violation of 18 U.S.C. § 1030(a)(2)(B), and knowingly and willfully making materially false statements to an FBI agent, in violation of 18 U.S.C. § 1001(a)(2), all in violation of 18 U.S.C. § 371 (Count One);
>
> 2. intentionally accessing a computer – the NCIC (National Crime Information Center) computer database – without authorization and in excess of authorization, to obtain information from a department or agency of the United States, for the purpose of private financial gain and in furtherance of criminal

> acts of extortion in violation 18 U.S.C. § 1030(c)(2)(B) (i) and (ii) and 18 U.S.C. § 2 (Counts Two and Four); and
>
> 3. knowingly and willfully making false statements during an interview with a Special Agent of the FBI, in violation of 18 U.S.C. § 1001(a)(2) (Count Five).

(*Id*.).

As discussed *supra*, the jury found Maye guilty of several charges. (*Id.* at 152). Maye was released from federal custody September 10, 2013, and completed his supervised release September 9, 2016. Since 2007, Maye has repeatedly – and unsuccessfully – attacked his conviction and sentence.

Maye's 28 U.S.C. Section 2255 Motions To Vacate

In his first Section 2255 motion, Case No. 8:07-cv-653-T-30EAJ, Maye claimed prosecutorial misconduct due to selective prosecution; presentation of false evidence; violations of his civil and due process rights; excessive sentence; and ineffective assistance of counsel due to counsel's failure to move to sever and failure to allege violation of the statute of limitations. Maye withdrew that motion. (*Id.* at Docs. 4,5).

A few months later, Maye filed a Section 2255 motion that this Court struck. *See* Case No. 8:07-cv-1258-T-30EAJ. Maye then filed an amended motion to vacate, raising nine grounds for relief:

> Ground One: counsel failed to object to the introduction of prejudicial evidence at trial.
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> Ground Two: counsel failed to move for dismissal of the Superseding Indictment prior to trial despite the lack of "ends of justice" findings by the court when granting Maye's requests for continuances.
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> Ground Three: counsel failed to move for dismissal of the Superseding Indictment even though it "substantially broadened" the original charges.
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> Ground Four: counsel failed to raise a claim of prosecutorial misconduct.
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> Ground Five: counsel failed to call key defense witnesses.
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> Ground Six: counsel failed to "flesh out" government witness Gregory Brown's bias against Maye.
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> Ground Seven: counsel was ineffective due to the cumulative prejudicial effects of the alleged errors set forth in Grounds 1, 4, 5, and 6.
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> Ground Eight: Maye's claim of "actual innocence" allowed the foregoing grounds to be heard despite failure to raise them on direct appeal.
>
> Ground Nine: counsel was ineffective in advising Maye that he had no appealable issues after trial.

(*Id*. at Doc. 8).

The Court denied Maye's amended motion in February 2008. (*Id*. at Doc. 25). The court denied Maye's application for a certificate of appealability, as did the Eleventh Circuit. (*Id.* at Docs. 29, 31, 32). The Eleventh Circuit also denied Maye's motion for reconsideration because Maye "failed to make a substantial showing of the denial of a constitutional right." (*Id.* at Doc. 33).

Maye then moved to reopen his 2007 § 2255 proceeding by filing a Fed. R. Civ. P. Rule 60(d)(1) motion in Case No. 8:10-cv-2327-T-30EAJ. Maye described the filing as an "[i]ndependent [a]ction in [e]quity," asserting that the Court failed to address Ground Five of his amended section 2255 motion. (*Id.* at Doc. 1). This Court denied relief, finding that Maye was effectively pursuing a second or successive § 2255 motion without first obtaining authorization from the Eleventh Circuit. (*Id.* at Doc. 5). Notwithstanding that denial, Maye filed a "Motion to Take Judicial Notice of Adjudicative Facts" arguing, among other things, that "Congress did not intend 18 U.S.C. § 1030 or any of its amendments to apply to state computers or their databases," an argument similar to one of his arguments in the present *coram nobis* petition. (*Id*. at Doc. 7). The Court denied Maye's motions. (*Id.* at Docs.18-24). The Court denied Maye's application for a certificate of appealability. (*Id.* at Docs. 25, 27). May filed a notice of appeal. (*Id.* at Doc. 26). The Eleventh Circuit denied Maye's application for certificate of appealability. (*Id*. at Doc. 33). The Eleventh Circuit also denied Maye's related appeals. (Eleventh Circuit Case Nos. 12-14819 and 14-14059).

Maye then filed a 28 U.S.C. § 2241 petition for writ of habeas corpus in the United States District Court for the Southern District of Georgia, raising arguments similar to those he raises in the present petition for writ of error *coram nobis*: that is, actual innocence based on new case law. That Court denied Maye's petition, which he unsuccessfully appealed. Maye petitioned for Supreme Court review, presenting two questions:

> 1. Should this Court exercise its discretion to interpret the Computer Fraud and Abuse Act (CFAA), codified at 18 U.S.C. § 1030, by resolving the conflict between the Ninth Circuit and the Eleventh, Fifth and Seventh Circuits on the interpretation of § 1030(e)(6)?
>
> 2. In light of the requirement of § 1030(a)(2)(B) that information be obtained from a federal database, does the Petitioner's conviction under the CFAA for accessing and obtaining information from a state database violate due process; and if so, did the lower courts violate principles established by this Court when they failed to determine whether they had federal subject matter jurisdiction, changed the statute to eliminate the jurisdictional element, and failed to retroactively apply a judicial construction of the statute that made him factually innocent?

Maye v. Haynes, 2012 WL 3805776 (July 2, 2012). On January 22, 2013, the Supreme Court denied certiorari. *Maye v. Haynes*, 133 S. Ct. 981 (2013).

Maye filed his final Section 2255 motion in 2013, alleging due process violations based on prosecutorial misconduct. (Case No. 8:13-cv-3104-T-30EAJ). This Court dismissed the motion, without prejudice, for lack of authorization to file a second or successive § 2255 motion. (*Id*. at Doc. 3). This Court denied Maye's application for a certificate of appealability. The Eleventh Circuit denied Maye's application for a certificate of appealability and denied Maye's motion to consolidate his appeal with appellate case number 14-14059. (*Id. at* Docs. 5, 9).

Present Petition for Writ of Error *Coram Nobis*

Maye's new legal argument is one of preemption, claiming that 18 U.S.C. § 2722 preempts 18 U.S.C. § 1030(a)(2)(B). Maye directly and indirectly asserts erroneous claims of factual and legal innocence (*e.g*., what he did was within the scope of his duties as a deputy).

Maye's and Collins' Criminal Actions

Maye and Collins met and began an ongoing financial relationship in the early 1990's. Collins was a businessman who owned a mobile home park and would often assist law enforcement. Maye worked for Collins at the mobile home park as a manager, making repairs and collecting rent. When the two men met, Collins was in the midst of a relationship with Linda Bobo. That relationship ended in 1996, and Bobo began a new relationship with James McLemore. Several

months later, Maye began to access the National Crime Information Center (NCIC) and Florida Crime Information Center (FCIC) databases to acquire restricted and private information about Bobo – at Collins' request. Maye also stopped Bobo's vehicle, gave her a warning for driving with a suspended license, and issued her a traffic citation.

Maye testified at his 2006 trial that he accessed the databases as part of an ongoing investigation of Bobo's alleged drug dealing. Maye also claimed that he asked Collins to get McLemore's tag number so that Maye could pass it along to the street crimes unit. Maye testified at trial that he never passed confidential information about Bobo to Collins. Despite Maye's alleged discretion, Collins still found Bobo's address (which she had been concealing) and caused her home to be burglarized.

Collins and others – Willie McCrary and "Little Willie" – claimed that Maye "ran McLemore's tag" for them after the three men spotted McLemore's vehicle in Bradenton. Maye provided Collins with McLemore's home address as well, and shortly thereafter Collins, McCrary and "Little Willie" went to that address and spoke with McLemore's then-estranged wife.

On June 16, 1996, Bobo and McLemore were returning to their home when McLemore was shot and wounded in a drive-by shooting. The shooter's vehicle was similar to one owned by Collins. Several days later, Collins called Bobo at the hospital where McLemore was being treated. Collins aggressively attempted to

persuade Bobo to leave McLemore, but Bobo refused. Soon thereafter, Bobo and McLemore moved to a different address.

Between June and September 1996, Maye continued to access the NCIC and FCIC databases concerning Bobo. Specifically, he ran searches on Bobo on July 9; July 12; July 26; September 2; and September 3. Maye also requested Bobo's official driving record from the Florida Department of Highway Safety and Motor Vehicles.

In September 1996, during the time Maye was obtaining information on Bobo, Collins had dinner with Bobo and threatened to harm McLemore if Bobo refused to leave him. Bobo declined to do so. Collins told Bobo that "they'd get him to leave," and that "he'll go if I put enough fire up his ass." A few days later, Collins shot McLemore in the head, killing him.

Over the next two months, Collins and Maye attempted to locate Bobo. Collins and Bobo had a recorded conversation three days after McLemore's murder in which Collins continued to attempt to lure Bobo back into a relationship with him. He also claimed to have access to computer databases.

Collins told his cohort, McCrary, that Maye was going to put Bobo in jail. That month, Maye again stopped Bobo for driving with a suspended license, and arrested her. Collins paid Bobo's bond and attempted to take her from jail, but Bobo refused to leave with him.

On November 24, 1996, a man threw an unidentified caustic substance into Bobo's face, blinding her. At trial, the Government argued that Collins arranged for this attack to occur. The Government also argued that Maye made false and misleading statements to Florida Department of Law Enforcement (FDLE) officials and to the Palmetto Police Department (PPD) to cover up his involvement in the conspiracy

The conspiracy did not end there. In July 1999, Maye also accessed the NCIC and FCIC databases to acquire restricted or private information about another of Collins' former girlfriends, Angeletta Hill Benavidez Williams. Maye, Collins, and Collins' son even went to Williams' home to help Collins take Williams' truck.

In August 2003, Collins accosted another former girlfriend, Veronica Smith. Collins attempted to force Smith to disclose her home address, but she refused. A few days later, Maye searched for Smith in the NCIC and FCIC databases to acquire restricted or private information. He attempted to justify the search by claiming that it was in conjunction with an ongoing investigation, but there was no evidence of such investigation.[1]

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[1] *See* Case Number 8:07-cv-1258-T-30EAJ at Doc. 25; *see also* Presentence Investigation Report dated July 18, 2006 ¶¶ 13-41 (more extensive facts listed therein).

The facts make clear that Maye was not acting as a deputy sheriff. The jury rejected that defense and the federal courts have consistently rejected it.

DISCUSSION

Maye fails to open the door to coram nobis relief.

A defendant may directly appeal the conviction and petition for a writ of *certiorari*. Appellate review is not a "second bite at the apple": the defendant benefits from *de novo* scrutiny only for legal error, and, if he failed to preserve his issue in the district court, he bears a heavy evidentiary burden on attack.

Once a defendant's conviction is final, he may collaterally attack that conviction under 28 U.S.C. § 2255, but only if in custody, and then only on a subset of legal errors that pose great constitutional harm.

If collateral relief eludes him, the convicted federal defendant may try the extraordinary 28 U.S.C. § 2241 petition for writ of habeas corpus, but only if he continues to suffer a deprivation of liberty, and for an even smaller subset of claims. He must also establish that prior collateral challenge(s) were not "adequate or effective." Each layer of subsequent review narrows the avenues for relief, and includes new and significant procedural and substantive hurdles. Maye has exhausted each of the preceding avenues of potential relief and, where his efforts were directed at the merits, lost each time.

A convicted defendant who no longer suffers any restraint on his liberty generally has no avenue to challenge a truly historical conviction. "The reason to bend the usual rules of finality" goes "missing when liberty is not at stake." *United States v. Keane*, 852 F.2d 199, 202-03 (7th Cir. 1988); *see Lane v. Williams*, 455 U.S. 624, 630-31 (1982). "Courts must conserve their scarce time to resolve the claims of those who have yet to receive their first decision." *Keane*, 852 F.2d at 203.

The last potential action for a person who has served his sentence, but still seeks to challenge his convictions, is the writ for error *coram nobis*. The All Writs Act, 28 U.S.C. § 1651(a), provides federal courts the authority to issue writs of error coram nobis. *United States v. Mills*, 221 F.3d 1201, 1203 (11th Cir. 2000). "A writ of error coram nobis is a remedy available to vacate a conviction when the petitioner has served his sentence and is no longer in custody." *United States v. Peter*, 310 F.3d at 712. *See also*, *United States v. Rahim*, ___ F. App'x. ___, 2018 WL 580618, at *2 (11th Cir., Jan. 29, 2018).

Coram nobis is the most narrow challenge because "courts may consider *coram nobis* petitions . . . only where no other remedy is available and the petition presents sound reasons for failing to seeks [sic] relief earlier." *Mills*, 221 F.3d at 1203-04; *see also Alikhani v. United States*, 200 F.3d 732, 734 (11th Cir. 2000) (coram nobis available only when there "is and was" no other avenue of relief). In other words, unless the petitioner establishes that he could not have raised his argument while still suffering a deprivation of liberty,

he cannot raise it when he is no longer in custody. *See*, *e.g.*, *Jackson v. United States*, 375 F. App'x. 958, 960 (11th Cir. 2010); *United States v. Spellissy*, 513 F. App'x. 915, 916 (11th Cir. 2013); *see also United States v. Obasohan*, 318 F. App'x. 798, 800 (11th Cir. 2009). Maye's petition raises arguments and issues already raised in various other pleadings, or arguments in support of a request to excuse his failure to do so. Either way, Maye fails to meet his threshold burden for *coram nobis* relief.

The coram nobis door is heaviest to open for relief because the petitioner must establish not only that the purported error in his long-closed criminal case was constitutional, but that it is truly "fundamental." *See United States v. Addonizio*, 442 U.S. 178, 186 (1979); *Moody v. United States*, 874 F.2d 1575, 1576 (11th Cir. 1989) (*Coram nobis* jurisdiction only available for error "of the most fundamental character"); *Ramdeo v. United States*, 2017 WL 6611047 *3 (S.D. Fla., Oct. 11, 2017). The error must call into question not just the propriety of the petitioner's past conviction, but the very propriety of the past criminal proceeding itself, rendering that proceeding potentially "irregular and invalid." *Mills*, 221 F.3d at 1203; *see Alikhani*, 200 F.3d at 734; *United States v. Peter*, 310 F.3d 709, 712 (11th Cir. 2002); *see also United States v. Denedo*, 556 U.S. 904, 915-16 (2009). Maye's allegations fail this test.

The Eleventh Circuit has stated that any truly fundamental defect that might merit *coram nobis* review must concern – as it did under the original understanding of *coram nobis* – an "error of fact," not law,

that has "never [yet] been put in issue" and that "lies outside the record that the court of judgment had before it." *See Alikhani*, 200 F.3d at 734; *Myles v. United States*, 170 F.2d 443, 444 (5th Cir. 1948); *see also United States v. Morgan*, 346 U.S. 502, 507-11 & n.21 (1954) (describing original purpose of the writ and use in accordance with availability "at common law to correct errors of fact"); *Blake*, 395 F.2d at 758-59; *cf. Addonizio*, 442 U.S. at 186 ("*Coram nobis* jurisdiction has never encompassed all errors of fact."). The Eleventh Circuit has "recognized that it is difficult to conceive of a situation in a federal criminal case today where *coram nobis* relief would be necessary or appropriate." *Roggio v. United States*, 597 F. App'x. 1051, 1052 (11th Cir. 2015) (citations omitted).

The Court has found one instance where *coram nobis* was appropriate. In *Peter*, the Eleventh Circuit found that the district court lacked subject-matter jurisdiction. By its nature, a jurisdictional error is of "such a fundamental character as to render proceedings irregular and invalid." *Peter*, 310 F.3d at 715. In *Peter*, the Court granted *coram nobis* relief where the district court did not have jurisdiction to accept the defendant's guilty plea because, based on the retroactive effect of the Supreme Court's decision that licenses were not "property" under the mail fraud statute, the defendant's actions never violated the mail fraud statute and did not constitute criminal conduct. *Id. See United States v. Spellissy*, 2017 WL 4387165, at *1 (11th Cir., Oct. 3, 2017)

Otherwise, neither the Eleventh Circuit nor the Supreme Court have suggested that any error, other than the complete deprivation of counsel (a common exception to absolute rules against relief) – or a mistake of fact under which everyone labored during the case – could support a *coram nobis* petition. *Myles*, 170 F.2d at 444 ("[T]he errors of fact capable of being corrected, which affect the validity of the legal proceeding, are of a very limited class. The errors to which the *coram nobis* writ applies ordinarily are not errors of the Court, but mistakes or oversights of the parties that vitiate the judgment."); *see also Mayer*, 235 U.S. at 67-68.

Thus, to pass through the *coram nobis* door, a petitioner must surmount formidable threshold barriers. Even if the petitioner surmounts the barriers, this Court may deny the *coram nobis* petition unless doing so abuses the Court's discretion. *See Alikhani*, 200 F.3d at 734.

Coram nobis is a demanding standard because the petitioner must hurdle, during the merits assessment of his petition, all barriers to relief that would have applied were he to have attacked the Court's judgment at any previous point. *See*, *e.g.*, *Chaidez v. United States*, 568 U.S. 342, 358 (2013) (*coram nobis* not available due to *Teague* non-retroactivity); *Peter*, 310 F.3d at 712 (procedural default did not bar relief only because error was of subject-matter jurisdiction). Maye fails to address all of these barriers to relief. In fact, he acknowledges that he cannot meet all of them including issues previously raised: "The Ninth

Circuit's decision in *Christenson*, and the Second Circuit's decision in *Valle* confirms what the Petitioner begged the courts to recognize inartfully in his § 2255 motion and in each succeeding post judgment motion." (Doc. 1 at 25). At best, Maye tries to excuse his inability to surmount all of the procedural bars (*e.g.*, *Id.* at 26, n.10) or argues that his petition raises a jurisdictional claim that would save him (e.g., arguing it is irrelevant that he previously attacked his conviction under 2255 and other post judgment motions because the statute proscribing his offense is preempted by 18 U.S.C. § 2722). (*Id*. at 26).

Maye's Preemption Argument

Maye's preemption argument – one federal statute preempting another – arguably invokes *coram nobis* subject matter jurisdiction, thus surviving the procedural barriers. However, Maye's argument fails.

Where other avenues of relief are available, a district court may consider *coram nobis* petitions only when a petitioner presents sound reasons for failing to seek relief earlier. *Mills*, 221 F.3d at 1204. By its nature, a jurisdictional error is of "such a fundamental character as to render proceedings irregular and invalid." *Peter*, 310 F.3d at 715 (quotation omitted).

Maye's argument that he did not commit a crime fails.

The core of Maye's argument is that his conduct was not a crime under the charging statute, 18 U.S.C. § 1030. He sweeps all of his convictions under section 1030 and makes two main arguments: (1) what he did was factually legal under *United States v. Nosal*, 676 F.3d 854 (9th Cir. 2012); and (2) as applied to his conduct, 18 U.S.C. § 2722 preempted § 1030(a)(2)(B) and, therefore, his convictions are illegitimate. Both arguments fail.

Maye's first factual argument is that his conduct did not violate section 1030(a)(2)(B) because he was acting in the course of his duties as a deputy. (*See* Case no. 8:17-cv-1314-T-33MAP, Doc. 1 at 2, 3, 8, 9, 16, 19). Maye argues that his defense at trial – that he accessed the databases within the scope of his duties as a deputy – was true, notwithstanding the jury's verdict and the court's repeated findings to the contrary. *(See id.* at 2 ["No prosecutor or court has even suggested that it (the statute) could apply in the context in which it was applied here of [sic] a state law enforcement officer accessing a motor vehicle database during the course of his duties as a police officer."]).

However, the facts, proven at trial and found by the jury, show that Maye's conduct was well outside the scope of his duties as a deputy. (*See*, *e.g.*, 8:07-cv-1258-T-30EAJ, Doc. 25 at 3-6 [facts section]; PSR ¶¶ 12-41). Maye, then a sworn law enforcement officer, accessed a private, law enforcement database to

endanger another or to profit. *Id.* A writ of error *coram nobis* is an inappropriate vehicle to re-litigate Maye's failed trial defense.

Maye also bundles into his argument an irrelevant and incorrect factual assertion about the nature of the NCIC. Maye incorrectly asserts that the NCIC data was public information. Here, Maye exceeded his access, authorized only for law enforcement purposes, to the NCIC by abusing the system throughout the course of the conspiracy. Maye offers no legal basis for his claim that the information he accessed must be non-public for him to have committed a crime.

Maye is also wrong about NCIC data. This Court need look no further than the indictment and warrant in Maye's criminal case to understand why Maye's NCIC assertions about warrants being public records is incorrect. The indictment (Doc. cr-1) in Maye's case generated a warrant. (Doc. cr-10). The Indictment and warrant were placed under seal. (Doc. cr-8). While some warrant information is accessible to the public (not through NCIC but typically by and through the entering agency or court records), not all is (*e.g.*, sealed warrants in NCIC). (*See* Attachments B [affidavit from NCIC] and C [affidavit from NCIC/FCIC].) The attachments to Maye's own petition show that he is wrong about the nature of NCIC. (*See* Doc. cv-1 at 53 ("Access Constraints: restricting access to those with a need to know to perform official duties."); *id.* at 56 ("Data in NCIC files is exchanged with and for the official use of authorized officials of the Federal Government, the States, cities, penal and other institutions, and certain

foreign governments."). Describing the warrant information as simply the existence of a warrant is a misnomer because, through NCIC, a warrant frequently includes information about extradition; whether someone is considered armed and dangerous; whether warrant is temporary (an entry indicating that someone is wanted by an agency but no formal arrest warrant has been obtained yet); and even foreign warrants (Canadian). (*See* Criminal Justice "Hot" Files, United States Department of Justice, National Institute of Justice (Nov. 1986) (https://www.bjs.gov/content/pub/pdf/cjhf.pdf); *see also* Doc. cv-1 at 54-55.)

In sum, Maye's NCIC arguments reflect a misunderstanding of this critical law enforcement tool.

Maye also asserts that, based on *Nosal*, 676 F.3d 854, his conduct (as he describes it, not as the jury and court found it) did not fall within the ambit of the Computer Fraud and Abuse Act (CFAA), 18 U.S.C. § 1030. In *Nosal*, the Ninth Circuit held "that 'exceeds authorized access' in the CFAA is limited to violations of restrictions on **access** to information, and not restrictions on its **use**." Other courts – including the Eleventh Circuit, as Maye acknowledged in his petition for writ of certiorari in the § 2241 litigation, *see Maye v. Haynes*, 2012 WL 3805776 – have split on the meaning of exceeding authorization under the CFAA. Maye was able to conduct searches in NCIC to determine if individuals had outstanding warrants, or if vehicles were reported stolen – information from a federal database to which a layperson would not have access. Whether Maye's searches resulted in negative

responses (*i.e.* 'no records found') is of no moment. Maye's search was not authorized because those negative responses confirmed information not publicly available to a layperson. *See*, *e.g.*, *United States v. DeLeon*, 9 F.3d 1535, n.3 (1st Cir. 1993) (*dicta*) ("The N.C.I.C. report contained only a single piece of (negative) information: it indicated that the handgun was not listed as stolen property.").

In 2010, the Eleventh Circuit joined other federal circuits taking a broader view of the statute, holding that when the employer had a policy limiting an employee's computer access for business purposes, an employee who accessed a database for an improper purpose exceeded authorized access. *United States v. Rodriguez*, 628 F.3d 1258, 1263 (11th Cir. 2010); *see also Int'l Airport Ctrs., L.L.C. v. Citrin*, 440 F.3d 418, 420-21 (7th Cir. 2006); *United States v. John*, 597 F.3d 263, 272 (5th Cir. 2010).

Maye's conduct falls under the ambit of the CFAA as interpreted by the Eleventh Circuit in *Rodriguez, supra*. Maye's conduct also fits under the narrower interpretations of the CFAA: while he corruptly used the database information, Maye exceeded his authorized access as part of the conspiracy, violating the restrictions on access to information. (*See* 8:07-cv-1258-T-30EAJ, Doc. 25 at 3-6; *see also* PSR ¶¶ 13-41.)

Finally, *Nosal* does not overturn circuit precedent that applied during Maye's trial, direct appeal, or first § 2255 motion. If a claim relies on a case that was decided after the petitioner's conviction and sentence

became final, and the case is not retroactive, then the petitioner "has not suffered such compelling injustice that would deserve relief pursuant to a writ of error *coram nobis*." *United States v. Swindall*, 107 F.3d 831 (11th Cir. 1997); *see also United States v. Williams*, 158 F. App'x. 249 (11th Cir. 2005).

Maye's argument, couched as a "legal" argument, is an attempt to re-write established facts. *Coram nobis* is not an opportunity to raise a new defense or, as Maye does here, re-assert failed defenses. Maye's argument is not meritorious and does not fit under the rubric of *coram nobis*.

Section 2722(a) does not preempt Section 1030(a)(2)(B)

Maye argues that by enacting section 2722(a), Congress preempted section 1030(a)(2)(B) as applied to Maye's conduct and, therefore, Maye did not commit a federal crime. Maye bases his assertion on his mistaken notion that, because his conduct could be prosecuted under many different federal criminal statutes, the section 1030 charges must, therefore, be preempted. Most federal crimes are susceptible to prosecution under any number of federal statutes. That fact alone does not invoke preemption. Maye must prove that a "positive repugnancy" exists between the two statutes to show preemption. *United States v. Tomeny*, 144 F.3d 749, 752 (11th Cir. 1998) (citing *United States v. Batchelder*, 442 U.S. 114, 122-24 (1979)). Maye fails to meet that burden.

Section 2722(a) applies only to certain motor vehicle records. Section 1030(a)(2)(B) applies to those who intentionally access a computer without authorization, or exceed authorized access, and thereby obtain information from any department or agency of the United States, *i.e.*, what Maye did. *See*, *e.g.*, *United States v. Salum*, 257 F. App'x. 225, 230 (11th Cir. 2007) (explaining in affirming that, "by providing information from the NCIC database, [former police officer] Salum exceeded his authority by accessing it for an improper purpose."). Maye cites to nothing and offers nothing to meet his burden to prove the "positive repugnancy." There is none. Maye's key claim – that section 1030(a)(2)(B) was preempted – fails even minimal scrutiny.

CONCLUSION

A petition for writ of error *coram nobis* attacks errors of the most fundamental nature. Maye has neither alleged one nor met his heavy burden to prove one.

Accordingly, the Court orders:

That Maye's petition for writ of error *coram nobis* is denied. The Clerk is directed to close this case.

ORDERED at Tampa, Florida, on February 16, 2018.

/s/ Virginia M. Hernandez Covington
VIRGINIA M. HERNANDEZ COVINGTON
UNITED STATES DISTRICT JUDGE

Counsel of Record

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CHARLES DANIEL MAYE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Case No.
8:17-cv-1314-T-33MAP
8:04-cr-321-T-30-MAP

ORDER

(Filed May 23, 2018)

This cause is before the Court on Charles Daniel Maye's Rule 59(e) motion to alter the judgment (Doc. 20), and Maye's Rule 52(a) and 52(b) request to remand to the Magistrate Judge for evidentiary hearing. (Doc. 21). Maye is represented by retained counsel.

The Government responded to Maye's motion to alter judgment and motion for evidentiary hearing (Docs. 23 and 24). Maye replied to the Government's response. (Doc. 29).

After review, Maye's motion to alter the judgment and request to remand to Magistrate Judge for evidentiary hearing must be denied.

PROCEDURAL HISTORY

A jury found Maye guilty of counts one, two, four, and five of the Superseding Indictment. Count one charged Maye with conspiracy to access a computer without authorization for private financial gain, in violation of 18 U.S.C. § 371. Count two charged Maye with accessing a National Crime Information Center (NCIC) computer without authorization, in violation of 18 U.S.C. §§ 1030(a)(2)(B) and (c)(2)(B) and (ii) and 18 U.S.C. § 2. Count four charged Maye with accessing an NCIC computer without authorization in violation of 18 U.S.C. §§ 1030(a)(2)(B) and (c)(2)(B) and (ii) and 18 U.S.C. § 2. Count five charged May [sic] with making false statements in violation of 18 U.S.C. § 1001(a)(2). (Doc. cr-166).

On July 24, 2006, this Court sentenced Maye to 97 months incarceration and 36 months supervised release. The Court ordered Maye to pay a $15K fine. (*Id.*). Maye filed a notice of appeal (*Id*. at 168), which he voluntarily dismissed. (Id. at 177). Maye also filed two 28 U.S.C. § 2255 motions to vacate, set aside or correct sentence; a 28 U.S.C. § 2241 petition for writ of habeas corpus challenging his conviction and sentence; and a petition for writ of error *coram nobis*, none of which gained Maye the relief he sought.

In his petition for *coram nobis*, Maye alleged that: (1) he was factually innocent; (2) a Ninth Circuit case, *Unite*d *States v. Nosal*, 676 F.3d 854 (9th Cir. 2012), applies to his conduct, contrary to binding Eleventh

Circuit precedent; and (3) 18 U.S.C. § 2722 preempted 18 U.S.C. § 1030.

After review, the Court denied Maye's *coram nobis* petition, finding that Maye's arguments failed because he did not meet his procedural or substantive burdens, and because he is factually and legally guilty.

Maye is now proceeding on his Rule 52 and Rule 59 motions, neither of which have merit.

MOTION TO ALTER OR AMEND JUDGMENT

Federal Rule of Civil Procedure 59(e) authorizes a motion to alter or amend a judgment after its entry. However "[t]he only grounds for granting [a Rule 59] motion are newly-discovered evidence or manifest errors of law or fact." *In re Kellogg*, 197 F.3d 1116, 1119 (11th Cir. 1999). At best, what Maye raises is an effort to "re-re-relitigate" matters decided against him. However, "a Rule 59(e) motion [cannot be used] to relitigate old matters, raise argument or present evidence that could have been raised prior to the entry of judgment." *Michael Linet, Inc. v. Village of Wellington, Fla.*, 40 F.3d 757, 763 (11th Cir. 2005). "This prohibition includes new arguments that were 'previously available, but not pressed.'" *Wilchombe v. TeeVee Toons, Inc.*, 555 F.3d 949, 957 (11th Cir. 2009) (quoting *Stone v. Wall*, 135 F.3d 1438, 1442 (11th Cir. 1998) (*per curiam*)). The Court's judgment against Maye's petition for writ of error *coram nobis* contains no manifest errors of law or fact and Maye presents no new evidence that could justify his proposed relief.

Accordingly, Maye's Rule 59(e) motion to alter or amend the judgment will be denied.

REQUEST FOR REMAND FOR EVIDENTIARY HEARING

Maye seeks to have this Court "remand" for an evidentiary hearing. Maye asks this Court to amend its findings or to make additional findings by speculating that an Office of Professional Responsibility report "may have a bearing on the Court's determination of the issues presented by [his] petition." Maye has not met his burden to invoke Rule 52(b).

Discussion

Maye filed his motion seeking an evidentiary hearing pursuant to Rule 52(a)(5) and Rule 52(b) of the Federal Rules of Civil Procedure. Rule 52(a)(5) permits Maye to "question the sufficiency of the evidence supporting [this Court's] findings." Fed. R. Civ. P. 52(a)(5). Rule 52(b) allows Maye to file a motion within 28 days after the entry of judgment to permit the Court to amend its findings or to make additional findings. "The purpose of Rule 52(b) is to allow the court to correct plain errors of law or fact, or, in limited situations, to allow the parties to present newly discovered evidence, but not to allow the relitigation of old issues, a rehearing on the merits, or the presentation of new theories of the case." *United States v. Davila*, 749 F.3d 982, 992-93 (11th Cir. 2014); Perez *v. Renaissance Arts & Educ., Inc.*, 2014 WL 408334, at *1 (M.D. Fla., Feb. 3, 2014)

(citing *Hanover Ins. Co. v. Dolly Transp. Freight, Inc.*, 2007 WL 170788, at * 2 (M.D. Fla., Jan. 18, 2007)). "A party seeking to amend findings under Rule 52(b) must show that the trial court's findings of fact or conclusions of law are not supported by evidence in the record." *Id.*

Maye requests that the Magistrate Judge, on remand, review the report of the investigation (ROI) of the Department of Justice that led to the termination of former Assistant United States Attorney Jeffrey DelFucco. That ROI was previously reviewed by a Magistrate Judge *in camera*. (*See* Copy of Magistrate Judge's Report and Recommendation attached as Exhibit One to this Order.) Maye believes that ROI may have a bearing on the Court's determination of the issues presented in Maye's *coram nobis* petition.

The *Engberg* FOIA Litigation

The United States Department of Justice's Office of Professional Responsibility (OPR) is tasked with investigating allegations of misconduct involving Department of Justice (DOJ) attorneys "that relate to the exercise of their authority to investigate, litigate or provide legal advice, as well as allegations of misconduct by law enforcement personnel when such allegations are related to allegations of attorney misconduct within the jurisdiction of DOJ-OPR." 28 C.F.R. § 0.39a(a)(1). The OPR, if appropriate, reports its findings to the responsible Department official.

In 2010, Engberg filed an action seeking disclosure and release of the information contained in the ROI that he alleged was improperly withheld. *Engberg v. Dep't of Justice*, No. 8:10-cv-01775-T-23MAP, 2011 WL 4502079, at *1 (M.D. Fla., Aug. 12, 2011). The Magistrate Judge found that the report was FOIA-exempt and the Court granted summary judgment in favor of the Department. *Engberg v. United States Dep't of Justice*, 2011 WL 4501388 at *1 (M.D. Fla., Sept. 27, 2011) (unpublished).

The ROI and Maye's Speculative Allegations

"Where a party attempts to introduce previously unsubmitted evidence on a motion to reconsider, the court should not grant the motion absent some showing that the evidence was not available during the pendency of the motion." *Mays v. United States Postal Serv.*, 122 F.3d 43, 46 (11th Cir. 1997). "On a motion for reconsideration a party is 'obliged to show not only that this evidence was newly discovered or unknown to it until after the hearing, but also that it could not have discovered and produced such evidence.'" *Id.* at n.6. Maye cannot show he could not have discovered the FOIA litigation, particularly in light of the fact that he did find it in the public docket.

Maye Fails To Meet his Burden under Rule 59(e)

Reconsideration of a previous order is an extraordinary remedy to be employed sparingly. On a motion

to reconsider a judgment, the moving party must set forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision. *Sussman v. Salem, Saxon & Nielsen, P.A.*, 153 F.R.D. 689, 694 (M.D. Fla. 1994). Maye simply asserts that the "ROI may have a bearing on the Court's determination of the issues presented by this petition." (Doc. 21 at 1). Maye's speculative assumption about the content of the Report does not carry Maye's burden to produce something of such a strongly convincing nature to induce the Court take [sic] the extraordinary step of essentially re-opening the litigation on his petition.

In an affidavit filed by the Department in the case, OPR FOIA Associate Counsel and Specialist Patricia Reiersen declared under penalty of perjury:

> I have reviewed Charles Daniel Maye's Petition for Writ of Error Coram Nobis; this Court's Order denying the petition; and Maye's request for Remand for Evidentiary Hearing. . . . The Report does not exculpate Charles Daniel Maye. . . . The Report does not address the issues raised by Maye in the Petition and that were addressed by the Court in its Order.

(*See* Declaration of Margaret McCarty attached as Exhibit Two to this Order.) Maye offers no legal basis for the Court to remand for an evidentiary hearing based on the OPR report. Maye has not explained how the OPR Report could even be raised in this litigation. Maye alleges no basis for concluding that there is a nexus between the OPR report and the prosecution of

his case. Maye does not meet his burden under Rule 52.

Accordingly, the Court orders:

That Maye's motion to alter or amend the judgment (Doc. 20) and Maye's request to remand for evidentiary hearing (Doc. 21) are denied.

ORDERED at Tampa, Florida, on May 23, 2018.

/s/ Virginia M. Hernandez Covington

VIRGINIA M.
HERNANDEZ COVINGTON
UNITED STATES
DISTRICT JUDGE

Counsel of Record

APPENDIX D

CIVIL NO. ___
RELATED CRIMINAL NUMBER
8:04-CR-321-T-30EAJ

IN THE
United States District Court
Middle District of Florida
Tampa Division

***IN RE* CHARLES DANIEL MAYE**,
Petitioner

PETITION FOR WRIT OF ERROR CORAM NOBIS

(Filed Jun. 1, 2017)

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[1] IN THE
United States District Court
Middle District of Florida
Tampa Division

IN RE CHARLES DANIEL MAYE,
Petitioner

PETITION FOR WRIT OF ERROR CORAM NOBIS

The petitioner, CHARLES DANIEL MAYE (sometimes hereinafter referred to as Petitioner, Defendant, or "Maye"), respectfully prays that a writ of error coram nobis issue to vacate his conviction in the case of *United States v. Charles Daniel Maye*, United States District Court for the Middle District of Florida, Tampa Division, Case Number 8:04-cr-321.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1651(a). See *United States v. Morgan*, 346 U.S. 502, 507, 74 S. Ct. 247 (1954). Venue is properly laid in the United States District Court, Middle District of Florida, under 28 U.S. Code § 1391(e)(1), because Maye was convicted in this Court.

INTRODUCTION

Petitioner, a former Hillsborough County Deputy Sheriff, was convicted in [2] 2006 for violating 18 U.S.C.

§ 1030(a)(2)(B) of the Computer Fraud and Abuse Act ("CFAA"). He was also convicted for violating 18 U.S.C. § 1001(a)(2) for making false claims to federal investigators where the CFAA was the matter under investigation that was within the jurisdiction of the United States. He is no longer in custody. Therefore, 28 U.S.C. § 2255 is now inadequate to collaterally attack the judgment.

Relief was previously unavailable because of a misunderstanding of the scope of the CFAA, defense counsel's failure to conduct the most basic research, and the complete lack of any authority even citing § 1030(a)(2)(B), much less interpreting its scope in this context. However, since its enactment in 1984, no prosecutor or court has even suggested that it could apply in the context in which it was applied here of a state law enforcement officer accessing a motor vehicle database during the course of his duties of enforcing the laws of the state. That fact makes it improbable that a case in that context would ever reach the Supreme Court to have made relief available under §§ 2241 & 2255(e), which makes coram nobis relief the only possible remedy to correct what is obviously a jurisdictional defect.

The convictions were based on allegations and proof that the Petitioner used the Mobile Data Terminal ("MDT") in his patrol vehicle to access the Florida Department of Highway Safety and Motor Vehicles ("DHSMV") to obtain and [3] disclose information in that database (consisting of addresses and the current whereabouts of certain individuals) to his co-defendant.

Because of that access, the DHSMV made an auto generated query (as it does whenever any state officer accesses it during any traffic stop or license or tag verification) to ascertain if the person or vehicle queried was wanted in another jurisdiction. His CFAA convictions and those dependent on the government's theory of their case should be vacated because Congress has preempted that conduct in 18 U.S.C. § 2722(a), which carries no jail time.[1] That makes the indictment not to have stated, and the trial not to have proved, a legitimate offense against the United States. In addition, based on the conduct alleged and proved, Congress has exempted the government's jurisdictional basis for the prosecution in 18 U.S.C. § 1030(f) ("This section does not prohibit any lawfully authorized investigative . . . activity of a law enforcement agency of . . . a political subdivision of a state . . . "). The Attorney General has exempted from regulation any information obtained by accessing the Florida DHSMV. See 28 C.F.R. § 20.20(b)(1) & (5). It includes, among other things, information contained in "(1) Posters, announcements, or lists for identifying or apprehending fugitives or wanted persons; [and] (5) Records of traffic offenses maintained by state departments of [4] transportation, motor vehicles or the equivalent thereof for the purpose of regulating the issuance, suspension, revocation, or renewal of drivers, pilots or other operators licenses." Finally, two appellate courts have recently held that § 1030(a)(2)(B) does not reach the conduct alleged and proved in this case.

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[1] "A person who knowingly violates this chapter shall be fined under this title." 18 U.S.C. § 2723(a).

Since the government waived its right to seek certiorari review of those cases decided against it, tacitly agreeing with the result, the Court should consider them a correct interpretation of the scope of § 1030(a)(2)(B) for purposes of coram nobis relief. If the government had sought review, relief would have been required under any analysis under 28 U.S.C. §§ 2241 & 2255(e) while the Petitioner was in custody.

STATEMENT OF FACTS AND PROCEDURAL HISTORY MATERIAL TO THE ISSUE PRESENTED

The charges. Petitioner was named, along with Leroy Collins, in a five count superseding indictment on December 16, 2004. The trial court construed the lengthy indictment to charge the Petitioner with the following crimes:

> Count One: conspiracy to intentionally access a computer without authorization and in excess of authorization, to obtain information from a department or agency of the United States, for the purpose of private gain and in furtherance of criminal acts of extortion in violation of 18 U.S.C. § 1030(a)(2)(B) and knowingly and willfully making false statements to an FBI agent in violation of 18 U.S.C. § 1001(a)(2) all in violation of 18 U.S.C. § 371; Counts Two and Four: intentionally accessing a computer—the NCIC computer database—without authorization and in excess of authorization, to obtain information from a department or agency of the United States, for the

> purpose of private [5] financial gain and in furtherance of criminal acts of extortion in violation of 18 U.S.C. § 1030(a)(2)(B)(i) and (ii) and 18 U.S.C. § 2; and Count Five: knowingly and willfully making false statements during an interview with a Special Agent of the FBI, in violation of 18 U.S.C. § 1001(a)(2).

Maye v. United States, Case No. 8:07-CV-1258-T-30EAJ.[2]

The substantive and false claims counts merely tracked the language of § 1030(a)(2)(B), without stating how the NCIC was accessed or what information was obtained. Count One contained several sections stating the government's theory of its case, which was that the Petitioner did so from the MDT in his patrol vehicle. However, it made no claim that he had any program to access any protected file within the NCIC database. Nor that he hacked into any such file.

Another section of Count One had 40 overt acts that were descriptions of traffic stops or license tag verifications that included the substantive violations alleged in Counts Two, Four and Five, half of which were conducted by other officers. However, none alleged that the Petitioner hacked into any protected file in the NCIC database, that he obtained any protected

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[2] The superseding indictment was filed as Cr. Dkt. #6 and is appended to this petition as Exhibit A because the post conviction court's characterization of the charges does not adequately or completely describe their nature or the government's theory of its case as to how it believed the CFAA was violated.

information from the NCIC, or that he or his MDT had the capability to do so.

[6] *Pretrial proceedings*. The defendants requested and received three continuances: two by the Petitioner and one by Collins. Notably, defense counsel's first request was styled as an "emergency motion" in which he stated: "In order to render effective assistance of counsel to Mr. Maye, it is absolutely imperative that the undersigned understand the intricacies of the data system of the NCIC and the FCIC and the Hillsborough County Sheriffs Office." Cr. Dkt. #48.

As this petition demonstrates, defense counsel did absolutely no research or investigation to understand the scope of the statute or the intricacies of the data systems involved, which in his own words, rendered his assistance ineffective. Merely reading the full text of the statute would have led him to § 1030(e)(6), which interprets exceeds authorized access as having used authorized access to obtain information that one is not entitled to obtain. According to the government's evidence, the only information the Defendant did or could have obtained from the NCIC was whether the person or vehicle queried in the DHSMV database was wanted in another jurisdiction, which is information that is not private and that any other citizen is entitled to obtain. It would also have led him to § 1030(f), which exempted the government's jurisdictional basis for the prosecution. Even the most basic, cursory research would have led counsel to 28 C.F.R. § 20.20(b) in which the Attorney General exempted from regulation the only information that could have been obtained [7]

from the NCIC by an auto generated query by the DHSMV of whether a person or vehicle was wanted in another jurisdiction. A mere Google search of the NCIC, would have led him to the FBI's own website explaining the information available, which would have shown that only information exempted by 18 U.S.C. § 1030(f) and 28 C.F.R. § 20.20(b) could have been obtained without a special program not available from an MDT.[3] A review of the legislative history would have shown that Congress did not intend the statute to cover information in state or local databases. *See* Sen. Rep. 99-432 (1986).

Ineffective assistance of counsel can form the legal basis for coram nobis relief if counsel's deficient performance caused a fundamental error. *United States v. Akinsade*, 686 F.3d 248, 256 (4th Cir. 2011) (In meeting his burden under *Strickland*, Akinsade "has also demonstrated that he has suffered a fundamental error necessitating coram nobis relief."); *Santos-Sanchez v. United States*, 548 F.3d 327, 332 (5th Cir. 2008) ("[I]neffective assistance of counsel is an error that can warrant coram nobis relief."). *See* also *United States v. Mills*, 221 F.3d 1201, 1204 (11th Cir. 2000) ("[C]ourts may consider coram nobis relief only if . . . the Petitioner presents sound reasons for failing to seek relief earlier.") The record supports that legal basis [8] for relief. Defense counsel by his own words had to (but did not) conduct a constitutionally required investigation

[3] See attached information from the FBI's website explaining the data systems of the NCIC and which files are retrieved and which are not, appended as Exhibit B.

into the intricacies of the databases involved and how (or even if) they were covered by the CFAA. If he had done so, the trial court would have been required to find that the scope of the CFAA did not reach the conduct alleged or proved.[4] The Petitioner was unable to vindicate the jurisdictional claim raised herein while he was in custody because of the trial court's misunderstanding of the scope of the CFAA. It was improperly influenced by the government's continued misrepresentations into the post conviction proceedings that the Petitioner accessed the NCIC and that its scope reached the conduct alleged and proved of only obtaining information from the NCIC that the person or vehicle queried by the DHSMV was not wanted in another jurisdiction.

The trial. The government's evidence was that the only database that was (or even could have been) accessed was the DHSMV via an auto generated query to what they called the "hot files" to ascertain if the person or vehicle queried was wanted. There was no testimony that the MDT had the capability of hacking into any [9] protected file of the NCIC. The government's witness from the NCIC, Jane McCully, testified that the only file that was accessed by the auto generated query was the unprotected files that only ascertained

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[4] It was not until Congress enacted the Driver's Privacy Protection Act, 18 U.S.C. § 2721, *et seq*., that information in a state's database became protected under federal law and the conduct alleged and proved at the trial became a federal crime. It was enacted as part of the Violent Crime Control and Law Enforcement Act of 1984 to close what it saw as a "loophole in the law." *See Margan v. Niles*, 250 F. Supp. 2d 63, 68-69 (N.D.N.Y. 2003).

whether the person or vehicle queried was wanted in another jurisdiction; and each time, the only information provided was no want or record found.[5]

The Defendant did not contest the element that he accessed a computer, nor did he contest the element of obtaining information from that computer, in as much as he accessed the MDT in his patrol vehicle and obtained information from that access. However, one of the addresses was a P.O. Box and another was not correct; and therefore, of no use to anyone. His defense was that every query to the Florida DHSMV was lawfully authorized investigative activity required by his duties as a deputy sheriff based on reasonable suspicion or probable cause of a violation of the laws of Florida. He denied that he disclosed any information to Leroy Collins, nor did any witness offer any testimony that supported that allegation, although it is not even an element of § 1030(a)(2)(B).

Counsel did not request, nor was the jury given, an instruction that it could acquit if it believed that the conduct was exempted from the scope of the CFAA by [10] 18 U.S.C. § 1030(f) and 28 C.F.R. § 20.20(b). Aside from the language of the statute, the only explanatory definition given was that of exceeding authorized access found in § 1030(e)(6). The jury was not given instructions on the definition of "information" or "agency" of the United States to determine if what he obtained violated the statute. Nor was the jury instructed that

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[5] See excerpts of testimony of Jane McCully from the NCIC, appended as Exhibit C.

he was not entitled to obtain information concerning whether a person or vehicle was wanted in another jurisdiction.[6] (Cr. Dkt. #124, #147)

Postconviction proceedings. The Defendant filed a timely notice of appeal. However, he dismissed it upon advice of counsel that he had no appealable issues and that he would complete his sentence before any appeal would be decided.[7] That advice should have been ineffective because, at the minimum, the indictment alleging that the Defendant accessed and obtained protected information from the NCIC and its proof at trial that he only accessed the DHSMV database constituted a constructive amendment of the indictment. At that time, no appellate court had even cited, much less interpreted, the scope of § 1030(a)(2)(B). Furthermore, no attorney rendering [11] reasonably effective assistance would have told his client that he would complete a 97 month sentence before an appeal would be resolved.

Leroy Collins did pursue an appeal. *United States v. Maye*, 241 Fed. Appx. 638 (11th Cir. 2007). However, for some unknown reason, the testimony of the most important witness in the trial, Jane McCully from the NCIC was not transcribed (Cr. Dkt. #218), which was

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[6] See excerpts from charging conference and jury instructions, appended as Exhibit D.

[7] Counsel's advice not to appeal was witnessed by members of the Defendant's family, one of which was an attorney. Affidavits of the substance of that advice are in the record because they were filed in support of the claim in the 28 U.S.C. § 2255 motion that it constituted ineffective assistance of counsel.

critical to the fact of whether any protected information was obtained from her agency, despite it being ordered by his attorneys. Consequently, Collins could not have raised the jurisdictional issue raised herein, nor could the appellate court have done so on their own motion as they are required to do whenever any jurisdictional defect is apparent from the face of the record. Her testimony was transcribed by the Petitioner at his expense after the § 2255 proceeding had concluded.

The Petitioner's § 2255 motion raised three grounds of ineffective assistance of counsel related to the jurisdictional claim raised herein. Ground Five alleged, in part, that counsel failed to investigate and call key witnesses, one of which was any sheriff deputy who could have testified that what the government was claiming was impossible from an MDT in a patrol vehicle. Ground Eight alleged that the Petitioner was actually innocent of the allegation that he provided any information to Leroy [12] Collins.[8] Ground Nine alleged that counsel was ineffective in advising that there were no appealable issues after trial. All were dismissed without a hearing based on the trial court's mistaken belief that the conduct proved was within the scope of § 1030(a)(2)(B).

The Petitioner then filed several motions and petitions where he raised in some form the jurisdictional issue raised herein. All were found to be procedurally

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[8] This claim was supported by a polygraph test given by an examiner approved by the FBI, who concluded that the Defendant was truthful and innocent of the allegations. (Cr. Dkt. #161)

defaulted based on the dismissal of the § 2255 motion. He filed a motion challenging the trial court's subject matter jurisdiction. He filed a complaint styled as an independent action in equity under Fed.R.Civ.P. 60(d)(1) seeking to reopen the § 2255 proceeding. *Maye v. United States*, 8:10-cv-2327-T-30TBM; 2010 U.S. Dist. LEXIS 118251. He filed a petition in the district of his confinement under 28 U.S.C. §§ 2241 & 2255(e). It was based on the ground that the holdings in *United States v. Salum*, 257 Fed. Appx. 225 (11th Cir. 2007) and *United States v. Rodriguez*, 628 F.3d 628 (11th Cir. 2010) made him innocent because he obtained no information from any federal database. *Maye v. Haynes*, 2011 U.S. Dist. LEXIS 65585 (S.D. GA.). Finally, he filed a motion alleging that his due process rights were violated at the trial and in the § 2255 proceedings. It was based on the grounds that the government falsely [13] represented to both courts that he accessed the NCIC from the MDT in his patrol vehicle when they knew that it was impossible to do so and that the conduct alleged and proven had been preempted by Congress in § 2722(a). *Maye v. United States*, 8:13-cv-3104-T-30EAJ; 2014 U.S. LEXIS 2485.

The supervening decisions. The first published case in which a law enforcement officer was charged under § 1030(a)(2)(B) was *United States v. Christenson*, 801 F.3d 971 (9th Cir. 2015). However, that fact is where the similarity with the facts of this case ends. The facts involved a widespread criminal enterprise offering illegal private investigation services in Southern California. The owner bribed Los Angeles area

police officers for access to confidential law enforcement databases. In direct contrast, the Defendant here only had access to the DHSMV from the MDT in his patrol vehicle.

The court vacated the CFAA and related convictions based on *United States v. Nosal*, 676 F.3d 854 (9th Cir. 2012) (*en banc*), which was decided after the convictions. *Nosal* held the term "exceeds authorized access" to be "limited to violations of restrictions on access to information, and not restrictions on its use." *Id*. at 864. The jury instructions were similar to those in this case, which the court held "was flawed in that it allowed the jury to convict for unauthorized use of information rather than only for unauthorized access." *Christenson*, 801 F.3d at 922. The court [14] held that under *Nosal*, the government was required to prove, and the jury instructed that it had to find, that the defendant "accessed any databases that she was not authorized to access in the course of her job." *Id*. It further held that, "Congress has created other statutes under which a government employee who abuses his database privileges may be punished, but it did not intend to expand the scope of the federal antihacking statute." *Id*. (citing *Nosal*, 676 F.3d at 857 & n. 3) ("refusing to 'transform the CFAA from an anti-hacking statute into an expansive misappropriation statute,' and citing another statute restricting the use of information under which a defendant might properly be charged.")

This petition does not challenge flawed jury instructions on the definition of exceeding authorized access that only became apparent after conviction.

Christenson held that the conduct alleged and proved did not fall within the scope of § 1030(a)(2)(B), but that it did fall within the scope of a state statute similar to the wording in 18 U.S.C. § 2722(a), in which the defendants were charged as a predicate for the racketeering charge. It provides that:

> (c) Except as provided in subdivision (h), any person who commits any of the following acts is guilty of a public offense . . . (2) knowingly accesses and without permission takes, copies, or makes use of any data from a computer, computer system, or computer network, or takes or copies any supporting documentation, whether existing or residing internal or external to a computer, computer system, or computer network.
>
> [15] Subdivision (h) exempts "acts which are committed by a person within the scope of his or her lawful employment." Cal. Penal Code § 502(h)(1). For purposes of this section, a person acts within the scope of his or her employment when he or she performs acts which are reasonably necessary to the performance of his or her work assignment." *Id*. Defendants do not argue that [they] were acting within the scope of their employment. Had they made this argument, we would have rejected it. Neither [of their] database searches were necessary for the performance of any legitimate work assignment.

Christenson, 801 F.3d at 895 & n. 8.

Except for the element of information in a DMV database, which is exempted by 28 C.F.R. § 20.20(b)(5), the California statute and the statute in which Congress preempted the conduct alleged in this case are identical in that they prohibit unauthorized use or disclosure of information. It provides in pertinent part:

> *Procurement for unlawful purpose*. It shall be unlawful for any person knowingly to obtain or disclose personal information, from a motor vehicle record, for any use not permitted under § 2721(b) of this title.

18 U.S.C. § 2722(a).

The defendants in *Christenson* argued that the court should interpret the California statute consistent with the federal statute as interpreted in *Nosal*, which would have precluded its use as a predicate offense. The court disagreed because the "statutes are different." 801 F.3d at 994 (The state statute's "focus is on unauthorized taking or use of information. In contrast, the CFAA criminalizes unauthorized access, not subsequent unauthorized use.") (*Nosal*, 676 F.3d at 865).

[16] *United States v. Valle*, 807 F.3d 508 (2nd Cir. 2015) was the first published case in which the government charged that a local police officer violated § 1030(a)(2)(B) from the MDT in his patrol vehicle. However, as in *Christenson*, that is where the similarity to the facts of this case ends. The undisputed facts were that Valle entered a name into a federal database from the MDT in his patrol vehicle with no legitimate law enforcement purpose. He could do so because, as a

NYPD officer, he had access to the Onmixx Force Mobile ("OFM"), a computer program that allowed him to search various restricted databases, including the restricted files of the NCIC, which contains sensitive information about individuals such as home addresses and dates of birth. It was undisputed that the NYPD policy, known to Valle, was that he could only access those databases in the course of an officer's official duties and that accessing them for personal use violated department rules.

In direct contrast to the facts here, the Petitioner had no access to the restricted files of the NCIC through any program like OFM and that his defense was that he had a legitimate law enforcement purpose for accessing the DHSMV. Implicit in the opinion was the fact that the statute would not even apply if access was for a law enforcement purpose because it stated that the dispositive question is whether Valle "exceeded authorized access" when he used his access to OFM to conduct a search for Maureen Hartigun with no law enforcement purpose. Here, the government [17] actually alleged in the overt acts that the Defendant had a law enforcement purpose of making traffic stops and verifying license tags, but that he obtained information from the DHSMV during that access and then disclosed it to Collins. After analyzing the interpretation of the CFAA by other circuits and its legislative history, it concluded that, under the rule of lenity, the statute should not apply in a way that covered information that must be disclosed to any member of the public upon request. Nor should it apply in a way that

would criminalize the conduct of millions of ordinary computer users, and place it in the position of a legislature. Here, the only information obtained from the NCIC was whether a person or vehicle was wanted in another jurisdiction, which is information that would be available to any person upon request. Applying it in that context would make every traffic stop and tag verification a violation of § 1030(a)(2)(B).

After *Christenson* and *Valle* were decided without the Government filing a petition for a writ of certiorari, the Supreme Court interpreted the definition in § 1030(e)(6) in a way that would ratify their reasoning and deprive the trial court of jurisdiction:

> The statute thus provides two ways of committing the crime . . . (1) obtaining access without authorization, and (2) obtaining access without authorization but then using that access improperly.

Musacchio v. United States, 136 S.Ct. 709, 713 (2016).

[18] Here, there was no allegation or proof that the Petitioner was not authorized to access the Hot Files of NCIC, not that he accepted any information from NCIC that he was not entitled to obtain or that he used that access improperly.

[19] **ARGUMENT**

MAYE IS ENTITLED TO A WRIT OF ERROR CORAM NOBIS

A WRIT OF ERROR CORAM NOBIS SHOULD ISSUE TO VACATE THE CONVICTIONS WHICH WERE BASED ON CONDUCT THAT IS NOT A CRIME UNDER THE CHARGED STATUTE AND FAILS TO PROVE A LEGITIMATE OFFENSE AGAINST THE UNITED STATES

Although the Petitioner has already served his sentence, *Christenson*, *Valle* and *Mussachio* [sic] have now made clear what he has argued all along in his *pro se* filings: that the CFAA charges and the false claim charges dependent on them were defective, because the conduct alleged and proved was outside the ambit of the statute. As previously pled above, there was no allegation or proof that the Petitioner was not authorized to access the Hot Files of NCIC, nor that he accessed any information from NCIC that he or any other officer was not only entitled but required to obtain during a traffic stop or license plate check, or that he used that access improperly. Because he was convicted of accessing the DHSMV and obtaining information from the NCIC that not only he and any other citizen was entitled to obtain, he was convicted in error. Moreover, that error—a conviction based on allegations that do not state a legitimate offense or for conduct that is not a crime under the statute charged—is so fundamental that, under established Eleventh Circuit case law, the district court lacked the power to convict and punish for that conduct. See *United* [20] *States v. Peter*, 310 F.3d 709, 712 (11th Cir. 2002); *United States v. Tomeny*, 144 F.3d 749, 751 (11th Cir. 1998). As a result, he is entitled to retroactive relief from the remaining consequences

of those convictions, even though that sentence has been served. Because "a writ of error coram nobis must issue to correct the judgment that the court never had the power to enter," *Peter*, 310 F.3d at 716, the Petitioner requests that this Court issue such a writ and vacate his 2006 CFAA and false claims convictions.

The writ of error coram nobis is an extraordinary writ designed to correct fundamental injustices. *Mills*, 221 F.3d at 1203 (citing *United States v. Swindall*, 107 F.3d 831, 834 (11th Cir. 1997)). To that end, the writ has been "allowed without limitation of time for facts that affect the 'validity and regularity' of the judgment."[9] *Morgan*, 346 U.S. at 507.

Through the writ of error coram nobis, "the law recognizes that there must be a vehicle to correct errors 'of the most fundamental character; that is, such as rendered the proceeding itself irregular and invalid.'" *Peter*, 310 F.3d at 712 (citing *Morgan*, 346 U.S. at 509 n. 15 (quoting *United States v. Mayer*, 235 U.S. 55, 69 (1914))); *Mills*, 221 F.3d at 1204. One such fundamental error is an absence of jurisdiction. [21] *Peter*, 310 F.3d at 712; *Alikhani v. United States*, 200 F.3d 732,734 (11th Cir. 2000) (rejecting defendant's arguments that his statutory claims are jurisdictional but noting that "[a] genuine claim that the district court lacked jurisdiction to adjudicate the petitioner guilty may well be a proper ground for coram nobis relief as

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[9] There is a "presumption of significant collateral consequences arising from a criminal conviction." *Spencer v. Kenma*, 523 U.S. 1, 12 (1998) (citing *Sibron v. New York*, 392 U.S. 40, 51 (1968)).

a matter of law."); *Tomeny*, 144 F.3d at 751) (holding statutory argument that Congress has preempted conduct in another statute to be a jurisdictional claim). A jurisdictional defect implicates "the court's statutory or constitutional power to adjudicate the case." *United States v. Cotton*, 535 U.S. 625, 630 (2002) (emphasis in original).

The Eleventh Circuit held that when Congress has preempted the conduct alleged or prosecuted in another section of the U.S. Code that the government has failed to allege or prove a legitimate offense against the United States. *Tomeny*, 144 F.3d at 751. The claim is jurisdictional and cannot be procedurally defaulted. *Id*. Analyzing a preemption argument is a two step approach. The first step is to determine whether the language of the statutes themselves demonstrates Congress's intent that "one statute preempts another." *Id*. at 752. If the statutory language does not demand a finding of preemption, then a court must determine whether the legislative history shows "clear and manifest" evidence of Congress's intent that one statute preempts another. *Id.* Preemption occurs when a specific statute would be rendered superfluous and robbed of all practical effect. *Id*. at 754. It is also [22] appropriate where Congress "would not have intended to allow a prosecution under the general provision, where prosecution under the specific provision was appropriate." *Id*. at n. 10.

The plain language of the statutes manifests Congress's intent that § 2722(a) preempts § 1030(a)(2)(B) when the subject matter is an allegation and proof that

a defendant obtained or disclosed information in a state motor vehicle database. The former makes it unlawful for any person knowingly to obtain or disclose personal information, from a motor vehicle record, for any use not permitted under § 2721 of that title. The latter makes it unlawful to intentionally access a computer without authorization or to exceed authorized access, and thereby obtain information from any department or agency of the United States. The Florida DHSMV is not a department or agency of the United States, but it is a database for motor vehicle records. However, if that plain statutory language does not demand a finding of preemption, the legislative history of the statute clearly and unequivocally manifests Congress's intent of preemption because it states that it does not cover information in state and local databases. If, as was the government's theory in this case which was ratified by the trial and § 2255 courts, the CFAA can be violated by a law enforcement officer accessing his state's DMV database, it would render § 2722(a) superfluous and robbed of all practical effect. More importantly, there would have been no need for [23] Congress to enact it because every time any state law enforcement officer accesses his state DMV database by merely verifying a license tag or writing a traffic citation, an auto generated query is always made to NCIC to ascertain if the person or vehicle queried is wanted in another jurisdiction.

The Eleventh Circuit held that when the Supreme Court defines a federal criminal statute to exclude the

conduct upon which a conviction is based, there is a fatal jurisdictional defect, and "a writ of error coram nobis must issue to correct the judgment that the court never had power to enter." *Peter*, 310 F.3d at 716. In *Peter*, the defendant had pled guilty based on his admissions that he committed mail fraud under 18 U.S.C. § 1341 when he mailed applications for alcoholic beverage licenses with misrepresentations. *Peter*, 310 F.3d at 711. Four years later, the Supreme Court held in *Cleveland v. United States*, 531 U.S. 12 (2000), that "[s]tate and municipal licenses in general . . . do not rank as 'property' for purposes of § 1341, in the hands of official licensors." *Peter*, 310 F.3d at 711. Peter held that "[d]ecisions construing substantive federal criminal statutes must be given retroactive effect" and voided Peter's conviction under *Cleveland*. *Peter*, 310 F.3d at 711 (citing *Bousley v. United States*, 523 U.S. 614, 620-21 (1998)). A court that convicts and sentences a defendant for conduct that is not a crime lacks jurisdiction, and "the conviction and sentence are void from their inception and remain void long after a defendant has fully suffered [24] their direct force." *Peter*, 310 F.3d at 715. Because the Supreme Court had defined the statute in a way that rendered Peter's conduct non-criminal, the district court was without legitimate authority or jurisdiction to enter a judgment of conviction for that conduct, and a writ of error coram nobis had to issue in order to correct the miscarriage of justice.

The Petitioner's case is exactly of the same character. He was convicted for conduct that was not a violation of the CFAA. Counts Two and Four charged him with substantive violations of the CFAA, Count Five charged him with making false statements to the FBI about whether he violated the CFAA, and Count One charged him with a conspiracy to violate those statutes based on overt acts describing conduct involving traffic stops, license and vehicle tag verifications and allegations that he disclosed information he learned to Leroy Collins, which Congress had preempted in § 2722(a) and exempted in § 1030(f). The Attorney General found those circumstances inapplicable to the regulations governing the FBI/NCIC systems. 28 C.F.R. § 20.20(b)(1) & (5). It is undoubtedly an investigative function of the DHSMV to ascertain if a person or vehicle is wanted in another jurisdiction.

Without any jury instructions defining department or agency and what information the Defendant was not entitled to obtain (Cr. Dkt. #127), the jury relied on the prosecution's theory that merely accessing the DHSMV for any reason violated [25] the CFAA. Under those circumstances, a writ of error coram nobis should issue to relieve the Petitioner of the continuing consequences of his decade old convictions. Four cases, the plain language of the statute itself, its legislative history, its motivating policies and the Attorney General's exemptions make his entitlement to coram nobis relief clear. The Ninth Circuit's decision in *Christenson*, and the Second Circuit's decision in *Valle* confirms

what the Petitioner begged the courts to recognize inartfully in his § 2255 motion and in each succeeding post judgment motion—that accessing the DHSMV during a traffic stop or license verification did not violate the CFAA under any interpretation. *Peter* reversed the denial of a petition for a writ of error coram nobis under facts virtually identical to those here and *Tomeny* would have granted relief under those facts. "Decisions construing substantive federal criminal statutes must be given retroactive effect," *Peter*, 310 F.3d at 711, because any alternative approach would "'necessarily carry a significant risk that a defendant stays convicted of an act that the law does not make criminal.'" *Schriro v. Summerlin*, 542 U.S. 348, 351-52 (2004) (citing *Bousley*, 523 U.S. at 620)). That is the case here. The Petitioner is, was, and always has been factually innocent of the CFAA, properly defined. He was convicted of "a specific course of conduct that is outside the reach of the [CFAA]." *Peter*, 310 F.3d at 715. As a result, his conviction represents an error that is "material to the validity and regularity of the legal proceeding itself." [26] *Carlisle v. United States*, 517 U.S. 416, 428 (1996) (citing *Mayer*, 235 U.S. at 67-68). The district court lacked jurisdiction to punish him for the non-existent crime of which he was convicted under § 1030(a)(2)(B), and he is therefore entitled to coram nobis relief to void those convictions and any dependent on them.

Finally, since this petition raises a jurisdictional claim, it is irrelevant that the Petitioner previously attacked his convictions under § 2255 or raised similar

claims in post judgment motions. The former was dismissed because he failed to particularize his jurisdictional claims as an attorney would and the latter because they were successive. "Since jurisdictional error implicates a court's power to adjudicate the matter before it, such error can never be waived by the parties to litigation. In other words, the doctrine of procedural default does not apply." *Peter*, 310 F.3d at 713. If a conviction obtained without jurisdiction is void," as *Peter* held, 310F.3d at 715, there can be no procedural bar.[10]

[27] CONCLUSION

Petitioner CHARLES DANIEL MAYE respectfully requests this Honorable Court grant his petition for a writ of error coram nobis. The judgment and convictions should be set aside and vacated pursuant to the wnt [sic] of error coram nobis because the government

[10] To the extent the Court or Government were to find any procedural bar, we would respectfully request the Court and Government consider the letter from attorney Peter J. Toren, attached hereto as Exhibit E, and the arguments made therein as a basis for waiving any remaining procedural bar.

did not allege nor prove a legitimate offense against the United States.

Respectfully submitted,

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[28] [Certificate Of Service Omitted]

APPENDIX E

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CHARLES DANIEL MAYE

vs. **Case No: 8:17-cv-1314-VMC-MAP**

UNITED STATES OF AMERICA /

MOTION TO AMEND FINDINGS AND TO ALTER OR AMEND THE JUDGMENT

(Filed Mar. 16, 2018)

Comes now the Petitioner, CHARLES DANIEL MAYE ("Maye"), by and through the undersigned counsel, pursuant to Rule 59, Federal Rules of Criminal Procedure, to move this Honorable Court to amend the findings and to alter or amend the order (doc. 19) entered on February 16, 2018 to correct the following manifest errors of law and fact:

1. On pages 2-3, line 22 the Order says NCIC and FCIC contain private information including home addresses. The trial evidence given by the NCIC witness does not support that.

2. On pages 9-10 the Order states that as part of the conspiracy in July of 1999, Maye also accessed the NCIC and the FCIC databases to acquire restricted or private information on Collins' former girlfriends Angeletta Hill and Benavidez Williams. That event occurred on 07/30/1999 while Maye was on duty assigned

to patrol in a High Crime Area where stolen and abandoned vehicles are often recovered. HCSO Reserve Deputy, Barry Canon [sic] was working with Maye and was driving Maye's assigned patrol car. The mobile digital terminal, (MDT) was facing Deputy Cannon. Deputy Cannon and Maye located a vehicle parked with no driver on the scene. They noted that the Florida tag attached to this vehicle had been expired for four months. Deputy Cannon entered this tag number into the State of Florida's DHMSV [sic] database utilizing specific commands on the MDT that access only the DHSMV database. That database auto-generates a query to FCIC, and FCIC, auto generates a query to the "Hot File" database of NCIC, which is not a protected file and contains no protected information, the return reply stated "no hits and no record". They then ran the registered owner's name and it came back with Ms. Williams and an old address—not where the Court alleged that Maye went with Collins and his son to take Williams' Truck. The information to verify Maye's statement is located in this action in Document 1 Exhibit C, pp. 97-98 and case number 8:10-cv-02327-JSM-TBM, Document 1, p. 17-18, and its appended exhibits A-J.

3. On page 10 the Order states that in August of 2003 Maye searched the NCIC and FCIC to acquire restricted or private information about one of Collins' former girlfriends, Veronica Smith. Maye initiated a query on Veronica Smith on August 11, 2003. Veronica Smith had stolen and forged checks on Mr. Collins. Mr. Collins had been alerted by his bank and was told to

make a report with law enforcement. He called Maye and asked where he could go to report this crime. Maye contacted his supervisor, Mike Willette, to see if Collins could come to the HCSO office to make a report and was advised that he could make the report at Maye's office but to another deputy. Collins did not have Smith's date of birth but he had a tag number on a car he had bought for her. Maye ran this tag number in the Florida DHSMV database. That database auto-generated a query to FCIC and a query to the Hot Files of NCIC which does not contain private or restricted information. The reply that came back to Maye was "no wants and no records" from the NCIC Hot Files. That reply does not constitute acquiring restricted or private information. *See* Maye's Document 1, exhibit C, pages 18-19 and evidence exhibits DD-MM.

4. On page 16, line 4 of the Order, the Court found that the jury verdict and the Court's repeated findings dispute the argument that Maye accessed the database within the scope of Maye's duties as a Deputy Sheriff. The evidence at trial shows that each access to the database was within the scope of Maye's duties; the query was done during a traffic stop or tag verification, and the Jury was not asked to find that the databases were accessed outside the scope of Maye's duties.

5. On page 16, line 8 of the Order, the Court found that the facts proved at trial that the database access was done outside Maye's duties as a Deputy Sheriff. The evidence does not support that finding.

6. On page 16, line 11 the Order states "Maye, then a sworn law enforcement officer, accessed a private, law enforcement database to endanger another or to profit." The evidence only shows that Florida's DHSMV was accessed.

7. On page 17, lines 10-15 of the Order, the Court found that, through NCIC, Maye could access information about extradition, whether someone is armed or dangerous, and information about temporary warrants. The trial evidence does not support that finding.

8. On page 18, lines 5-7, the Order states that Maye was able to conduct searches in NCIC to determine if individuals had outstanding warrants. The evidence does not support that finding. Maye was only able to access the State of Florida's DHSMV and that database would query the Hot Files of NCIC to determine if a person was wanted.

9. On page 18, lines 9-10 of the Order, the Court found that negative responses confirmed information not publicly available. The evidence does not support that finding. Whether a person is wanted or not is publicly available information.

WHEREFORE, the Petitioner, CHARLES DANIEL MAYE, respectfully requests that this Honorable Court grant this motion and amend the findings and alter or amend the order (doc. 19) entered on February 16, 2018 to correct the manifest errors of law and fact.

Respectfully submitted,

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APPENDIX F

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CHARLES DANIEL MAYE	**8:17-cv-1314-T-33MAP**
vs.	
UNITED STATES OF AMERICA /	**8:04-cr-321-T-30MAP**

MAYE'S REQUEST FOR REMAND FOR EVIDENTIARY HEARING

(Filed Mar. 16, 2018)

Comes Now the Petitioner, CHARLES DANIEL MAYE, through his undersigned counsel, pursuant to Rule 52(a)(5) and Rule 52(b), Federal Rules of Civil Procedure, and respectfully requests this Honorable Court remand the matter to the United States Magistrate Judge for additional findings of fact in consideration of Petitioner Maye's Rule 59 motion, filed concurrently herewith, and in addition, respectfully requests that the Magistrate Judge, on remand, review the report of investigation ("ROI") of the Department of Justice that led to the termination of former Assistant United States Attorney Jeffrey DelFuoco, which ROI was previously reviewed by the Magistrate Judge *in camera* in Case Number 8:10-cv-01775, because Petitioner believes that that ROI may have a bearing on the Court's determination of the issues presented by this petition.

Respectfully submitted,

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APPENDIX G

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CHARLES DANIEL MAYE

vs.

UNITED STATES OF AMERICA /

Case No: 8:17-cv-1314-VMC-MAP

NOTICE OF APPEAL

(Filed Jul. 23, 2018)

NOTICE is hereby given that the Petitioner, CHARLES DANIEL MAYE ("Maye"), appeals to the United States Court of Appeals, Eleventh Circuit, from the *Order* [Doc. 19] filed February 16, 2018, denying the petition for writ of error coram nobis, and the *Order* [Doc. 28] filed May 23, 2018, denying the Rule 59(e) motion to alter the judgment and Rule 52(a) and 52(b) request for remand for evidentiary hearing, in the above styled matter.

Respectfully submitted,

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