APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRETT KIMBERLIN,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

No. 21-1691

Submitted January 5, 2022[*]

Decided January 6, 2022

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

No. 1:18-cv-01141-TWP-MPB
Tanya Walton Pratt, *Chief Judge*.

Before FRANK H. EASTERBROOK, *Circuit Judge*; MICHAEL Y. SCUDDER, *Circuit Judge*; AMY J. ST. EVE, *Circuit Judge*

NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with FED. R. APP. P. 32.1

[*] We have agreed to decide the case without oral argument because the briefs and record adequately present the facts and legal arguments, and oral argument would not significantly aid the court. FED. R. APP. P. 34(a)(2)(C).

ORDER

Almost 20 years after serving his sentence for felonies related to a series of bombings, Brett Kimberlin petitioned for a writ of *coram nobis,* seeking to set aside some convictions in order to obtain relief from civil disabilities. The district court denied his petition. It correctly reasoned that, even if some felony convictions were overturned, Kimberlin does not (and cannot) successfully challenge others. Because his remaining felony convictions mean that the civil disabilities that he protests will remain intact, the equitable relief of *coram nobis* is unavailable; thus we affirm.

In 1979, Kimberlin was arrested after he tried to procure counterfeit government documents—including a presidential seal, military driver's license forms, and military license plates. Federal officers eventually connected him to eight bombings in Speedway, Indiana. He was later convicted of several felonies, including impersonating a federal official by wearing a uniform representing the Department of Defense. *See* 18 U.S.C. § 912. We affirmed Kimberlin's convictions and sentence on direct appeal, *see United States v. Kimberlin,* 781 F.2d 1247, 1248 (7th Cir. 1985); *United States v. Kimberlin,* 805 F.2d 210, 252 (7th Cir. 1986), and collateral review, *see United States v. Kimberlin,* 675 F.2d 866, 869 (7th Cir. 1982). Kimberlin was paroled in 1994, but his parole was revoked in 1997 for submitting a fraudulent mortgage loan application and for failure to pay a civil judgment to victims of the bombings. *See Kimberlin v. Dewalt,* 12 F. Supp. 2d 487, 490-94 (D. Md. 1998), *aff'd sub nom. Kimberlin v. Bidwell,* 166 F.3d 333 (4th Cir. 1998). He completed his prison sentence in 2001.

Nearly 20 years after his release, Kimberlin petitioned for a writ of *coram nobis*. This equitable remedy may be available in rare cases where the defendant is no longer "in custody" (rendering 28 U.S.C. § 2255 unavailable) yet collateral relief is necessary to eradicate unjustified civil disabilities. *See United States v. Delhorno,* 915 F.3d 449, 452 (7th Cir. 2019). He wants the district court to vacate his convictions for impersonating a federal official, illegally using the presidential seal and an insignia of the Department of Defense, and his role in the bombings. Kimberlin asserts that, because of these convictions, he faces civil disabilities: he cannot obtain grants for his non-profit organization, qualify for loans, serve on a jury, or renew his pilot's license.

The district court denied Kimberlin's petition. It observed that Kimberlin could obtain *coram nobis* relief only if all his felony convictions yielding the unwanted civil disabilities were removed, and Kimberlin could not prevail against all his convictions. First, the court noted, *United States v. Bonin,* 932 F.3d 523 (7th Cir. 2019), foreclosed Kimberlin's argument that the First Amendment conflicts with his convictions under § 912 for impersonating a federal official. Second, Kimberlin had felony convictions (for marijuana possession and perjury) that he was not challenging in the petition. These alone were sufficient to maintain his civil disabilities.

On appeal, Kimberlin maintains that his § 912 conviction is invalid. He relies on *United States v. Alvarez,* 567 U.S. 709, 715 (2012). There, a decade after Kimberlin's release, the Supreme Court held that the free-speech protection of the First Amendment invalidated a part of the Stolen Valor Act of 2005, 18 U.S.C. § 704(b), that criminalized "falsely representing" receipt of military decorations or

medals. Kimberlin argues that *Alvarez* undermines his § 912 conviction because wearing a uniform of the Department of Defense could involve protected speech like "a protest, theatrical performance," or a "Halloween party." Kimberlin adds that, because he used the uniform for "commercial" transactions, he did not meet § 912's requirement that he "act as such" officer that he impersonated. *See United States v. Wade,* 962 F.3d 1004, 1010 (7th Cir. 2020).

These arguments ignore the restrictions on the writ. Because it upends finality, a writ of *coram nobis* requires not just a fundamental error affecting a conviction, and civil disabilities from it, but also good reason that the defendant failed to seek relief while in custody. *United States v. Wilkozek,* 822 F.3d 364, 368 (7th Cir. 2016). We can focus on the § 912 conviction because, as the district court noted, a *coram nobis* challenge that might eliminate some felony convictions but leaves intact others that yield the same civil disabilities does not warrant relief. *See United States v. Keane,* 852 F.2d 199, 205 (7th Cir. 1988) ("Indeed, even one count stating an offense would be the end of things, for a single felony conviction supports any civil disabilities . . . [the plaintiff] may have to endure."); *United States v. Craig,* 907 F.2d 653, 658 n.2 (7th Cir. 1990), amended, 919 F.2d 57 (7th Cir. 1990) (noting "our rule that if an indictment states one valid offense, then no coram nobis relief is available"). For three reasons, the district court rightly denied Kimberlin's petition.

First, nothing prevented Kimberlin from raising on direct appeal or in his prior petition under § 2255 the legal arguments that the defendants advanced in *Alvarez* (about the First Amendment) and *Wade* (about "act as such") and that Kimberlin

urges now. Rather, he pursued his one opportunity that Congress allowed him under § 2255 to challenge his § 912 conviction without mentioning these arguments. "[I]t is entirely inappropriate for the judiciary to invoke the common law" with *coram nobis* "to override limitations enacted by Congress." *Godoski v. United States,* 304 F.3d 761, 763 (7th Cir. 2002). Thus, Kimberlin cannot use these arguments in this petition to challenge the validity the § 912 conviction. *See Delhorno,* 915 F.3d at 452–53.

Second, in any event, Kimberlin's arguments about errors in his § 912 conviction are meritless. As the district court observed, in *Bonin* we rejected the First Amendment argument that he raises. *See* 932 F.3d at 534. We noted that the plurality opinion in *Alvarez* distinguished § 912 from the Stolen Valor Act and ruled that § 912's "act as such" element is a constitutional, narrowly drawn ban on false speech (impersonation) that protects compelling interests in government processes, reputation, and service. *Id.* at 534-36 (citing *Alvarez,* 567 U.S at 720–21). *Wade* does not help him either. We explained there that § 912 validly criminalizes "overt action taken to cause the victim to follow a course of action he would not otherwise have pursued." *Wade,* 962 F.3d at 1010. Kimberlin's impersonations violated that statute.

Third, as the district court also recognized, Kimberlin is not challenging his felony convictions for marijuana possession and perjury. And he does not contest the district court's conclusion that his ongoing civil disabilities will remain intact by virtue of these unchallenged convictions (as well as by virtue of the intact § 912 conviction). Thus, for this reason as well, he cannot obtain relief he seeks in his *coram nobis* petition.

We have considered Kimberlin's other arguments, but none warrants relief.

AFFIRMED

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

BRETT KIMBERLIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Case No. 1:18-cv-01141-TWP-MPB

Filed: February 28, 2020

ENTRY ON PETITION FOR WRIT OF *CORAM NOBIS* AND ALL PENDING MOTIONS IN THIS CASE NUMBER

This matter is before the Court on Petitioner Brett Kimberlin's ("Kimberlin") Motion to Vacate Conviction Based on Newly Discovered Evidence and/or Confession of Error by the Government (Dkt. 30)--which was converted to a Petition for Writ of Error *Coram Nobis--and* several other motions. Kimberlin has also filed a Motion for Limited Discovery (Dkt. 33), Motion to Strike (Dkt. 45), Motion for Hearing (Dkt. 68), Motion to File New Supplemental Authorities on the Issue of Microscopic Hair Evidence (Dkt. 73), and *pro se* Motion to Supplement Petition for Writ of Error Coram Nobis on Rehaif Issue (Dkt. 77). Also pending is Respondent, the United States of America's Motion for Leave to File Surreply, (Dkt. 64). For the reasons explained below Kimberlin's Motion to Supplement Petition for Writ of Error Coram Nobis on Rehaif Issue, Dkt. 77, is **granted,** and the other Motions are **denied,** including

Kimberlin's Petition, as set forth in Docket 1 and his Motion to Vacate Conviction, Dkt. 30.

I. BACKGROUND

In February 1979, Kimberlin was charged in a 34-count indictment with crimes related to a series of bombings in Speedway, Indiana. Over the course of three trials in 1980 and 1981, Kimberlin was convicted of numerous felonies arising out of his impersonation of a Department of Defense police officer and eight explosions that occurred in Speedway, Indiana in September 1978. *See United States v. Kimberlin,* 781 F.2d 1247 (7th Cir. 1985). Kimberlin has challenged his convictions on numerous occasions. *See, e.g., id.; United States v. Kimberlin,* 805 F.2d. 210 (7th Cir. 1986); *Kimberlin v. United States,* Case No. IP 00-280-C-D/G (S.D. Ind. May 3, 2000). He served his sentences and was released from imprisonment in 2001.

In addition to the convictions challenged in this case, Kimberlin has incurred a 1974 felony perjury conviction in Case No. IP 73-cr-132; and the Government asserts and Kimberlin has not disputed a 1979 felony conviction for conspiracy to distribute marijuana in Texas. (Dkt. 46 at 5).[1]

[1] The record does not provide a case number or citation for the Texas felony conviction, but does make several references to its existence. The Seventh Circuit acknowledged that on June 11, 1980, Mr. Kimberlin received a four-year sentence after pleading guilty to conspiracy to possess four thousand pounds of marijuana in a federal court in Texas. *United States v. Kimberlin,* 805 F.2d 210, (7th Cir. 1986). ("He had been indicted for conspiracy to possess and for importation and possession with intent to distribute four thousand pounds of marijuana. The prosecution in Texas was disposed of June 11, 1980, when he was sentenced on a plea of guilty, to one count, and returned to Indiana June 16.") *Id.* at 225. ("The burden on defendant in this case is somewhat heavier because he had been convicted in a federal court in Texas of conspiracy with others from on or about February 7, 1979 to on or about February 16, 1979 to possess marijuana with an intent to distribute.") *Id.* at 237. Based on this record, the Court concludes that the felony conviction still exists.

On April 13, 2018, Kimberlin filed a motion pursuant to 28 U.S.C. § 2255 again challenging his convictions for possessing and wearing a uniform bearing a Department of Defense sleeve patch and illegal use of the Presidential Seal in violation of 18 U.S.C. §§ 912, 701, and 713. (*See* 1:79-cr-7-TWP-MDJ-1, Dkt. 2). On April 27, 2018, in response to an order to show cause why his motion should not be dismissed because he is no longer in custody, Kimberlin notified the Court that his motion to vacate would proceed as a petition for writ of error *coram nobis* under the All Writs Act, 28 U.S.C. § 1651. (Dkt.3.) Kimberlin alleges that he continues to suffer consequences from his convictions for possessing and wearing a uniform bearing a Department of Defense sleeve patch and possession of a copy of the Presidential Seal. "For example, because these convictions bear on the issue of fraud, Petitioner is unable to apply for or successfully receive government grants." *Id.* at 2.

Later filings by Kimberlin and his attorney, Kevin McShane, expanded his challenges to cover his other convictions arising out of the bombings in Speedway. Sadly, Mr. McShane passed away suddenly on January 2, 2020.[2]

II. LEGAL STANDARD

"The writ of coram nobis, available under the All Writs Act, 28 U.S.C. § 1651(a), provides a method for collaterally attacking a criminal conviction when a defendant

[2] On January 29, 2020, pursuant to Ind. R. Adm. and Disc. 23(27)(c)(2), an Attorney Surrogate for Mr. McShane was appointed by the Marion Superior Court, Probate Division, Case No. 49D08-2001-CB-))1596. Upon appointment, the Attorney Surrogate may do several things, including (among other things): take possession of the files and records of the law practice; obtain information about pending matters notify clients to obtain replacement counsel; apply for extensions of time in pending cases; and make referrals to replacement counsel with the agreement of the client. Ind. R. Adm. and Disc. 23(27)(c)(3).

is not in custody, and thus cannot proceed under 28 U.S.C. § 2255." *Chaidez v. United States,* 655 F.3d 684, 687 (7th Cir. 2011) (citing *United States v. Folak,* 865 F.2d 110, 112–13 (7th Cir. 1988)). "The writ is an extraordinary remedy, allowed only where collateral relief is necessary to address an ongoing civil disability resulting from a conviction." *Id.* (citing *Godoski v. United States,* 304 F.3d 761, 762 (7th Cir. 2002)).

> *[C]oram nobis* relief is available when: (1) the error alleged is of the most fundamental character as to render the criminal conviction invalid; (2) there are sound reasons for the defendant's failure to seek earlier relief; and (3) the defendant continues to suffer from his conviction even though he is out of custody.

United States v. Wilkozek, 822 F.3d 364, 368 (7th Cir. 2016) (quotation marks omitted) (citing *United States v. Sloan,* 505 F.3d 685, 697 (7th Cir. 2007)).

III. DISCUSSION

Kimberlin has alleged numerous errors in the three trials that led to his convictions in this case. Some of his arguments rely on recent developments in case law which were not available at the time of his prior appeals and collateral attacks. He seeks relief from those convictions asserting that they have interfered with his ability to obtain government grants, sit on a jury in his home state of Maryland, and renew his pilot's license, among other impediments. (Dkt. 3; Dkt. 67 at 28-29.)

The Court assumes, without deciding, that these alleged impediments cause Kimberlin more than merely incidental harm. *Sloan,* 505 F.3d at 697. But because he has been convicted of multiple felonies in separate trials, including a 1974 perjury conviction in this Court, Case No. IP 73-cr-132, and the 1979 conspiracy to distribute marijuana conviction in Texas, (as referenced in *Kimberlin,* 805 F.2d at 225), neither

of which are at issue here, a successful challenge to any one conviction will not relieve him of these impediments. *See United States v. Keane,* 852 F.2d 199, 205 (7th Cir. 1988) ("a single felony conviction supports any civil disabilities and reputational injury [a convicted felon] may have to endure").

As discussed in detail below, Kimberlin's challenge to his convictions for impersonating a Department of Defense official fail. Even if he were to successfully overturn his other bombing-related convictions, he would remain a convicted felon on at least the impersonation convictions, and likely his felony perjury and felony drug conspiracy convictions which he does not challenge here. Those felony convictions interfere with his ability to sit on a jury in Maryland state court, renew his pilot's license, and obtain government grants whether his convictions related to the explosions in Speedway are overturned.

"Courts must conserve their scarce time to resolve the claims of those who have yet to receive their *first* decision." *United States v. Sloan,* 505 F.3d 685, 698 (7th Cir. 2007) (quoting *United States v. Keane,* 852 F.2d 199, 203 (7th Cir. 1988)). Kimberlin's liberty is not at stake and overturning his bombing-related convictions would not relieve him of the civil impediments discussed above. Therefore, the Court will analyze Kimberlin's challenge to his false impersonation convictions, but not his other claims.

A. Challenge to Convictions Under 18 U.S.C. § 912

Kimberlin challenges his convictions under 18 U.S.C. § 912, for falsely impersonating a Department of Defense ("DOD") official. (Dkt. 1.) He argues that

these convictions violate the First Amendment under *United States v. Alvarez,* 567 U.S. 709 (2012), and contends his trial counsel provided ineffective assistance of counsel when he failed to challenge these charges on First Amendment grounds. (Dkt. 21.)[3] Specifically, Kimberlin argues that his convictions under § 912 violate the First Amendment because his wearing of the uniform and DOD patch while conducting commercial transactions constitutes expressive speech protected by the First Amendment. (Dkt. 1 at 3.) He seeks to extend the reasoning of *United States v. Alvarez,* 567 U.S. 709 (2012), and *United States v. Swisher,* 811 F.3d 299 (9th Cir. 2016), cases which dealt with the Stolen Valor Act of 2005, 18 U.S.C. § 704, to his convictions under § 912.

In *Alvarez,* the United States Supreme Court addressed the constitutionality of the Stolen Valor Act, 18 U.S.C. § 704(b) (which prohibits lying about being awarded military medals) and held it to be invalid under the First Amendment. In *Swisher,* the Ninth Circuit extended the holding in *Alvarez* to § 704(a) (which criminalizes the unauthorized wearing of such medals). *Swisher,* 811 F.3d at 303-04. However, Neither *Alvarez* nor *Swisher* held convictions under § 912 or § 701, the statutes Kimberlin was convicted under, to be unconstitutional.

Last year, the Seventh Circuit addressed an argument similar to Kimberlin's in *United States v. Bonin,* 932 F.3d 523 (7th Cir. 2019). In *Bonin,* the Seventh Circuit

[3] In addition, Mr. Kimberlin challenges his convictions under 18 U.S.C. § 701 for unlawfully possessing an official DOD insignia, and 18 U.S.C. § 713 for illegal use of the presidential seal violate the First Amendment under *Alvarez,* but the Court need not reach these arguments.

rejected the defendant's attempt to extend the reasoning of *Alvarez* to overturn his conviction under 18 U.S.C. § 912 for impersonating a United States Marshal. The Seventh Circuit squarely held that the acts-as-such clause of § 912 is narrowly drawn to serve the government's compelling interests of protecting the integrity of government processes. *Id.* at 536 (citing *Alvarez,* 567 U.S. at 721).

Undeterred, Kimberlin argues that *Bonin* left the door open for challenges to § 912 in less egregious cases such as his, but this Court disagrees. The Seventh Circuit rejected Bonin's argument that, if allowed to stand, 18 U.S.C § 912 could be used to prosecute people for simply wearing Halloween costumes. But that was in the context of Bonin's void for vagueness challenge, not his facial challenge under *Alvarez,* and the Seventh Circuit ultimately avoided evaluating his void for vagueness challenge because his conduct—claiming to be a U.S. Marshal and displaying a weapon in a theater as a way to intimidate other moviegoers who asked him to stop talking on his cell phone—clearly violated § 912.

The same can be said of Kimberlin's conduct. He was not on his way to a Halloween party when he stopped to have a calendar or party invitations printed. The evidence at his trial demonstrated that he wore a DOD patch on his shirt and attempted to have copies made of the presidential seal. It makes no difference that the copies were never made for Kimberlin. It was reasonable for the jury to conclude that he wore the DOD patch to deceive the copy store employee so that he or she would copy the presidential seal for him and the impersonation was to falsely imply that he was government official. Bonin held that public safety and protection of the

reputation of law enforcement were compelling interests and § 912 is narrowly drawn to protect that interest. Thus, Kimberlin's First Amendment challenge is foreclosed by *Bonin.*

As for Kimberlin's ineffective assistance of counsel claim, the Government argues that Kimberlin previously raised ineffective assistance of counsel in his § 2255 motion and is therefore precluded from raising it again here. (Dkt. 37 at 26.) Kimberlin represented himself in his § 2255 motion. He argued that his counsel failed to prepare a defense against these charges. He could have also argued that his counsel failed to raise a First Amendment challenge to the charges. Claims that could have and should have been raised in a § 2255 motion cannot be brought in a petition for writ of *coram nobis. See Cooper v. United States,* 199 F.3d 898, 901 (7th Cir. 1999) (§ 1651 is not a "substitute" for § 2255). Kimberlin requests a hearing on this issue because his former trial counsel has submitted an affidavit stating that he performed deficiently in this regard. But counsel's self-assessment that he was ineffective does not change the fact that *Bonin* held that the acts-as-such clause of § 912 is constitutional.

Kimberlin has not shown that a fundamental error renders his convictions under § 912 invalid. Because these felony convictions, and his other unrelated felony convictions are valid, the Court need not address Kimberlin's arguments regarding the alleged errors in his second and third trials which resulted in his conviction on charges related to the explosions in Speedway in the fall of 1978.

B. Other Motions

Kimberlin's Motion for Hearing, Dkt. 68, is **denied** because a hearing is not needed to address his ineffective assistance of counsel claim and his other arguments for a hearing are rendered moot by the Court's holding. His Motion for Limited Discovery, Dkt. 33, and the Government's Motion for Leave to File Surreply in Opposition to Motion for Limited Discovery, Dkt. 64, are **denied as moot.** Kimberlin's Motion to Strike, Dkt. 45, is also **denied.** The only request to strike that is relevant to this Order is Kimberlin's request to strike reference to his unrelated conviction for conspiracy to distribute marijuana. That conviction is relevant to the question of whether overturning the convictions Kimberlin challenges in this jurisdiction would relieve him of civil disabilities associated with being a convicted felon. The other items listed in Kimberlin's Motion to Strike were not considered by the Court in reaching its decision.

Kimberlin's Motion to Supplement Petition for Writ of Error Coram Nobis on Rehaif Issue, Dkt. [77], is **granted.** In *Rehaif v. United States,* 139 S.Ct. 2191 (2019), the United States Supreme Court held that to convict an individual of illegal firearm possession under 18 U.S.C. §§ 922(g) and 924(a)(2), the Government must prove (1) the individual knew he or she possessed a firearm, and (2) the individual knew that he or she belonged to the relevant category of persons banned from possessing a firearm. Kimberlin asserts that his felon in possession of explosive convictions (violations of 18 U.S.C. § 842(i)(1)), as charged in Counts 23 and 24 of the 34-count indictment, must be vacated because the government never proved at trial that "he

had any criminal intent or that he knew he had been convicted of a crime punishable by more than one year." (Dkt. 48 at 1). The evidence presented at Kimberlin's trial does not support this assertion. The Court has considered Kimberlin's Supplement Petition for Writ of Error Coram Nobis on Rehaif Issue, but finds it unpersuasive.

Finally, Kimberlin's Motion to File New Supplemental Authorities on the Issue of Microscopic Hair Evidence, Dkt. 73, now only relates to his motion for DNA testing in the underlying criminal action. The motion is **denied as moot** under this case number because the Court will consider the supplemental authority on microscopic hair evidence in the criminal case. Accordingly, the Clerk is directed to refile the motion at Dkt. 73, and the related submission by Kimberlin at Dkt. 81, in the criminal case: No. 1:79-cr-00007-TWP-MJD-1.

IV. CONCLUSION

For the reasons stated above, Kimberlin's Motion to Vacate Conviction Based on Newly Discovered Evidence and/or Confession of Error by the Government, Dkt. [30], as converted to a petition for writ of *coram nobis* is **DENIED.** Kimberlin's Motion to Supplement Petition for Writ of Error Coram Nobis on Rehaif Issue, Dkt. [77], is **GRANTED.** All other pending motions, Dkt. [33], Dkt [45], Dkt. [64], Dkt. [68], are **DENIED.**

His Motion to File New Supplemental Authorities on the Issue of Microscopic Hair Evidence, Dkt. [73] is **DENIED AS MOOT** under this case number and is to be re-docketed by the Clerk to be determined in the related case, **Case No. 1:79-cr-00007-TWP-MJD-1.** The clerk is directed to also re-docket Kimberlin's Submission

of Petitioner's Supplement with New Authorities on the Issue of Microscopic Hair Evidence, Dkt. [81], in **Case No. 1:79-cr-00007-TWP-MJD-1.**

The § 2255 motion, Dkt. [2], shall also be terminated in the underlying criminal action **Case No. 1:79-cr-00007-TWP-MJD-1.**

Final judgment consistent with this Order will issue in a separate filing.

SO ORDERED.

Date: 2/28/2020

/s/_____
TANYA WALTON PRATT, JUDGE
United States District Court
Southern District of Indiana

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRETT C. KIMBERLIN,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

No. 21-1691

Filed: March 9, 2022

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

No. 18-cv-01141
Tanya Walton Pratt, *Chief Judge*.

Before FRANK H. EASTERBROOK, *Circuit Judge*; MICHAEL Y. SCUDDER, *Circuit Judge*; AMY J. ST. EVE, *Circuit Judge*

ORDER

Petitioner-Appellant filed a petition for rehearing and rehearing en banc on February 22, 2022. No judge[*] in regular active service has requested a vote on the petition for rehearing en banc, and all the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

[*] Judge Hamilton did not participate in the consideration of this petition.