APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

March 9, 2022

BRETT C. KIMBERLIN,
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

No. 21-1691

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.

APPENDIX B

NONPRECEDENTIAL DISPOSITION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

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

BRETT KIMBERLIN,
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

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.

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* 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).

Before

FRANK H. EASTERBROOK, *Circuit Judge*

MICHAEL Y. SCUDDER, *Circuit Judge*

AMY J. ST. EVE, *Circuit Judge*

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 C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

BRETT C. KIMBERLIN,

Defendant.

Case No. 1:79-cr-00007-TWP-MJD

ENTRY ON PENDING MOTIONS

This matter is before the Court on *pro se* Defendant Brett Kimberlin's ("Kimberlin") Motion to Reconsider Court's Order of June 12, 2020 (Dkt. 39), Motion to Supplement (Dkt. 40), and Motion for Ruling on Defendant's Motion to Reconsider and an Order for the Government to State its Position on the Microscopic Hair Issue (Dkt. 42). For the reasons explained below, the Court **grants in** part and denies in part the Motion for Ruling, **grants** the Motion to Supplement, and **denies** the Motion to Reconsider.

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.

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. He later expanded his petition to challenge his convictions related to the Speedway bombings and converted his motion to a petition for writ of error *coram nobis* because he was no longer in custody. *See, e.g.*, Dkt. 3, Dkt. 30 in *Kimberlin v. United States of America*, 1:18-cv-01141-TWP-MPB. He also filed a motion for DNA testing in this case. (Dkt. 3.)

In addition to the convictions challenged in Case No. 1:18-cv-01141-TWP-MPB, Kimberlin has incurred a 1974 felony perjury conviction in Case No. IP 73-cr-132, and a 1979 felony conviction for conspiracy to distribute marijuana in Texas. (*See* 1:18-cv-01141-TWP-MPB, Dkt. 46 at 5).[1]

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[1] The record did not provide a case number or citation for the Texas felony conviction but did 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

On March 17, 2021, the Court denied Kimberlin's petition for writ of coram nobis because he had not shown that a fundamental error rendered his convictions under § 912 invalid. (Dkt. 41.) Because those felony convictions, and his other unrelated felony convictions were and are still valid, the Court did 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.

Kimberlin's Motion to File New Supplemental Authorities on the Issue of Microscopic Hair Evidence, (Case No. 1:18-cv-01141-TWP-MPB, Dkt. 73), challenged his bombing convictions which the Court did not address in the coram nobis action, so the Court considered the motion alongside his motion for DNA evidence in his criminal case. The Court ultimately denied the motion for DNA evidence because the DNA testing provision of 18 U.S.C. § 3600(a) does not apply after a defendant is released from custody (Dkt. 38); 28 C.F.R. § 28.22.

On June 22, 2020, Kimberlin filed the Motion to Reconsider and sought to supplement that Motion with additional authority on November 23, 2020. (Dkts. 39, 40.) His Motion requesting a ruling on the Motion to Reconsider was filed on June 22, 2021 (Dkt. 42). The Court will address each motion below in order.

II.MOTION TO RECONSIDER

In his Motion to Reconsider, Kimberlin asks the Court to reconsider the Order of June 12, 2020, in which the Court denied him relief, stating that he is "floored that this Court did not address the issue concerning the use of microscopic hair testimony at [his] trial." (Dkt. 39 at 1.)

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distribute.") *Id.* at 237. Based on this record, the Court concluded that the felony conviction still exists.

Kimberlin contends that the Court erred when it *sua sponte* transferred his motion to file new supplemental authority on the issue of microscopic hair evidence from his *coram nobis* case (1:18-cv-01141-TWP-MPB) to his criminal case. He argues that had the issue of microscopic hair evidence been considered in his *coram nobis* case, the Court would have vacated his convictions.

"[M]otions to reconsider in criminal prosecutions are proper and will be treated just like motions in civil suits." *United States v. Rollins*, 607 F.3d 500, 502 (7th Cir. 2010). Kimberlin's Motion to Reconsider the denial of his Motion for DNA testing was filed within 28 days of the date the Court denied his original Motion for DNA testing. It is therefore treated as a motion to amend judgment pursuant to Rule 59 of the Federal Rules of Civil Procedure.

Rule 59(e) allows a court to amend a judgment only if the movant can "demonstrate a manifest error of law or fact or present newly discovered evidence." *Lightspeed Media Corp. v. Smith*, 830 F.3d 500, 505-06 (7th Cir. 2016) (internal citations omitted). A "manifest error" means "the district court commits a wholesale disregard, misapplication, or failure to recognize controlling precedent. " *Stragapede v. City of Evanston, Illinois*, 865 F.3d 861, 868 (7th Cir. 2017) (internal quotation omitted). "A manifest error is not demonstrated by the disappointment of the losing party." *Oto v. Metropolitan Life Ins. Co.*, 224 F.3d 601, 606 (7th Cir. 2000) (internal quotations omitted). Relief through a Rule 59(e) motion for reconsideration is an "extraordinary remed[y] reserved for the exceptional case." *Foster v. DeLuca*, 545 F.3d 582, 584 (7th Cir. 2008).

Here, Kimberlin has not established any special circumstances that would justify the extraordinary remedy of relief under Rule 59(e). As explained above, the

Court did not address the microscopic hair issue in his *coram nobis* action because it would have had no effect on the outcome of that action.

The writ of *coram nobis* "is an extraordinary remedy, allowed only where collateral relief is necessary to address an ongoing civil disability resulting from a conviction." *Chaidez v. United States*, 655 F.3d 684, 687 (7th Cir. 2011) (citing *Godoski v. United States*, 304 F.3d 761, 762 (7th Cir. 2002)). Because Kimberlin has been convicted of multiple felonies in separate trials, including a 1974 perjury conviction in this Court, Case No. IP 73-cr-132, and a 1979 conspiracy to distribute marijuana conviction in Texas (as referenced in *Kimberlin*, 805 F.2d at 225), neither of which were at issue here, a successful challenge to any or all of the convictions he challenged in this Court would not have relieved him of the ongoing civil disabilities of which he complains. *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").

In addition, this Court found that his convictions under 18 U.S.C. §§ 912 are valid. Thus, even if his challenge to the use of microscopic hair evidence in his bombing trials is meritorious, it would not entitle him to *coram nobis* relief.

The supplemental authorities produced by Kimberlin do not warrant reconsideration of the Court's denial of his motion for DNA testing. *Watkins v. State*, No. 348855, 2020 WL 6236500 (Mich. Ct. App. Oct. 22, 2020), involved Watkin's claim for compensation after murder conviction was overturned. Although the case involved microscopic hair evidence, it is distinguishable because Watkins was in custody at the time of challenge to the evidence. Also, because he was a state prisoner, his case did not involve application of 18 U.S.C. § 3600(a). This Court's ruling on a

motion to dismiss in *Barnhouse v. City of Muncie*, 1:19-cv-00958-TWP-DLP, Dkt. 137 (November 4, 2020) is also inapposite. Barnhouse brought a civil complaint under 42 U.S.C. § 1983 after he was exonerated of his state court rape conviction. Just as in *Watkins*, Barnhouse was still in custody when he sought DNA testing which led to his exoneration. And, as a state prisoner, his case did not involve application of 18 U.S.C. § 3600(a).

For the reasons stated above, Kimberlin has not established that he is entitled to the extraordinary remedy of relief under Rule 59(e). He has not demonstrated that the Court committed a manifest error of law or fact when it *sua sponte* transferred his motion to file new supplemental authority on the issue of microscopic hair evidence from his *coram nobis* case (1:18-cv-01141-TWP-MPB) to this case. Neither has he presented newly discovered evidence that warrants a change to the Court's original decision. Consequently, his Motion to Reconsider, (Dkt. 39), is **denied**.

III. MOTION FOR RULING AND MOTION TO SUPPLEMENT

Kimberlin's Motion for Ruling, (Dkt. 42), is **granted to the extent** this Order rules on his Motion to Reconsider. The Motion is **denied to the extent** it asks the Court to order the Government to state the current Department of Justice's position on the microscopic hair issue. The Government's position on this issue is not germane to the Court's ruling on the Motion to Reconsider.

Kimberlin's Motion to Supplement his Motion to Reconsider, (Dkt. 40), is **granted to the extent** the Court considered the supplemental authority and argument contained in the Motion when addressing his Motion to Reconsider.

IV. CONCLUSION

For the reasons stated above, Kimberlin's Motion for Ruling, (Dkt. [42]), is **GRANTED in part and denied in part**; his Motion to Supplement, (Dkt. [40]), is **GRANTED**; and his Motion to Reconsider, (Dkt. [39]), is **DENIED**.

SO ORDERED.

Date: 9/3/2021

s/ Tanya Walton Pratt

Hon. Tanya Walton Pratt, Chief Judge United States District Court Southern District of Indiana

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APPENDIX D

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

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]

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[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

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]

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to distribute.") *Id.* at 237. Based on this record, the Court concludes that the felony conviction still exists.

[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).

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 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. <u>Challenge to Convictions Under 18 U.S.C. § 912</u>

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 rejected the defendant's attempt to extend the reasoning of *Alvarez*

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[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.

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 *Rehaifv. 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*

TANYA WALTON PRATT, JUDGE

United States District Court
Southern District of Indiana

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APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

BRETT KIMBERLIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

MEMORANDUM IN SUPPORT OF PETITIONER'S MOTION TO VACATE IN LIGHT OF *REHAIF V. UNITED STATES*

Petitioner Brett Kimberlin, by counsel Kevin McShane, hereby files this Memorandum in support of his Motion to Vacate Counts 23 and 24 in light of the Supreme Court's June 21, 2019 decision in *Rehaif v. United States*, 588 U. S. ___ (2019), which held that the Government is required to prove that a defendant has knowledge that his conduct was criminal in firearms cases. Under *Rehaif*, Petitioner's conduct was not criminal at all because the Government failed to produce a shred of evidence that he had any criminal intent or that he knew he had been convicted of a crime punishable by more that one year. Moreover, the holding and language of *Rehaif* starkly demonstrates that the trial court's jury instructions on knowledge and receipt were wrong by stating that the Government did not have to prove such knowledge or criminal intent. Finally, the Government's assertions to the trial judge and the jury that Petitioner was automatically guilty simply because he was

a convicted felon and *mens rea* is not required has been totally rejected by the *Rehaif* Court.

Statement of Facts

Counts 23 and 24 charged Petitioner with receiving explosives and blasting caps as a previously convicted felon on May 14, 1975:

Count 23

On or about the 14th day of May, 1975, in the Southern District of Indiana, BRETT C. KIMBERLIN, having been convicted of perjury, a crime punishable by imprisonment for a term exceeding one year, on January 18, 1974, in the Southern District of Indiana, did receive an explosive, to-wit: Tovex 200, which had been shipped and transported in interstate commerce, in violation of Title 18, United States Code, Section 842(i)(1).

Count 24

On or about the 14th day of May, 1975, in the Southern District of Indiana, BRETT C. KIMBERLIN, having been convicted of perjury, a crime punishable by imprisonment for a term exceeding one year, on January 18, 1974, in the Southern District of Indiana, did receive an explosive, to-wit: Dupont blasting caps, which had been shipped and transported in interstate commerce, in violation of Title 18, United States Code, Section 842(i)(1). (Tr. 2322)

18 U.S.C. 842 (i)(1) at the time of trial, stated the following:

> (I) It shall be unlawful for any person who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year to receive any explosive which has been shipped or

transported in interstate or foreign commerce. (Tr. 2322-23).

The undisputed evidence showed that Petitioner hired a builder/architect to build a home on Petitioner's unimproved property in Jackson County Indiana. While digging out the basement, the builder encountered bedrock so he consulted an expert and was told to blast out the rock with explosives. The builder rented a compressor to drill out holes for the explosive charges and asked Petitioner to tow the compressor because his pickup truck had a special hitch on it. Petitioner and the others drove several vehicles, and the builder, riding in Petitioner's truck, stopped to purchase the explosives and blasting caps on the way to the property. The workers spent the day at the property blasting the bedrock. There was no evidence that Petitioner removed the explosives from the property in his vehicle that day. Petitioner was present during the blasting but did not handle the explosives. After the blasting was completed, Petitioner left the property and no one saw him leave with the explosives.

Almost five years later, Petitioner was indicted for "receiving" the explosives and blasting caps as a convicted felon based on a teenage perjury conviction that occurred on January 18, 1974. That perjury occurred when Petitioner, a mere teenager, was called before a grand jury without an attorney and asked an incriminating question about drug sales, which he denied. He was tried and sentenced to 30 days in jail, which U.S. District Judge Holder later cut in half, and placed on probation for 11 months. The probation officer and his attorney told him at the time that his sentence was imposed under the "Youth Corrections Act" ("YCA") and would be set aside and expunged when he reached adulthood. In fact, Judge Holder did not make the required findings that Petitioner would not benefit from the YCA if he intended to sentence

him as an adult. *Dorszynski v. United States*, 418 U.S. 424 (l974) (sentencing court must make findings on the record when sentencing a teen that he or she would not benefit from the Youth Corrections Act).

In short, one year after Petitioner was sentenced on a perjury charge that he believed was imposed under the Youth Corrections Act and would be expunged when he reached 21, he was present when the builder legally, properly and innocently used explosives at his property. Prior to trial in the instant case, Petitioner's trial counsel implored the Judge to dismiss the case because of the issue surrounding the YCA (Tr. 113-145), and the Judge even asked the Government to consider "withdraw[ing]" the charges prior to trial on that ground. (Tr. 139). However, the Government refused and then prosecuted the case under a strict liability standard without any proof of knowledge, criminal intent, or Petitioner's knowledge that he was a convicted felon.

The Trial and Instructions

Petitioner did not take the stand, and the Government introduced evidence that he had been convicted of perjury as a teenager. The Government did not present a single shred of evidence that Petitioner knew that his presence during the legal purchase and legal use of the explosives by others would violate the statute. Every single government witness who was present during the blasting of the bedrock testified that Petitioner did nothing wrong and was merely present because the builder had asked him to tow the compressor. In fact, they all testified that there was no criminal intent whatsoever. Moreover, the Government, despite knowing the facts surrounding Petitioner's belief that he was sentenced under the YCA, did not present a shred of evidence that Petitioner knew that his status

would prohibit him from being present when his builder used explosives on his property.

Following the Government's presentation to the jury, Petitioner's attorney asked the judge to acquit Petitioner because his conduct was totally innocent, there was no criminal intent as required by Congressional intent, and because Petitioner's innocent presence did not violate the statute anymore than would an employed cargo handler who unloaded explosives from a truck or aircraft. (Tr. at 1946)

The Government in response and later to the jury stated that 18 USC 842(I)(i) was a strict liability statute, which required no *mens rea* or knowledge of illegality, and allowed no exception for innocent conduct. In fact, it said that the "statutory language in no way requires the Government to prove unlawfully, intentionally or anything else ... " (Tr. 1943) It said that if a felon working at an airport unloads a box marked explosives, he would violate the statute. (Tr. 1944) It said, "So there is no criminal intent required." (Tr. 1946). It said, "In summary, it is the Government's position it is simply a possessory crime, there is no criminal intent required...." (Tr. 1947). "The law makes it illegal in an absolute form for a convicted felon to possess explosives." (Tr. 2250-52)

The judge instructed the jury as follows on the issue of "knowledge:"

> If the jury finds beyond a reasonable doubt that the defendant received the explosives here in question, it is not necessary to show that the defendant knew he was violating the law. (Instruction No. 16, Tr. 2331)

The trial court instructed the jury on the issue of receipt as follows:

> To receive any explosive as the term is used in the statute means to knowing take possession of or knowingly accept any explosive, under the statute, the reason for receiving the explosive is irrelevant. The statute in absolute terms makes unlawful and thus prohibits receipt of an explosive by a previously convicted felon. The purpose of the statute is broadly to keep explosives away from persons convicted of a felony. Such persons are comprehensively barred by the statute from acquiring explosives by any means or for any reason. .... (Instruction No. 12, Tr. 2325-26).

Defense counsel objected to Instruction Number 12 as contrary to congressional intent and because it implied that mere proximity to or presence near explosives would constitute a crime. (Tr. 1949-52, 2349).

The trial judge denied the motion for acquittal stating: "Knowledge is not an element of crime (sic) of receipt by a convicted felon of a firearm which has been shipped or transported in interstate commerce since mere receipt is enough. Statute (sic) is not constitutionally deficient for failing to require knowledge. ... If one has been convicted of a felony he is thereafter barred from having possession of a firearm." (Tr.1957).

The Supreme Court's *Rehaif* Decision

In *Rehaif*, the Supreme Court held that in firearms cases, "the Government must prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm." The Court noted that "[s]cienter requirements ... help to separate wrongful from innocent acts. That is the case here. Possessing a gun can be entirely innocent. It is the defendant's status, not his conduct alone, that makes the difference. Without knowledge of that

status, a defendant may lack the intent needed to make his behavior wrongful."

The Court went on to reject the Government's contention that the firearms' statutes impose strict liability on defendants:

> Or these provisions might apply to a person who was convicted of a prior crime but sentenced only to probation, who does not know that the crime is "punishable by imprisonment for a term exceeding one year."§922(g)(1) (emphasis added); see also *Games-Perez*, 667 F. 3d, at 1138 (defendant held strictly liable regarding his status as a felon even though the trial judge had told him repeatedly—but incorrectly—that he would "leave this courtroom not convicted of a felony"). As we have said, we normally presume that Congress did not intend to impose criminal liability on persons who, due to lack of knowledge, did not have a wrongful mental state.

Interestingly, in *Games-Perez*, then appellate Judge Gorsuch begrudgingly upheld the defendant's conviction based solely on precedent –*id.* at 1142 -- but later, after becoming a Supreme Court Justice, joined the 7-2 majority in *Rehaif* in rejecting the decision in *Games-Perez*.

In the instant case, like *Games-Perez*, Petitioner was sentenced to 30 days in the county jail, which was quickly reduced by half and he was placed on probation. His lawyer and probation officer told him that he was sentenced under the Youth Corrections Act and his conviction would be expunged when he reached 21.

As Petitioner states in his attached Declaration, he believed that he was sentenced under the YCA rather than as an adult. Exhibit A. He believed that he was on probation

and if he completed his probation without any violations (which he did), his conviction would be set aside as if it never existed. In fact, his then-counsel filed, under the YCA, a motion on April 16, 1976 for the perjury trial judge to terminate his probation and set aside his conviction, which stated that Petitioner's probation officer concurred in the request to set aside the conviction under the YCA. Exhibit B. Yet the Government at trial in the instant case (1) never provided any evidence that Petitioner was aware that his status under the YCA would make him criminally liable or (2) ever showed how Petitioner had any criminal intent by his innocent conduct.

Under *Rehaif*, Petitioner's conduct was not even a crime because it was totally innocent and lacked a single iota of criminal intent. Petitioner was engaged in the American Dream of building a home, yet the Government turned it into a nightmare by prosecuting him without any proof that he knew that (1) a builder's use of explosives on his property would subject him to criminal prosecution, (2) that he was prohibited from engaging in such activities, or (3) that he was sentenced for a felony as an adult rather than a Youth Offender for a crime that carried more than a year in prison.

Under *Rehaif*, The Trial Court's Instructions Were Erroneous

The *Rehaif* Court has categorically rejected the language of the trial court's instructions on knowledge and intent. As noted above, the instructions stated that the Government was not required to show that Petitioner knew he was violating the law or had criminal intent. However, in *Rehaif*, the Court explained:

> the understanding that an injury is criminal only if inflicted knowingly "is as universal and persistent in mature systems of law as belief in freedom of the

human will and a consequent ability and duty of the normal individual to choose between good and evil." *Morissette*, 342 U. S., at 250. Scienter requirements advance this basic principle of criminal law by helping to "separate those who understand the wrongful nature of their act from those who do not." *X-Citement Video*, 513 U. S., at 72–73, n. 3.

The cases in which we have emphasized scienter's importance in separating wrongful from innocent acts are legion. *See, e.g.*, *id.*, at 70; *Staples*, 511 U. S., at 610; *Liparota v. United States*, 471 U. S. 419, 425 (1985); *United States v. Bailey*, 444 U. S. 394, 406, n. 6 (1980); *United States v. United States Gypsum Co.*, 438 U. S. 422, 436 (1978); *Morissette*, 342 U. S., at 250–251. We have interpreted statutes to include a scienter requirement even where the statutory text is silent on the question. *See Staples*, 511 U. S., at 605. And we have interpreted statutes to include a scienter requirement even where "the most grammatical reading of the statute" does not support one. *X-Citement Video*, 513 U. S., at 70.

Applying the word "knowingly" to the defendant's status in §922(g) helps advance the purpose of scienter, for it helps to separate wrongful from innocent acts. Assuming compliance with ordinary licensing requirements, the possession of a gun can be entirely innocent. *See Staples*, 511 U. S., at 611. It is therefore the defendant's status, and not his conduct alone, that makes the difference. Without knowledge of that status, the defendant may well lack the intent needed to make his behavior wrongful. His behavior may instead be an innocent mistake to which criminal sanctions normally do not attach.

In the instant case, everyone who testified for the Government agreed that there was no criminal intent whatsoever when the builder purchased explosives and used them for legitimate purposes at Petitioner's property. In fact, the Government did not even allege that there was any criminal activity there. Instead, it argued to the judge and the jury that it did not need to prove either criminal intent or knowledge of wrongdoing or status, and the judge instructed the jury as such. Under *Rehaif*, this constituted clear error, which allowed the jury to convict Petitioner without proof of essential elements of the offense, thereby denying him due process under the Fifth Amendment. The Supreme Court has explicitly held that the "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. *In re Wihship*, 397 U.S. 358, 364 (l970).

Conclusion

At trial, counsel for Petitioner argued (1) that Petitioner's belief that he received a YCA sentence, (2) Petitioner's lack of criminal intent, and (3) Petitioner's innocent conduct were grounds for a judgment of acquittal. This was rejected by the judge, who then compounded that error by instructing the jury that the Government need not prove knowledge of any element of the offense or criminal intent of Petitioner.

The *Rehaif* Court has finally held that the arguments made by defense counsel were absolutely correct and the arguments made by the Government and the trial court's instructions were categorically and fundamentally wrong. Therefore, it is imperative that this Court apply the *Rehaif* holding to the instant case to correct the "manifest injustice" of Petitioner's conviction for which he is "actually innocent" of the charged offenses. Clearly,

subsequent to Petitioner's conviction, the prevailing law changed substantially so as to deem Petitioner's conviction invalid. The error in Petitioner's case is of the most fundamental character. As the Supreme Court stated emphatically in *Bousley v. United States*, 523 U.S. 614, 620-21 (1998), a "conviction and punishment...for an act that the law does not make criminal ... results in a complete miscarriage of justice." In such circumstances, it is appropriate for a district court to vacate a conviction under the All Writs Act. *See, e.g.*, *U.S. v. Russo*, 358 F. Supp. 436 (D.N.J. 1973); *U.S. v. Summa*, 362 F. Supp. 1177 (D. Conn. 1972); *Lawson v. U.S.*, 397 F. Supp. 370 (N.D. Ga. 1975); *Korematsu v. U.S.*, 584 F. Supp. 1406 (N.D. Cal. 1984); *see also U.S. v. Loschiavo*, 531 F.2d 659, 665-66 (2d Cir. 1976).

In the instant case, as Petitioner notes in his attached Declaration, his conviction for receiving explosives had a severe impact on him because the Government used it at a subsequent trial to prejudice the jury and to impeach Petitioner when he took the stand. The conviction likely affected the jury because a person convicted of receiving explosives would not be given the benefit of innocence but instead would more than likely be guilty of another explosives related offense.

In *Rehaif*, *supra*, the Supreme Court created new law when it clarified the scope of firearms prosecutions to cases where the Government proves criminal intent and knowledge of the crime and of the defendant's status. Petitioner is entitled to have this new substantive rule applied retroactively to his conviction for which he has already served his sentence. *Schriro v. Summerlin*, 542 U.S. 348 (2004) (citing *Bousley v. United States*, 523 U. S. 614, 620, 621 (1998)); *see also Davis v. United States*, 417 U.S. 333 (1974) (applying retroactively in the context of *habeas corpus* petition). Petitioner's conviction is one of "those

cases where the errors were of the most fundamental character -- that is, such as rendered the proceeding itself irregular and invalid." *United States v. Mayer*, 235 U. S. 55, 69 (1914); *United States v. Morgan*, 346 U.S. 502, 512 (1954). To be prosecuted for offense conduct that is not criminal is such an error, and must be addressed with this Court issuing a writ of *coram nobis* vacating the conviction. This will ensure that the "manifest injustice" of Petitioner's conviction is finally rectified.

Respectfully submitted,

s/ Kevin McShane
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Certificate of Service

I hereby certify that the foregoing was filed electronically. Notice of this filing will be sent to AUSA James R. Wood by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

s/ Kevin McShane

Kevin McShane

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

BRETT C. KIMBERLIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

CAUSE NO.: 1:79-cr-00007-TWP-MJD-01

MOTION TO VACATE CONVICTION BASED ON NEWLY DISCOVERED EVIDENCE AND/OR CONFESSIONS OF ERROR BY THE GOVERNMENT

Now comes Defendant Brett Kimberlin, by counsel Kevin McShane, and moves this Court, pursuant to either or both 28 USC 2255 or 28 USC 1651, to vacate Defendant's conviction in this matter for the following reasons:

1. The Department of Justice, in a letter issued by Assistant Attorney General Peter Kadzick, has stated that the DOJ would (1) waive any "statute of limitations for collateral attacks on the convictions and any procedural-default defenses in order to permit a resolution on the merits of any legal claims arising from erroneous statements in laboratory reports or testimony" about microscopic hair analysis, (2) not dispute that the hair testimony given at trial was false and that knowledge of that falsity "should be imputed to the prosecution...." Exhibit A. Accordingly, a great many cases involving microscopic hair evidence across the country have been

recently vacated under Section 2255, habeas corpus or corum nobis either via court order or agreement with the Government without regard to any time limitations. In the 2255 cases, the Government has waived the statute of limitations on the filing of such motions based on the Kadzick letter.

2. In the instant case, Defendant already filed a *pro se* Motion for DNA testing under 18 USC 3600. However, that motion did not address the issue of falsity imputed to the Government as noted in #2 of the DOJ letter. Therefore, counsel is filing this Motion to Vacate to raise that issue. Many courts have recently decided that DNA testing of hair was unnecessary because relief was required under the "false testimony" standard articulated in *Napue v. Illinois*, 360 U.S. 264, 269 (1959). See *Jones v. United States*, ____ F.3d____No. 15-CO-1104 (DC Cir. March 7, 2019) and United States v. Ausby, ___F.3d___ (DC Cir. March 1, 2019). Both *Jones* and *Ausby* were brought under section 2255 even though they were decades old. Moreover, under section 2255, the defendants were not required to show any adverse consequences, as required under corum nobis. Counsel has filed a separate Memorandum discussing these and many other cases that have been vacated because of the improper used of hair evidence. Counsel has also formally asked the Government to confess error on this issue and agree to vacate Defendant's convictions.

3. Moreover, three weeks ago, counsel was contacted by Dan Luzzader, a highly respected investigative reporter who is currently investigating events relating to the instant case. Mr. Luzzader told counsel that he had read the recent Seventh Circuit case vacating a conviction because the prosecution failed to disclose information that could undermine the credibility of testimony involving hypnosis. *Sims v. Hyatte*, ____F.3d ____ (7th Cir. February 1, 2019). He

further said that he had recently discovered crucial evidence about the Indiana State Police hypnotist in the instant case that bore a striking similarity to the *Sims* case, which he believed he had an ethical obligation to disclose.

On March 12, 2019, Mr. Luzzader executed a Declaration under 28 U.S.C. 1746, which stated in essence that he interviewed Brooke Appleby, the hypnotist in this case, in February and March 2019, and Detective Appleby told him that (1) prior to his involvement in this case, he had been secretly investigating Defendant for years and had compiled a secret six to eight inch investigative file that he handed to the chief ATF agent in this case, Patrick Donovan, prior to trial, and (2) one of Appleby's relatives was a juror in this case but that fact was withheld from the Court and defense counsel even though the prosecution likely knew of that relationship. Exhibit B.

Clearly, this information, like that in *Sims*, would have been extremely important to the defense. Had Defendant known that a key government witness had actually been surveilling and investigating Defendant prior to his arrest, this would have been strong evidence that Detective Appleby had a bias and agenda, and was not simply a dispassionate hypnotist involved in this case. Moreover, had Defendant known that Detective Appleby gave a secret investigative file to the chief ATF agent, that information could have been used to challenge the credibility of Agent Donovan. And that file could have contained exculpatory evidence or other evidence that could have been used to explore bias on the part of the witness or even the entire investigation.

4. Defendant has stated in his attached Declaration that the defense in this case had requested all discovery from the Government prior to trial and that the Government never turned any "Appleby file" over to the defense.

Moreover, Defendant states that neither Appleby nor any juror disclosed any familial relationship prior, during or after trial. Indeed, it was standard for Judge Steckler to ask every juror during voir dire if they were related to any witness, and he received no response from Detective Appleby's relative.

5. The use of hypnosis in this case was a major issue in both pretrial and trial proceedings. On appeal, the Seventh Circuit found that the issue of hypnosis was "exceedingly close and difficult." *United States v . Kimberlin*, 805 F.2d 210, 254 (7th Cir. 1986) (Cudahy, J,concurring). Therefore, any information that could have undermined the credibility of the hypnotist likely would have made a difference at trial or on appeal.

6. Hypnosis is now considered "junk science" and is barred in criminal trials throughout the nation, including in Indiana courts. See *Sims*, *supra*.

7. A significant issue after trial involved allegations of jury misconduct, which resulted in a motion for new trial and a challenge on appeal. An alternate juror came forward after trial with an affidavit saying that certain jurors had reached a conclusion prior to hearing the evidence. In Mr. Luzzader's Declaration, he states that Detective Appleby's relative who was on the jury complained about that alternate to the prosecutors in private but that was never disclosed to the defense. This demonstrates that the Government prosecutors likely knew that the juror was related to Detective Appleby. Clearly, Defendant was denied a fair trial by having a biased juror on the jury that convicted him, and he was denied due process because the Government intentionally failed to disclose that a relative of a key witness was on the jury.

Wherefore, Defendant moves this Court to vacate Defendant's conviction.

Respectfully submitted,

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Certificate of Service

I hereby certify that on March 19, 2019, the foregoing was filed electronically. Notice of this filing will be sent to all counsel of record by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

s/ Kevin McShane
Kevin McShane

EXHIBIT A

U.S. DEPARTMENT OF JUSTICE
OFFICE OF LEGISLATIVE AFFAIRS

September 15. 2015

The Honorable Richard Blumenthal
United States Senate
Washington. DC 20510

Dear Senator Blumenthal:

This responds to your letter to the Attorney General and the Federal Bureau of Investigation (FBI) Director, dated April 28, 2015, regarding the FBI's review of federal and state criminal cases in which the results of microscopic hair comparison analyses were used. We are sending identical responses to the other Senators who joined in your letter and we apologize for our delay in responding.

As you are aware, the Department of' Justice (the Department) and the FBI are engaged in a review of historical cases involving testimony and laboratory reports regarding microscopic hair comparison analysis. The Department and FBI have developed a process to systematically identify and review all cases that resulted in a conviction in which microscopic hair comparison analysis was conducted, a positive association between evidentiary hair and a known sample was identified. and the hair was not submitted for mitochondrial DNA analysis. We have given the highest priority to reviewing capital cases. To date, 21,614 cases have been identified as having the potential to meet the above stated criteria and the FBI has completed its review of 95% of those cases. Of those 95%, 3,118 contained positive associations between evidentiary hair and a known sample. So far, 89% of the 3,118 cases have been marked as complete following a review.

The FBI's methodology for processing identified cases was carefully constructed in coordination with the Innocence Project (IP), the National Association of Criminal Defense Lawyers (NACDL.), and the Department. A coordinated effort with multiple parties throughout the country is being implemented to obtain information to conduct reviews. This process requires multiple attempts to obtain pertinent case file materials via telephone and letter. If no response is received, assistance is sought from the applicable state's attorney general, the IP, the NACDL, and the Department. In the event that pertinent materials are obtained after a reviewed matter is closed, it is reopened and the review resumes. The FBI has received valuable assistance by following this process, including. but not limited to, obtaining several testimony transcripts.

The FBI anticipates completing reviews of all identified cases by the end of the calendar year 2015. This means the identified case tiles will be reviewed to determine if further action is required. This review process, however, is dependent on the responses and cooperation the FBI receives from contributors of the evidence, prosecutor's offices, and others.

Once the files have been reviewed and notifications are made, individuals seeking to challenge their convictions based on erroneous statements in laboratory reports or testimony will file their claims in an appropriate court proceeding, such as a direct appeal, collateral review, or petition for a writ of habeas corpus. In state courts, the claims will be subject to state laws and procedures regarding post-conviction challenges. Since the United States is not a party to the underlying state court criminal proceedings, it does not have jurisdiction to intervene post-conviction proceedings. However, in our notification letters to state prosecutors and defense counsel, we are informing them that in federal post-conviction

proceedings, in the interest of justice, the government is waiving reliance on the statute of limitations for collateral attack on the convictions and any procedural-default defenses in order to permit a resolution on the merits of any legal claims arising from erroneous statements in laboratory reports or testimony. Specifically, the government will not dispute that the erroneous statements should be treated as false evidence and that knowledge or the falsity should he imputed to the prosecution. This will allow the parties to litigate the effect of the false evidence on the conviction in light of the remaining evidence in the case. In addition, in cases where it is clear that a defendant is actually innocent, the government will consent to vacating the conviction.

In addition to the above actions, the FBI continues to be involved in the forensic science community. The FBI has enjoyed a long history of working with the National Institute of Standards and Technology (NIST) and has already partnered with NIST, through the Department to strengthen and enhance the practice of forensic science through the establishment of the Organization of Scientific Area Committees (OSAC). The mission of the OSAC is to develop standards of practice and guidance documents within the forensic science disciplines represented in the organization. The FBI is well-represented in the OSAC with over 35 members currently employed in the FBI's Science and Technology Branch.

We hope this information is helpful. Please do not hesitate to contact this office if we may provide additional assistance regarding this or any other matter.

Sincerely,

s/ Peter J. Kadtik
Peter J. Kadtik
Assistant Attorney General

EXHIBIT B

DECLARATION OF DANIEL LUZADDER

I, Daniel M. Luzadder, declare, pursuant to the provisions of 28 U.S.C. 1746, that the following is true and correct.

1. I am an investigative reporter and freelance writer, currently residing in Evergreen, Colorado, and am at work on a book project concerning the 1978 Burger Chef murder case in Speedway, Indiana. That investigation includes events related to two other crimes that took place in the summer and fall of 1978, one of which was the so-called Speedway Bombing of which Mr. Brett Kimberlin was convicted, and another unsolved homicide; I am a former investigative reporter for the Indianapolis Star and participated in a police task force that conducted an investigation into new leads that I had developed in the unsolved Burger Chef murder case in 1985-86, as reported in the Indianapolis Star at the time. I have also known Mr. Kimberlin in my capacity as a journalist since his trial and conviction in 1981, and have previously investigated matters pertaining to his case.

2. In February and March 2019, in the course of investigating these events for the book project, I interviewed former Indiana State Police Detective Brooke Appleby on a number of occasions related to his role in the Burger Chef investigations. These interviews took place by telephone from his residence in Sarasota, Florida. He spoke to me on the record and for attribution, at the request of another former investigator, to assist me with my investigation and in compiling a true and accurate account of related events.

3. Mr. Appleby was the hypnotist who hypnotized witnesses in the case of Mr. Kimberlin, and he testified as a government witness in that case. Mr. Appleby told me

that he had first become aware of Mr. Kimberlin in the early to mid 1970s, while an undercover narcotics officer for the Indiana State Police, beginning when Mr. Kimberlin was a teenager, and had investigated Mr. Kimberlin over suspicions of drug trafficking, periodically surveilling him over several years prior to Mr. Kimberlin's arrest in the bombing case.

4. He said he compiled a six to eight-inch file during that investigation, and while he was unable to obtain sufficient evidence to bring trafficking charges against Mr. Kimberlin, later turned over the only copy of that file to Alcohol Tobacco and Firearms agent Patrick Donovan, who was investigating the Speedway bombings. He said this occurred at a date uncertain, but prior to the first trial of Mr. Kimberlin. He said the file was never returned to him. He offered to share the file if it could be located. He described the file as containing extensive details of that surveillance, including photographs, case reports detailing potential evidence and contacts, and police aerial photos of Mr. Kimberlin's home and other properties.

5. In the course of discussions, I told Mr. Appleby that Mr. Kimberlin's lead trial attorney, Nile Stanton, had recently given Mr. Kimberlin an affidavit saying there was ineffective assistance of counsel during Mr. Kimberlin's trial. Mr. Appleby said he agreed with that conclusion, because Mr. Kimberlin's attorneys at the time failed to discover, during jury voir dire, that one of the female jurors in the trial was acquainted with Mr. Appleby -- and in fact was a relative by marriage to Mr. Appleby's wife. He indicated that the juror never disclosed this fact to the judge nor defense counsel. However, he said he believed this was disclosed to prosecutors because the juror spoke to them to complain about an alternate juror, whom the sitting juror believed was inappropriately sympathetic to Mr. Kimberlin. Mr. Appleby said that he was never asked

about his relationship to this juror by the judge or defense counsel, nor by prosecutors in the course of appearing as a witness.

6. I spoke with attorney Kevin McShane about the Kimberlin conviction in the course of my inquiries, and we discussed controversies pertaining to the use of hypnosis in light of the recent Seventh Circuit case, Sims v. Hyatte, where the court granted habeas relief to a defendant based on the government's failure to disclose information that could be used to challenge the credibility of a hypnotist who testified in that case.

7. I have made efforts to obtain access to the surveillance file to learn details of matters that might be pertinent to my ongoing inquires. Mr. Appleby said the only copy was turned over to Pat Donovan of the ATF, and as I have not yet located him to make inquiries, I asked Mr. McShane whether the defense was aware of the prior investigation and of the surveillance file described to me by Mr. Appleby. He indicated that he was not, and that the government had not turned over any surveillance file of Mr. Kimberlin, nor was it made known to the defense that Mr. Appleby had been involved in prior investigations of Mr. Kimberlin, or that such a file was in the possession of federal authorities as part of their investigation.

9. I discussed with Mr. Appleby, immediately prior to his disclosures concerning the juror, that I was investigating the Kimberlin conviction and assertions about potential police misconduct as part of my inquiries. I told him I had spoken to Mr. Kimberlin and with Mr. McShane and was continuing to investigate relationships between the Speedway Bombing incidents, the unsolved homicide, and another potential suspect other than Mr. Kimberlin in the related cases. Mr. Appleby reiterated that he was convinced then and has remained convinced of Mr. Kimberlin's guilt, and would never see it otherwise.

10. I have given this affidavit at Mr. McShane's request, despite my professional concerns about protection of journalistic privilege over confidentiality, in consideration of fairness in this instance. The information was not disclosed to me on a confidential basis and is intended for publication. Mr. Kimberlin's counsel requested this affidavit because of potential relevance to the court's examination of requests by Mr. Kimberlin to have advanced DNA testing conducted on a hair fiber, found taped to a bomb fragment, earlier presented as inconclusive evidence in his case, and the subject of court testimony; and as evidence concerning his claims that Government witness Brooke Appleby knew and was related to a juror and that this fact was not disclosed to the Court or the defense during voir dire, or at any other time; and that Brooke Appleby told me that he had provided an investigative/surveillance file that he had compiled pertaining to Brett Kimberlin to ATF Agent Patrick Donovan.

Dated this 12th day of March, 2019

Signed: *s/ Daniel M. Luzadder*
Daniel M. Luzadder

EXHIBIT C

DECLARATION OF BRETT KIMBERLIN

I, Brett Kimberlin, declare, pursuant to 28 U.S.0 1746, that the following is true and correct.

1. Indiana State Police Detective Brooke Appleby testified as a government witness in my criminal case. IP-79-7-CR. He was the detective who conducted the hypnosis of several witnesses prior to trial.

2. The government prosecutors never disclosed that Detective Appleby had been investigating me for years prior to my arrest or that he had compiled an investigative file or that he turned that file over to the lead ATF agent in my case, Patrick Donovan. Had this information been disclosed to my defense attorneys and me, it would have been crucial to challenging Detective Appleby's bias, credibility and agenda. It would have also been important in challenging the testimony of Agent Donovan.

3. Prior to trial, my defense counsel requested in discovery all information in the Government's possession that had a bearing on the case. including exculpatory information and information that bore on the credibility and/or bias of any witness. The Government prosecutors assured us that all such evidence was disclosed.

4. At no time during voir dire, the trial or post trial proceedings was defense counsel or I informed that one of the jurors in the case was related to Detective Appleby. Had we known this, we would have insisted that this juror be excused from the jury.

5. Neither the juror nor Detective Appleby informed Judge Steckler of the relationship during any proceeding in flip courtroom.

Dated this 10th day of March, 2019.

s/ Brett Kimberlin
Brett Kimberlin

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

_____

CAUSE NO.: 1:79-cr-00007-TWP-MJD-01

_____

BRETT C. KIMBERLIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

_____

ORDER

Defendant Brett C. Kimberlin, by counsel, having filed his Motion to Vacate Conviction Based on Newly Discovered Evidence and/or Confessions of Error by the Government.

And the Court being duly advised in the premises now GRANTS Defendant's Motion.

IT IS SO ORDERED.

Date:_____ _____

TANYA WALTON PRATT, Judge
United States District Court
Southern District of Indiana

Distribution:

Kevin McShane
AUSA James Wood
AUSA Brian Reitz

APPENDIX G

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

BRETT KIMBERLIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

FILED

Nov 16 2018

U.S. CLERK'S OFFICE

INDIANAPOLIS, INDIANA

PETITIONER'S REPLY TO RESPONDENT'S OPPOSTION TO WRIT OF ERROR CORUM NOBIS

Petitioner Brett Kimberlin hereby replies to Respondent's Opposition to his Writ of Error Corum Nobis as follows; first, the statutes under which Petitioner was convicted are unconstitutional under the First Amendment as held by *United States v. Alvarez*, 567 U.S. 709 (2012) because they prohibit "expressive speech," and, *as applied in the instant case*, because the evidence at trial showed that Petitioner simply wore a shirt with an army insignia affixed to the sleeve and displayed a

facsimile of the presidential seal, and did not deceive anyone into doing anything that they would not otherwise have done; second, Petitioner was denied effective assistance of counsel and suffered prejudice from the failure of counsel at trial and on appeal to challenge Counts 26 and 30-34 on First Amendment grounds; third, Petitioner has a separate motion pending in this Court under 18 USC 3006 for DNA testing that could likely require a new trial for the "Speedway Bombing" case relied on by Respondent to argue against the granting of this Writ; and fourth, Petitioner has and is suffering grievous harm from these convictions. The issuance of this writ will redress a grave injustice against Petitioner since he was convicted based on First Amendment activity, given a 12-year sentence, and continues to suffer grievous harm.

The Government Should Have Confessed Error Because The Statutes Are Unconstitutional On Their Face And As Applied

Respondent disingenuously argues that the Supreme Court in *Alvarez* distinguished 18 USC 912 from the Stolen Valor Act under Section 704. However, the -Court did not rule on the constitutionality of Section 912, but rather only noted, "[s]tatutes forbidding impersonation of a public official typically focus on *acts* of impersonation, not mere speech, and may require a showing that, for example, someone was deceived into following a course [of action] he would not have pursued but for the deceitful conduct." *Alvarez*, 132 S. Ct. at 2554 (Breyer, J., concurring) (alteration in original) (internal quotation marks omitted). In the instant case, Respondent ignores the fact that in Counts 31-34, Petitioner simply made commercial transactions wearing a shirt with a sleeve patch attached, and no one was defrauded of anything. Moreover, Respondent appears to have intentionally withheld both the charges and the trial transcripts of the instant case in

order to mislead the Court into believing that Petitioner engaged in anything other than expressive speech. Finally, Counts 26 and 30, possession of a DOD insignia and display of a facsimile of the presidential seal, are so similar to the statute in *Alavarez* that Respondent does not even try to distinguish them. A copy of the Indictment is attached as Exhibit A, and each count is written verbatim below.

Count 26

On or about the 15th day of September, 1978, in the Southern District of Indiana, BRETT C. KIMBERLIN did knowingly possess an insignia of the design prescribed by the Secretary of the Department of Defense on the United States of America, that being a shoulder patch, which shoulder patch is prescribed for use by officers and employees of the said Department of Defense, the said BRETT C. KIMBERLIN not being authorized under regulations of the Department of Defense to possess said shoulder path, in violation of Title 18, United States Code, Section 701.

Count 30

On or about the 18th day of September, 1978, in the Southern District of Indiana, BRETT C. KIMBERLIN did knowingly display a printed facsimile of the seal of the President of the United States, for the purpose of conveying a false impression of sponsorship and approval by the Government of the United States, in violation of Title 18, United States Code, Section 713(a).

Count 31

On or about the 15th day of September, 1978, in the Southern District of Indiana, BRETT C. KIMBERLIN, did falsely pretend and assure to be an officer and employee of the United States, and acting under the authority thereof, that is, a security police officer of the United States

Department of Defense, and did falsely take upon himself to act as such, in that while wearing a uniform with a United States Department of Defense sleeve patch, he ordered from Richard Ehrgott two rubber stamps, one to stamp "Top Secret" and the other to stamp "U.S. Department of Defense", in violation of Title 18, United States Code, 912.

Count 32

On or about the 18th day of September, 1978, in the Southern District of Indiana, BRETT C. KIMBERLIN, did falsely pretend and assure to be an officer and employee of the United States, and acting under the authority thereof, that is, a security police officer of the United States Department of Defense, and did falsely take upon himself to act as such, in that while wearing a uniform with a United States Department of Defense sleeve patch, he falsely stated to Donaleen Smith that he was an employee and officer of the Department of Defense and ordered six security badges and six hat shields, in violation of Title 18, United States Code, 912.

Count 33

On or about the 18th day of September, 1978, in the Southern District of Indiana, BRETT C. KIMBERLIN, did falsely pretend and assure to be an officer and employee of the United States, and acting under the authority thereof, that is, a security police officer of the United States Department of Defense, and did falsely take upon himself to act as such, in that while wearing a uniform with a United States Department of Defense sleeve patch, he falsely stated that to John Dottenwhy that he was an employee and officer of the Department of Defense and ordered printed military drivers license forms and six license plates with the "Department of Defense" and serial

numbers inscribed thereon, in violation of Title 18, United States Code, 912.

Count 34

On or about the 18th day of September, 1978, in the Southern District of Indiana, BRETT C. KIMBERLIN, did falsely pretend and assure to be an officer and employee of the United States, and acting under the authority thereof, that is, a security police officer of the United States Department of Defense, and did falsely take upon himself to act as such, in that while wearing a uniform with a United States Department of Defense sleeve patch, he falsely stated that to John Dottenwhy that he was an employee and officer of the Department of Defense and attempted to receive certain printed military drivers license forms and six license plates with the "Department of Defense" and serial numbers inscribed thereon, in violation of Title 18, United States Code, 912.

The Transcripts

At trial, Richard Ehrgott (Tr. 2024-2030), John Dottenwhy (Tr. 2030-2041) and Donaleen Smith (Tr 2047-2051) each testified that Petitioner, looking like a state trooper, came into their commercial establishments and engaged in commercial transactions. Ehrgott and Dottenwhy stated that they recalled seeing a Department of Defense insignia on the sleeve, (Tr. 2026, 2032), while Smith did not recall any insignia. (Tr. 2050). (Transcripts attached as Exhibit B). Contrary to the language in Counts 32, 33 and 34, there was no evidence that Petitioner ever told Dottenwhy or Smith that he was an officer of the Department of Defense. But under *Alvarez and Swisher*, even if he had, that too would be considered protected speech.

These shirts and insignia were sold at army surplus stores at the time and the insignia are widely available on the Internet today. See e.g. Exhibit C. Rubber stamps like those Petitioner ordered in Count 31 are also widely available today. See Exhibit D.

The Law

In *United States v. Swisher*, 811 F.3d 299 (9th Cir. 2016) (en banc), which Respondent asks this Court to reject, the court noted the following:

> As a practical matter, the government's concession at oral argument that military medals are freely available for purchase confirms that the probative value of owning a medal or other military decoration is minimal, In any event, wearing a medal has no purpose other than to communicate a message. We therefore see no principled basis for distinguishing a spoken communication from a symbolic communication in this context. Id. at 316.

Respondent argues that this Court is not bound by *Swisher* because it is from another circuit. However, *Swisher* was decided on the basis of the Supreme Court's decision in *Alvarez*. The defendant in *Swisher* was charged with violating 18 USC 704(a):

> Elven Swisher took Alvarez one step better [than Alvarez]: he not only said he was a decorated soldier, he proved it by wearing his Marine Corps League uniform with five medals — including a Silver Star, a Purple Heart, and the Navy and Marine Corps Commendation Medal with a bronze "V." Like Alvarez, Swisher was an undeserving claimant; although a veteran, he had not earned a single one of the commendations he wore. As in Alvarez, the United States indicted Swisher under the Stolen

> Valor Act, but this time it accused him of violating § 704(a), which prohibits "knowingly wear[ing] any decoration or medal authorized by Congress ... except when authorized." 18 U.S.C. § 704(a) (2002 ed.) [811 F.3d at 318].

The *Swisher* court, after an exhaustive analysis of *Alvarez*, found the following:

> Alvarez clarified that lies do not fall into a category of speech that is excepted from First Amendment protection. 132 S.Ct. at 2546-47 (Kennedy, J., plurality opinion); *id.* at 2553 {Breyer, J., concurring). Given that clarification, our analysis follows a familiar road. Content-based prohibitions of speech and symbolic speech are analyzed under the same framework, and so Alvarez dictates our conclusion that § 704(a) violates the First Amendment. Because § 704(a) was unconstitutionally applied to Swisher's conduct, the district court erred in denying Swisher relief under 28 U.S.C. § 2255. We therefore reverse the district court and overrule Perelman to the extent inconsistent with this opinion.[14] [811 F.3d at 317]

Application Of The Law To The Facts Of The Instant Case

Petitioner was charged in **Count 26** with possession of a Department of Defense insignia in violation of 18 USC 701, which states the following:

> Whoever manufactures, sells, or possesses any badge, identification card, or other insignia, of the design prescribed by the head of any department or agency of the United States for use by any officer or employee thereof, or any colorable imitation

> thereof, or photographs, prints, or in any other manner makes or executes any engraving, photograph, print, or impression, in the likeness of any such badge, identification card, or other insignia, or any colorable imitation thereof, except as authorized under regulations made pursuant to law, shall be fined under this title or imprisoned not more than six months, or both.

The evidence at trial indicated that Petitioner wore a shirt that had a Department of Defense sleeve patch on its sleeve. Because he wore it, according to the Government, he possessed it. Clearly, under *Alvarez* and *Swisher*, this statue is unconstitutional because it prohibits the expressive conduct of owning, wearing or copying any military badge or insignia. If one cannot possess such items, then one cannot wear them, but wearing them has been found constitutional in *Alvarez/Swisher* as expressive/symbolic speech.

Petitioner was charged in **Count 30** with displaying a facsimile of the presidential seal in violation of 18 USC 713(a), which states the following:

> Whoever knowingly displays any printed or other likeness of the great seal of the United States, or of the seals of the President or the Vice President of the United States, or the seal of the United States Senate, or the seal of the United States House of Representatives, or the seal of the United States Congress, or any facsimile thereof, in, or in connection with, any advertisement, poster, circular, book, pamphlet, or other publication, public meeting, play, motion picture, telecast, or other production, or on any building, monument, or stationery, for the purpose of conveying, or in a manner reasonably calculated to convey, a false

> impression of sponsorship or approval by the Government of the United States or by any department, agency, or instrumentality thereof, shall be fined under this title or imprisoned not more than six months, or both.

The evidence at trial was that Petitioner displayed a facsimile of the presidential seal when he asked Dottenwhy to print a copy of the seal on a piece of paper. Tr. 2032. Clearly displaying a facsimile of the presidential seal is expressive/symbolic speech that cannot be constitutionally prohibited. Respondent knows this and knows that the presidential seal is widely available on the Internet in the form of bumper stickers, coffee mugs, and other commercial items, see e.g. Exhibit E, and has been used in conjunction with protests against presidents and their polices for decades. Indeed, in *Stromberg v. California*, 283 U.S. 359 (1931), the Supreme Court invalidated a conviction for displaying a "red flag, banner or badge or any flag, badge, banner, or device" as a form of opposition. Clearly, Petitioner's display of the seal is expressive conduct that is constitutional.

Petitioner was charged in **Counts 31-34** with impersonating an officer of the Department of Defense in violation of 18 USC 912, which states the following:

> Whoever falsely assumes or pretends to be an officer or employee acting under the authority of the United States or any department, agency or officer thereof, and acts as such, or in such pretended character demands, or obtains any money, paper, document, or thing of value, shall be fined under this title or imprisoned not more than three years, or both.

The Government's theory of the case at trial was that Petitioner, because he wore a shirt with a Department of

Defense sleeve patch on it, acted under the authority of the United States. However, *Alvarez* and *Swisher* clearly hold that wearing a military insignia does not mean that one acts under the authority of the United States or that one is or was an officer or employee of the United States. Indeed, following such logic, the Government could simply post agents outside of every Army Surplus store and arrest people for simply wearing things they just purchased. Clearly, this is absurd. Whether in the form of a medal or a patch, wearing military insignia is expressive/symbolic speech and therefore fully allowed under the First Amendment of the Constitution.

Ineffective Assistance Of Counsel

Ineffective counsel can be raised by way of a writ of error corum nobis. *United States v. Denedo*, 556 U.S. 904 (2009). *United States v. Akinsade*, 686 F.3d 248 (4th Cir. 2012). See also *United States v. Morgan*, 346 US 502 (1954), where the writ was used to address a failure to appoint counsel. In the instant case, counsel was ineffective by not contesting the constitutionality of Counts 26, and 30-34, and Petitioner's conviction on those counts. Counsel did not raise this issue *at any of the three trials or in any of the appeals* and these errors prejudiced Petitioner, as required under *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Had counsel raised the issue at trial in -pre or post trial motions, these criminal-charges would likely have been dismissed before or after trial. Had counsel raised them on appeal, they likely would have been vacated.

Nile Stanton was Petitioner's lawyer at two trials in this case and on appeal of the instant convictions. In his attached Declaration under 28 USC 1746, he swears under penalty of perjury that his representation fell below expected standards and that Petitioner was prejudiced.

Exhibit F. The relevant portions of that Declaration are set forth below:

> 2. In that appeal, I failed to raise a First Amendment challenge to the validity of these charges. Had I done so, it seems very likely to me that the Seventh Circuit would have reversed the convictions on the basis later outlined by the Supreme Court in *United States v. Alvarez*, 567 U.S. 709 (2012). Specifically, the possession and wearing of a military sleeve patch, and the display of a facsimile of the Presidential Seal, are clearly expressive speech as outlined in *Alvarez*.
>
> 3. I have read both *Alvarez* and the Ninth Circuit's *en banc* decision in *United States v. Swisher*, 811 F.3d 299 (9th Cir. 2016), and believe them to be dispositive of the issues raised in Brett Kimberlin's instant petition regarding the unconstitutionality of 18 USC 701, 713(a), and 912, as applied to him.
>
> 4. Government symbols, especially those denoting official sponsorship, have historically been used by American citizens to express themselves whether during protests of Government policies, in cartoons, or mass demonstrations. Indeed, the Supreme Court in *Texas v. Johnson*; 491 U.S. 397 (1989), even held that the burning the American flag is a constitutional form of expressive conduct.
>
> 5. Brett Kimberlin's wearing of a military insignia and displaying a facsimile of the Presidential Seal was protected speech and should have been contested as such at both his trial and on appeal, and this omission was not due to any trial or appellate strategy or tactic but, rather, a major blunder by Brett's attorneys.

6. It is my opinion that Brett Kimberlin has suffered extreme prejudice from the unconstitutional convictions and will continue to suffer various spillover effects in the future. First, the unconstitutional charges were placed in front of the first jury that heard the Speedway Bombing case, which hung 9 to 3 for acquittal, and it may have acquitted him outright absent those. Second, he was given a severe 12-year sentence on those charges. Third, when the retrial occurred on the hung charges, he was impeached with the prior convictions on the unconstitutional charges. Fourth, when he was sentenced after that retrial; the trial judge considered those unconstitutional charges in imposing an extreme 50-year sentence. Fifth, the Government used those charges to paint him in an unfavorable light when he appealed his convictions. Sixth, the United States Parole Commission almost certainly considered those unconstitutional convictions to initially deny him parole. Seventh, numerous media outlets both during trial and on the Internet today use those convictions to harm his reputation. Eighth, these convictions, because they allege deceit, could be used to deny him government grants, bank loans, and employment licenses and opportunities.

7. I believe that I did not provide Brett Kimberlin with effective assistance of counsel due to my failure to contest the charges at issue here during his retrial/sentence of the Speedway Bombing case. Specifically, I should have challenged the use of those convictions during his testimony, and I should have challenged them during the sentencing phase of that trial.

8. I also believe that I did not provide Brett Kimberlin with effective assistance of counsel on his appeal of those convictions, because I did not raise the issue of expressive speech under the First Amendment as later found in *Alvarez*. At the time of the appeal, it was black letter law that the First Amendment protected expressive speech including the display and possession of government symbols. See for example; *Stromberg v. California*, 283 U.S. 359 (1931), which invalidated a .conviction for displaying a "red flag, banner or badge or any flag, badge, banner, or device" as a form of opposition.

9. In my view, my failure to challenge the convictions fell below an attorney's expected objective standard of reasonable competence.

***Note: Mr. Stanton is currently a professor employed in Europe and he lives in Spain. He sent the Declaration to Petitioner digitally and stated that his digital signature should be taken as his full signature. Mr. Stanton is willing to testify before this Court at any hearing set in this case.

Prejudice And Spillover

Respondent argues that even if the instant convictions were vacated, Petitioner has not shown harm because his "Speedway Bombing" convictions would still stand. However, this argument is belied by the following facts:

- The counts at issue were initially tried in a 34-count indictment along with the explosive counts. There was never any relationship shown between the two sets of charges yet the first jury found Petitioner guilty of the instant counts while hanging 9 to 3 for acquittal on the explosive counts. Had trial counsel challenged the instant charges in a pre trial motion on First Amendment grounds, they likely

would have been dismissed and never considered by the jury. All evidence relating to those charges would not have been considered by the jury and this likely could have swayed the remaining three jurors to acquit Petitioner on the explosives charges.

- Moreover, had these counts been successfully challenged at the first trial, Petitioner never would have been convicted and given a 12-year sentence. Had they been challenged and that challenge denied, the issue would have been preserved for appeal.

- There were two retrials after the hung jury. The first one involved two severed counts of receipt of explosives. Petitioner did not take the stand in that trial in large part because, *as attested to by his Declaration* filed separately under seal, he would have been impeached by his prior convictions with the instant counts. Had those counts been successfully challenged at the first trial, he would have exercised his right to testify and he may have been acquitted on those charges. Had Nile Stanton in the second trial successfully challenged those counts with a motion in limine, Petitioner would have taken the stand. Had the judge denied such a challenge, Petitioner could have appealed that he was denied his right to testify because of unconstitutional convictions. Moreover, the sentencing judge considered those unconstitutional convictions in imposing the maximum five-year sentence consecutive to 12 years imposed for those convictions. Attorney Stanton appealed this second trial to the Seventh Circuit but did not raise the First amendment issue. Had he raised this issue at trial and been denied, he

could have made a very powerful argument on appeal that Petitioner was deprived of a fair trial.

- In the retrial of the "Speedway Bombing" counts, Petitioner did take the stand and *was impeached* with his convictions from the first trial, and those convictions were set forth in his Presentence Report and considered by the sentencing judge when imposing the draconian 50-year sentence. As Nile Stanton attests in his attached affidavit, his failure to contest the introduction of those charges in a motion in limine allowed those convictions and the evidence related to them to be introduced at trial and sentencing. This was extremely prejudicial to Petitioner. Moreover, had the trial judge denied the motion in limine, this would have provided a strong issue on appeal, which Judge Cudahy found was a "very close case" with a great deal of "troubling" prejudicial information presented to the jury. 805 F.2d 211, 254-55 (7th Cir. 1983). Attorney Stanton attests that his failure to raise the issue at trial and on appeal fell below objective standards of effectiveness and prejudiced Petitioner.

- In the direct appeal of the instant counts, Attorney Stanton failed to raise the First Amendment issue even though that had not been raised in the lower court. Clearly, because the statutes are unconstitutional under the First Amendment, they could have been raised on appeal as "plain error" and considered by the Court of Appeals. Attorney Stanton states in his Declaration that his failure to raise this issue on appeal fell below objective standards which prejudiced Appellant.

- Of course, had the Seventh Circuit rejected these challenges, they could have been considered by the Supreme Court as they were later in *Alvarez*. Because of the importance of Petitioner's case, and the assertions that he had been wrongly convicted, his case was appealed to the Supreme Court by the most respected lawyer in the United States at that time, former Harvard Law School Dean and Solicitor General Erwin Griswold. Attorney Griswold, *pro bono*, filed certiorari of Petitioner's third trial appeal because he believed that a gross injustice had occurred and that Petitioner had been wrongly convicted. Clearly, had the issue involving the instant counts been raised and denied in the lower courts, Dean Griswold could have raised it in the Supreme Court and, like *Alvarez*, likely would have prevailed.

The failure of Petitioner's first trial counsel to challenge the instant counts fell below expected standards of effectiveness and seriously prejudiced Petitioner not only at his first trial, but at his second and third trials and on appeal of his first, second and third trials. The toxic spillover effect that these unconstitutional convictions had on those subsequent trials and appeals was devastating and seriously affected the fairness, integrity or public reputation of all the judicial proceedings against Petitioner.

Petitioner Has Filed For DNA Testing Of Evidence Used In The Third Trial

Respondent has argued that Petitioner has not shown harm from the instant convictions because the explosive convictions would remain. However, because of a recent admission by the Department of Justice that virtually all hair evidence presented at trials prior to 2000 was

inaccurate, Petitioner, on October 3, 2018, filed a Motion under 18 USC 3006(a)(1), for DNA testing of hair found attached to tape at one of the explosive sites. That was filed under the original cause number in this case. On April 20, 2015, the DOJ ordered a review of all cases in which hair testimony/evidence was used but failed to review Petitioner's case. https://www.fbi.govinews/pressrel/press-releases/fbi-testimony-on-microscopic-hair-analy_sis-contained-errors-in-at-least-90-percent-of-cases-in-ongoing-review -Exhibit G.

The hair introduced at Petitioner's third trial will not match Petitioner's hair using DNA testing. Clearly, this would support his claim of innocence and would cast doubt on his conviction. Accordingly, this Court cannot use the "Speedway Bombing" convictions to find that Petitioner suffers no harm from the convictions at issue in this case. Moreover, other courts have vacated some convictions from multi-count indictments under corum nobis while leaving others. See *United States v. Walgren*, 885 F.2d 1417, 1421-22 (9th Cir. 1989) (assuming that conviction on one count is valid and granting *coram nobis* relief on two other counts). *Hirabayashi v. United States*, 627 F. Supp. 1445, 1457 (W.D. Wash. 1986) (district court did not vacate all of petitioner's convictions even though it concluded that *coram nobis* was appropriate).

Petitioner Continues To Suffer Harm From The Instant Convictions

As Nile Stanton states in his Declaration, Petitioner suffers continued harm from the convictions in the instant case. Courts have repeatedly found that economic harm and the inability of a person to get professional licenses is sufficient to meet the harm standard under corum nobis. In *United States v. Mandel*, 862 F.2d 1067, 1075 (4th Cir.

1988), the court found that "[c]onviction of a felony imposes a status upon a person[,] which not only makes him vulnerable to future sanctions through new civil disability statutes, but which also seriously affects his reputation and economic opportunities"

While the Seventh Circuit in *United States v. Keane*, 852 F.2d 199, 203 (7th Cir 1988), rejected using corum nobis to vacate an unconstitutional conviction *solely* on the basis of reputational harm, that 30-year old decision has been harshly criticized as not only legally flawed and downright mean, but also because it cannot be squared with the advent of social media, online criminal databases, and the shocking consequences they have on persons convicted of crimes. David Wolitz, *The Stigma of Conviction: Coram Nobis, Civil Disabilities, and the Right to Clear One's Name*, 2009 BYU L. Rev. 1277 (2009). Criminal convictions have today become modern day "Scarlet Letters" that can be used by banks, employers, or enemies to cause extreme harm to an individual, and that is exactly what has happened to Petitioner.

The Vilification Of Petitioner By Alt-Right Extremists

Petitioner is the director of a Maryland based nonprofit that supports progressive causes, fair elections, tolerance and pluralism. Because of his work, right wing agitator Andrew Breitbart put a cyber hit on Petitioner calling for all alt-right bloggers and media to target Petitioner with an "Everybody Blog About Brett Kimberlin" campaign. Those fanatics looked for anything that could harm Petitioner and this led to the 40-year old convictions in the instant case. It is no exaggeration that this multi-year harassment campaign generated tens of thousands of negative stories and blog posts dredging up every conspiracy theory about the 40-year old convictions, and focused on two false narratives—first, that Petitioner is a fraudster because he

deceived people by wearing the DOD shirt, and second, that he is a terrorist because he was convicted of explosive related charges.

They posted photos of Petitioner wearing the Department of Defense shirt and argued that he was a terrorist planning to attack the United States Government. They used the instant convictions to assert that Petitioner is a fraudster. They filed multiple suits against Petitioner seeking discovery and depositions to learn every detail of the prior convictions. They contacted foundations that donated money to Petitioner's employer and told them that Petitioner is a fraudster and criminal, which led to hundreds of thousands in lost revenue. They contacted the State Department and forced it to shut down a program Petitioner was involved with for years training foreign activists on how to use social media to counter dictatorial regimes. They terrorized Petitioner and his family with death threats, stalkers, and harassment that amounted to a siege and required police protection, peace orders, and years of constant civil court appearances just to stay alive. They stalked Petitioner's wife and adolescent daughter asserting that they were proper targets because of "corruption of blood." See Petitioner's Declaration filed separately under seal. They launched a Wikipedia page focused on Petitioner's criminal convictions which mentions and lists the instant charges at least four different times. https://en.wikipedia.org/wiki/Brett Kimberlin

This campaign has not ceased but continues to be led by former Brietbart editor Lee Stranahan, who now works for Russia's *Sputnik*. On November 8, 2018, he sent out a tweet storm about Petitioner including this one:

> Reminder: in 2012 as the Arab Spring was gearing up, the Obama / Clinton State Department

> introduced visitors from " Saudi Arabia, Syria, Iraq, Egypt" and other counries (sic) to convicted Bomber Brett Kimberlin {Exhibit H)

Stranahan and his cohorts have been using these 40-year criminal convictions to undermine the work Petitioner's nonprofit is doing surrounding the Russia investigation by Special Counsel Robert Mueller. On November 6, 2018, Stranahan tweeted:

> BREAKING Update on Brett Kimberlin State Department / Possible @BillBrowder Connection #Bombergate

Stranahan himself is under FBI and Special Counsel investigation because of his criminal contacts with Roger Stone, Juilan Assange, Wikileaks and others regarding the theft and hacking of DNC and Clinton emails. Yet Stranahan/Breitbart/Sputnik are trying to taint the Mueller investigation by tying Petitioner's 40-year old convictions to that investigation.

Clearly, these criminal convictions have had a devastatingly harmful effect on Petitioner's reputation, sanity, and financial well-being. However, that is not all. Because of the misuse of the convictions to falsely paint Petitioner as a fraudster because he "deceived" people by wearing a shirt with a DOD insignia attached, Petitioner cannot even be considered for any government grants even though his nonprofit is considered one of the top organizations in the world dealing with Russian malign influence. Moreover, Petitioner cannot even get a car loan today because banks now consult social media when deciding whether to grant a loan. As he attests in his Declaration, he recently applied for such a secure loan at two major banks where he has been a customer for decades. However, after "reputational scoring" by the banks, he was denied even though he has perfect credit, no

debt, and had received multiple car loans prior to the onslaught of social media campaign highlighting his 40-year old convictions.

In short, this Court should find that Petitioner has overwhelmingly met the harm/disability standard.

Petitioner Did Not Delay Filing The Writ

Respondent halfheartedly in a single paragraph asserts that Petitioner has offered no explanation for not filing his writ prior to March 2018, while admitting that *Swisher* was not decided until 2016. First, Petitioner is a *pro se* litigant who filed the writ soon after he was contacted by an associate who read about the *Swisher* case. Petitioner had to research whether the holding in *Swisher* would apply retroactively to Petitioner and, once he determined that it would, he worked diligently to prepare and file the writ. Second, as noted above and in Petitioner's Declaration, the harm from the convictions reached critical mass with the explosion in online attacks against Petitioner by extremists who decided to use the convictions to discredit Petitioner, the work he was doing, and his important assistance to law enforcement officials. Third, his inability to seek government grants and car loans did not manifest until 2018. Clearly, Petitioner did not delay the filing of the writ.

Conclusion

Petitioner has clearly met the standards required for the issuance of a Writ of Error Corum Nobis to vacate Counts 26, and 30-34. Counts 26 and 30 related to the possession and/or display of a military insignia and presidential seal are unconstitutional on their face under the First Amendment analysis of *Alvarez/Swisher*. Similarly, Counts 31-34 related to Petitioner's wearing of the commercially available shirt with the DOD insignia attached to the sleeve

are unconstitutional as applied since he simply wore the shirt as part of expressive speech when he entered commercial establishments and did not cause any "harm" or defraud anyone.

Moreover, Petitioner's convictions are unconstitutional under the Sixth Amendment because Petitioner was denied effective assistance of counsel by counsels' failure to contest these charges prior to, during or after trial, and on appeal. Petitioner's attorney, Nile Stanton, has stated under oath that he failed to provide effective assistance of counsel and that Petitioner was prejudiced therefrom.

Wherefore, this Court should issue the writ vacating Counts 26, 30, 31, 32, 33, and 34.

Respectfully submitted,

s/ Brett Kimberlin
Brett Kimberlin
[redacted]

CERTIFICATE OF SERVICE

I certify that I mailed a copy of this motion to the United States Attorney for this Southern District of Indiana this 14th day of November, 2018.

s/ Brett Kimberlin
Brett Kimberlin

EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

_____

NO. IP 79-CR

_____

UNITED STATES OF AMERICA,

v.

BRETT C. KIMBERLIN,

INDICTMENT

COUNT 1

The Grand Jury charges that:

On or about the 1st day of September, 1978, in the Southern District of Indiana, BRETT C. KIMBERLIN knowingly possessed a firearm, that is, a destructive device, which had not been registered to him in the National Firearms Registration and Transfer Record as required by Chapter 53, Title 26, United States Code; in violation of Title 26, United States Code, Sections 5861(d) and 5871.

COUNT 2

The Grand Jury further charges that:

On or about the 1st day of September, 1978, in the Southern District of Indiana, BRETT C. KIMBERLIN knowingly possessed a firearm, that is, a destructive device, which had not been registered to him in the National Firearms Registration and Transfer Record as

required by Chapter 53, Title 26, United States Code; in violation of Title 26, United States Code, Sections 5861(d) and 5871.

COUNT 3

The Grand Jury further charges that:

On or about the 1st day of September, 1978, in the Southern District of Indiana, BRETT C. KIMBERLIN knowingly possessed a firearm, that is, a destructive device, which had not been registered to him in the National Firearms Registration and Transfer Record as required by Chapter 53, Title 26, United States Code; in violation of Title 26, United States Code, Sections 5861(d) and 5871.

COUNT 4

The Grand Jury further charges that:

On or about the 2nd day of September, 1978, in the Southern District of Indiana, BRETT C. KIMBERLIN knowingly possessed a firearm, that is, a destructive device, which had not been registered to him in the National Firearms Registration and Transfer Record as required by Chapter 53, Title 26, United States Code; in violation of Title 26, United States Code, Sections 5861(d) and 5871.

COUNT 5

The Grand Jury further charges that:

On or about the 3rd day of September, 1978, in the Southern District of Indiana, BRETT C: KIMBERLIN knowingly possessed a firearm, that is, a destructive device, which had not been registered to him in the National Firearms Registration and Transfer Record as required by Chapter 53, Title 26, United States Code; in

violation of Title 26, United States Code, Sections 5861(d) and 5871.

COUNT 6

The Grand Jury further charges that:

On or about the 3rd day of September, 1978, in the Southern District of Indiana, BRETT C. KIMBERLIN knowingly possessed a firearm: that is, a destructive device, which had not been registered to him in the National Firearms Registration and Transfer Record as required by Chapter 53, Title 26, United States Code; in violation of Title 26, United States Code, Sections5861(d) and 5871.

COUNT 7

The Grand Jury further charges that:

On or about the 5th day of September, 1978, in the Southern District of Indiana, BRETT C. KIMBERLIN knowingly possessed a firearm, that is, a destructive device, which had not been registered to him in the National Firearms Registration and Transfer Record as required by Chapter 53, Title 26, United States Code; in violation of Title 26, United States Code, Sections 5861(d) and 5871.

COUNT 8

The Grand Jury further charges that:

On or about the 6th day of September, 1978, in the Southern District of Indiana, BRETT C. KIMBERLIN knowingly possessed a firearm, that is, a destructive device, which had not been registered to him in the National Firearms Registration and Transfer Record as required by Chapter 53, Title 26, United States Code; in

violation of Title 26, United States Code, Sections 5861(d) and 5871.

COUNT 9

The Grand Jury further charges that:

On or about the 1st day of September, 1978, in the Southern District of Indiana, BRETT C. KIMBERLIN knowingly manufactured a firearm, that is, a destructive device, in violation of Chapter 53, Title 26, United States Code; all in violation of Title 26, United States Code, Sections 5861(f)and 5871.

COUNT 10

The Grand Jury further charges that:

On or about the 1st day of September, 1978, in the Southern District of Indiana, BRETT C. KIMBERLIN knowingly manufactured a firearm, that is, a destructive device, in violation of Chapter 53, Title 26, United States Code; all in violation of Title 26, United States Code, Sections 5861(f) and 5871.

COUNT 11

The Grand Jury further charges that:

On or about the 1st day of September, 1978, in the Southern District of Indiana, BRETT C. KIMBERLIN knowingly manufactured a firearm, that is, a destructive device, in violation of Chapter 53, Title 26, United States Code; all in violation of Title 26, United States Code, Sections 5861(f) and 5871.

COUNT 12

The Grand Jury further charges that:

On or about the 2nd day of September, 1978, in the Southern District of Indiana, BRETT C. KIMBERLIN knowingly manufactured a firearm, that is, a destructive device, in violation of Chapter 53, Title 26, United States Code; all in violation of Title 26, United States Code, Sections 5861(f) and 5871.

COUNT 13

The Grand Jury further charges that:

On or about the 3rd day of September, 1978, in the Southern District of Indiana, BRETT C. KIMBERLIN knowingly manufactured a firearm, that is, a destructive device, in violation of Chapter 53, Title 26, United States Code; all in violation of Title 26, United States Code, Sections 5861(f) and S871.

COUNT 14

The Grand Jury further charges that:

On or about the 3rd day of September, 1978, in the Southern District of Indiana, BRETT C. KIMBERLIN knowingly manufactured a firearm, that is, a destructive device, in violation of Chapter 53, Title 26, United States Code; all in violation of Title 26, United States Code, Sections 5861(f) and 5871.

COUNT 15

The Grand Jury further charges that:

On or about the 5th day of September, 1978, in the Southern District of Indiana, BRETT C. KIMBERLIN knowingly manufactured a firearm, that is, a destructive device, in violation of Chapter 53, Title 26, United States Code; all in violation of Title 26, United States Code, Sections 5861(f) and 5871.

COUNT 16

The Grand Jury further charges that:

On or about the 6th day of September, 1978, in the Southern District of Indiana, BRETT C. KIMBERLIN knowingly manufactured a firearm, that is, a destructive device, in violation of Chapter 53, Title 26, United States Code: all in violation of Title 26, United States Code, Sections 5861(f) and 5871.

COUNT 17

The Grand Jury further charges that:

On or about the 5th day of September, 1978, in the Southern District of Indiana, BRETT C. KIMBERLIN did maliciously damage and destroy, by means of an explosive, a vehicle, that is, a Speedway Police Department police car, owned, possessed, and used by the Speedway Police Department, which at that time received Federal Financial Assistance, in violation of Title 18, United States Code, Section 844(f).

COUNT 18

The Grand Jury further charges that:

On or about the 2nd day of September, 1978, in the Southern District of Indiana, BRETT C. KIMBERLIN did maliciously damage and destroy, by means of an explosive, real and personal property, located at the Speedway High School, which was then owned by, possessed by, and used by the School Town of Speedway, Indiana, which at that time received Federal Financial Assistance, in violation of Title 18, United States Code, Section 844(f).

COUNT 19

The Grand Jury further charges that:

On or about the 1st day of September, 1978, in the Southern District of Indiana, BRETT C. KIMBERLIN did maliciously damage by means of an explosive, a building and personal property, to-wit; the Hi-Fi Buys located at 6016 Crawfordsville Road, Speedway Shopping Center, Speedway, Indiana, a business used in and affecting interstate commerce, in violation of Title 18, United States Code, Section 844(i).

COUNT 20

The Grand Jury further charges that:

On or about the 1st day of September, 1978, in the Southern District of Indiana, BRETT C. KIMBERLIN did maliciously damage by means of an explosive, real and personal property located at the Speedway Motel, 4400 West 16th Street, Speedway, Indiana, a motel used in and affecting interstate commerce, in violation of Title 10, United States Code, Section 844(i).

COUNT 21

The Grand Jury further charges that:

On or about the 3rd day of September, 1978, in the Southern District of Indiana, BRETT C. KIMBERLIN did maliciously damage by means of an explosive, real and personal property located at the Speedway Bowling Alleys, Inc., 3508 West 16th Street, Speedway, Indiana, a business used in and affecting interstate commerce, in violation of Title 18, United States Code, Section 844(i)

COUNT 22

The Grand Jury further charges that:

On or about the 6th day of September, 1978, in the Southern District of Indiana, BRETT C. KIMBERLIN did maliciously damage and destroy, by means of an explosive,

real and personal property, located at the Speedway High School which was then owned by, possessed by, and used by the School Town of Speedway, Indiana, which at that time received Federal Financial Assistance, personal injuries resulting therefrom to the persons of Carl David DeLong and Sandra DeLong, in violation of Title 18, United States Code, Section 844(f).

COUNT 23

The Grand Jury further charges that:

On or about the 14th day of May, 1975, in the Southern District of Indiana, BRETT C. KIMBERLIN, having been convicted of perjury, a crime punishable by imprisonment for a term exceeding one year, on January 18, 1974, in the Southern District of Indiana, did receive an explosive, to-wit: Tovex 200, which had been shipped and transported in interstate commerce, in violation of Title 18, United States Code, Section 842(i)(1).

COUNT 24

The Grand Jury further charges that:

On or about the 14th day of May, 1975, in the Southern District of Indiana, BRETT C. KIMBERLIN, having been convicted of perjury, a crime punishable by imprisonment for a term exceeding one year, on January 18, 1974, in the Southern District of Indiana, did receive an explosive, to-wit: DuPont electric blasting caps, which had been shipped and transported in interstate commerce, in violation of Title 18, United States Coder Section 842(i)(1).

COUNT 25

The Grand Jury further charges that:

On or about September 21, 1978, in the Southern District of Indiana, BRETT C. KIMBERLIN, having been convicted of

perjury, a crime punishable by imprisonment for a term exceeding one year, on January 18, 1974, in the Southern District of Indiana, knowingly did transport ammunition, that is, two boxes of .223 caliber Remington ammunition, in interstate commerce, from the Southern District of Ohio, into the Southern District of Indiana, in violation of Title 18, United States Code, Section 922(g)(1).

COUNT 26

The Grand Jury further charges that:

On or about the 15th day of September, 1978, in the Southern District of Indiana, BRETT C. KIMBERLIN did knowingly possess an insignia of the design prescribed by the Secretary of the Department of Defense of the United States of America, that being a shoulder patch, which shoulder patch is prescribed for use by officers and employees of the said Department of Defense, the said BRETT C. KIMBERLIN not being authorized under regulations of the Department of Defense to possess said shoulder patch, in violation of Title 18, United States Code, Section 701.

COUNT 27

The Grand Jury further charges that:

On or about the 18th day of September, 1978, in the Southern District of Indiana, BRETT C. KIMBERLIN did knowingly possess an insignia of the design prescribed by the Secretary of the Department of Defense of the United States of America, that being a shoulder patch, which shoulder patch is prescribed for use by officers and employees of the said Department of Defense, the said BRETT C. KIMBERLIN not being authorized under regulations of the Department of Defense to possess said shoulder patch, in violation of Title 18, United States Code, Section 701.

COUNT 28

The Grand Jury further charges that:

On or about the 18th day of September, 1978, in the Southern District of Indiana, BRETT C. KIMBERLIN did knowingly possess an insignia of the design prescribed by the Secretary of the Department of Defense of the United States of America, that being a shoulder patch, which shoulder patch is prescribed for use by officers and employees of the said Department of Defense, the said BRETT C. KIMBERLIN not being authorized under regulations of the Department of Defense to possess said shoulder patch, in violation of Title 18, United States Code, Section 701.

COUNT 29

The Grand Jury further charges that:

On or about the 20th day of September, 1978, in the Southern District of Indiana, BRETT C. KIMBERLIN did knowingly possess an insignia of the design prescribed by the Secretary of the Department of Defense of the United States of America, that being a shoulder patch, which shoulder patch is prescribed for use by officers and employees of the said Department of Defense, the said BRETT C. KIMBERLIN not being authorized under regulations of the Department of Defense to possess said shoulder patch, in violation of Title 18, United States Code, Section 701.

COUNT 30

The Grand Jury further charges that:

On or about the 18th day of September, 1978, in the Southern District of Indiana, BRETT C. KIMBERLIN did knowingly display a printed facsimile of the seal of the

President of the United States, for the purpose of conveying a false impression of sponsorship and approval by the Government of the United States, in violation of Title 18, United States Code, Section 713(a).

COUNT 31

The Grand Jury further charges that:

On or about the 15th day of September, 1978, in the Southern District of Indiana, BRETT C. KIMBERLIN, did falsely pretend and assume to be an officer and employee of the United States, and acting under the authority thereof, that is, a security police officer of the United States Department of Defense, and did falsely take upon himself to act as such, in that while wearing a uniform with a United States Department of Defense sleeve patch, he ordered from Richard Ehrgott two rubber stamps, one to stamp "Top Secret" and the other to stamp "U. S. Department of Defense", in violation of Title 18, United States Code, Section 912.

COUNT 32

The Grand Jury further charges that:

On or about the 18th day of September, 1978, in the Southern District of Indiana, BRETT C. KIMBERLIN, did falsely pretend and assume to be an officer and employee of the United States, and acting under the authority thereof, that is, a security police officer of the. United States Department of Defense, and did falsely take upon himself to act as such, in that while wearing a uniform with a United States Department of Defense sleeve patch he falsely stated to Donaleen Smith that he was an employee and officer of the Department of Defense and ordered six security badges and six hat shields, in violation of Title 18, United States Code, Section 912.

COUNT 33

The Grand Jury further charges that:

On or about the 18th day of September, 1978, in the Southern District of Indiana, BRETT C. KIMBERLIN, did falsely pretend and assume to be an officer and employee of the United States, and acting under the authority thereof, that is, a security police officer of the United States Department of Defense, and did falsely take upon himself to act as such, in that while wearing a uniform with a United States Department of Defense sleeve patch be falsely stated to John Dottenwhy that he was an employee and officer of the Department of Defense and ordered printed blank military drivers license forms and six license plates, with the "Department of Defense" and serial numbers inscribed thereon, in violation of Title 18, United States Code, Section 912.

COUNT 34

The Grand Jury further charges that:

On or about the 20th day of September, 1978, in the Southern District of Indiana, BRETT C. KIMBERLIN, did falsely pretend and assume to be an officer and employee of the United States, and acting under the authority thereof, that is, a security police officer of the United States Department of Defense, and did falsely take upon himself to act as such, in that while wearing a uniform with a United States Department of Defense sleeve patch he falsely stated to John Dottenwhy that he was an employee and officer of the Department of Defense and attempted to receive certain printed blank military drivers license forms and six license plates with the "Department of Defense" and serial numbers inscribed thereon, which he had previously ordered, in violation of Title 18, United States Code, Section 912.

A TRUE BILL:

s/
FOREMAN

s/
UNITED STATES ATTORNEY

EXHIBIT B

(Direct - Ehrgott)

(Trial resumed, 11:25 A.M.)

(Jury present.)

MR. PYLITT: The government calls Richard Ehrgott.

R I C H A R D E. E H R G O T T, called as a witness on behalf of the government, having been first duly sworn to tell the truth, testified as follows:

DIRECT EXAMINATION,

QUESTIONS BY MR. PYLITT:

Q Sir, could you tell the Jury your name and spell your name for the record.

A Richard E. Ehrgott. E-h-r-g-o-t-t.

Q Do you live here in Indianapolis, sir?

A I do.

Q Do you have a business or occupation?

A I own my own business .

Q What is the name of that business?

A Ehrgott Rubber Stamp Company and Butcher Printing Company.

Q Referring to Ehrgott Rubber Stamp Company, can you tell the jury where that is located?

A 4619 East Tenth in Indianapolis.

Q How long have you been involved in that business, sir?

A About 18 years.

Q Was that the location of the Ehrgott Rubber Stamp Store in September of 1978?

A Yes, it was.

Q Approximately how many rubber stamps a year do you make, sir?

A Upwards of 10,000.

Q Do you recall on September 15th, 1978, whether or not an individual came in and ordered certain types of rubber stamps?

A Yes, sir.

Q Can you tell the Jury approximately what time of the day that was?

A In the morning hours before lunch.

Q Can you describe what the customer looked like sir? Was he a male?

A He was a male.

Q Black or white?

A White.

Q Approximately what age?

A Twenty-six, 27.

Q What was he dressed in, sir?

A He had some kind of a military or police uniform.

Q Any hat?

A It looked like a trooper's hat.

Q When you say a trooper, like an Indiana State Trooper?

A Well, a wide-brimmed hat.

Q Wide-brimmed hat?

A Uh-huh.

Q What color was it, do you recall?

A Blue, I believe.

Q What about the pants?

A The whole uniform was blue.

Q Do you recall any specific markings on the sleeve?

A To my best recollection, it said, "United State Department of Defense."

Q Where was that located?

A On the shoulder.

Q What, if anything, did the customer say to you?

A He wanted to order rubber stamps.

Q Can you describe what the customer said about each of the stamps, if anything?

A He wanted one stamp that said "Top Secret," and he wanted another stamp in a seal formation that would say "U. S. Department of Defense."

Q And did the customer give you a name?

A He did.

Q What name was that, sir?

A Drew Jacobs.

Q Did he pay you any money?

A He did. He paid cash for the stamps.

Q Let me show you, sir, what has been marked for identification purposes as Government's Exhibit 65A, which consists of three pieces of paper stapled together, and I'll ask if you can identify that for the record, sir?

A I can identify the statement as mine, my company, yes.

Q And does it reflect what type of transaction was involved and the date?

A Yes, it does.

Q Can you tell the Jury what that is, sir?

A The invoice date was 9/19/78. Invoice number was 41207, and it has an impression of the Department of Defense stamp and a Top Secret stamp.

Q Was there a certain time that the customer was to pick up the items that he ordered?

A At that time I don't think there was a definite time. I told him there would be a waiting period and I would mail them to him, and he said no, he would come back and pick them up.

Q Did the customer ever come back and pick up those items?

A No; sir.

Q I would like to hand you what has been marked for identification purposes only as Government Exhibit 109, and I will ask you if you can identify that item, sir?

A That is the stamp that we manufactured.

Q What does the stamp say?

A "Top Secret."

Q Would that imprint the words "Top Secret" if you used ink?

A Yes, sir.

Q Let me also show you what has been marked for identification purposes only as Government Exhibit 110, and I will ask you if you will describe what that is for the record, sir?

A It is a date stamp enclosed in a circle that says "Department of Defense," with a date and "U.S." below it.

Q Was that stamp likewise ordered by the man known as Drew Jacobs in the uniform?

A Yes, sir.

Q Did the customer say anything to you when you told him there would be a while before it was ready?

A No, sir. He wanted them the next day, I believe, and I told him that they would be special setups and there would be a waiting period.

Q Was there any other conversation with the customer?

A Not that I can recall.

Q Is the individual that you have referred to as the customer who gave the name Drew Jacobs in the Court today?

A Yes, sir.

Q Could you point him out for the Jury?

A The man in the light suit with the dark brown tie.

Q Of the three men, looking from your left to right, which man is he?

A The one on the farthest right.

MR. PYLITT: Thank you, sir. No further questions.

THE COURT: Mr. Kammen or Mr. Pritzker.

MR. PYLITT: I'm sorry, Your Honor we are offering Government Exhibit 65A at this time.

MR. PRITZKER: We have no questions.

THE COURT: Any objection to Government's Exhibit 65A?

MR. PRITZKER: No, Your Honor.

MR. PYLITT: Could we have one moment? I may have one omitted question.

THE COURT: Show 65A admitted.

(Government's Exhibit 65A for identification received in evidence.)

MR. PYLITT: No further questions, Your Honor, of this witness.

THE COURT: You are excused.

(WITNESS EXCUSED)

MR. PYLITT: The government calls John Dottenwhy.

J O H N D O T T E N W H Y, called as a witness on behalf of the government, having been first duly sworn to tell the truth, testified as follows:

DIRECT EXAMINATION,

QUESTIONS BY MR. PYLITT:

Q Tell the Jury your name, sir.

A John Dottenwhy.

Q What is your occupation or employment, Mr. Dottenwhy?

A I'm a printer.

Q What type of printing do you do, sir?

A Instant printing. I do commercial printing as well as instant.

Q And in September of 1978 what was your occupation or employment?

A I was a local printer in the Speedway -- as an instant printer owning my own business.

Q What was the name of that business, sir?

A Northwest Instant Press.

Q On September 18th, 1978, did you have a conversation with an individual wearing a uniform?

A Yes, I did.

Q Can you describe approximately what time of the day that was, sir?

A It was early afternoon.

Q And what does early afternoon mean to you, sir?

A After 12:00 o'clock, shortly after lunch.

Q Do you recall what time closing was on that date?

A Five-thirty.

Q Do you recall what the customer was wearing on that date?

A He was wearing a dark blue, what I considered trooper's uniform. It had a Department of Defense insignia on both shoulders. To my recollection, he was wearing a gun, hat, dark blue trooper's hat, with a -- not an attache case, but a folder that he carried in, and he was wearing sunglasses.

Q And what, if anything, did that customer say to you, sir?

A Well, he identified himself as Jacoby, and that he was a special agent and he needed some printing done, which he couldn't get done fast enough for an assignment that he was on.

Q What type of printing was he interested in, sir?

A Well, there were three pieces. The first piece was an ID tag, which he referred to it as an ID tag at the time. The second piece was a letterhead with the United States Seal imprinted on the sheet.

Q What type of seal, sir?

A To my recollection, it was the Presidential Seal.

Q All right. Then what?

A Then the third piece was a series of license plates, not the kind that you see on a car, but the type that would be sold by a dime store where it has a person's name silk screened on it. It had a series of numbers and then in small printing down across the bottom it said "Department of Defense."

Q And did the customer offer to pay you any money at that time?

A No, he didn't.

Q Was it your policy to require any pre-payment at that time?

A No, it wasn't. But at that time my policy was, since it had to be typeset and proofs had to be taken before I would print anything and O.K'd by the customer, we take the information, get it typeset and then after have the customer come back the following day or days, whatever the case may be, depending on how long it was, and have him O.K. it and then place the order for the printing of whatever it was.

Q Was there any conversation between you and the man in uniform?

A Conversation as to what?

Q Other than what you have testified about, the items requested to be printed.

A No, not at all.

Q How long did the transaction take place?

A About a half hour.

Q What did you do, if anything, after the customer left the store?

A Well, running my own business, it was – I'm always in a rush to get things done like that. I cubby-holed or put the material away at that time and I later on pulled it out when my typesetter came to pick the material up and I gave it to them that evening. The following morning he called me and he said, "Have you taken a look at what you have gotten?" And I said, "Well, not really."

Q You said he called you. Who is he?

A John Welsh.

Q Is he a gentleman that was working with you?

A Well, yes. He did my typesetting at the time. He has a typesetting business out of his home.

Q What did you do then?

A I asked him what particularly -- why couldn't he set it, and he said, “It’s a military driver’s license,” and I really hadn’t looked at it, so then I got my copy out and started looking at it and we decided that we couldn’t print it. And at that point we called the FBI and the CIA.

Q The CID?

A CID.

Q What happened next?

A Well, we had two CID man come out and talk to us and we showed them the information and they said that they would be back the following day, which was the 20th, to not apprehend the person but just observe. After that, the following day when they were out in front of my shop we had two FBI men pull up and they were to apprehend the person and hold him.

Q Did the customer wearing the uniform that you had seen two days earlier then return to your store on September the 20th, 1978?

A Yes, he was supposed to be back. My hours were until 5:30. He didn’t show at 5:30 and the FBI man was in my shop talking to me over the counter when the person walked in the door.

Q And the FBI man, was that Chester Lucas?

A Yes, it was, a tall Negro.

Q And then what happened?

A Well, he had informed me that if the person did come in, not to say anything, but just give the material back to him. So he sort of stood back behind the counter, or behind Mr. Lucas, and didn't come up to the counter, and I told him that -- he was looking at something else - - that he could come up and we would talk it over, I told him I could not do the printing because it was possibly forgery and that I was sorry and I gave him the material back. He took it, and at that time Mr. Lucas informed him that he was an FBI man.

Q And was the man that came in on September 20th the same man that came in two days earlier on September 18th?

A Yes, it was.

Q And was he wearing the same uniform that you have described?

A Yes, except he was without gun and the satchel. He did not have the sunglasses on and I do not remember a hat.

Q And is the man that you have referred to as the man in the uniform, the customer, is he present in the Courtroom today?

A Yes, I think he is sitting over in the brown suit, tan suit.

Q Of the three men that are seated over there, from your left to right, which man are you referring to?

A The man on the far right.

Q After he was placed under arrest did you see him do anything with any of the items that he had given to you to print?

A Yes, sir. At the time that the man, Mr. Lucas, informed him that he was an FBI man and to stand still, Mr. Jacoby, that I knew at that time, started to move, and there was a tussle in front of the counter and I sort of stepped back away from the counter and Mr. Jacoby very non-chalantly balled up two pieces of material and stuck them in his mouth and proceeded to eat them.

Q Let me show you what has been marked for identification purposes as Government's Exhibit 64, 67A and B, and I'll ask you if you will describe what each of those are and if you have seen those before, sir, starting with 64 on your left

A Yes. This was the card or the sheet that Mr. Jacoby had given us to typeset from. I did not read it real close at the time. If he would have given me a military driver's license and said to reproduce it, I would have probably said no at the time.

Q Did you make that sketch or was that --

A That sketch was made by the person. He handed it to me across the counter.

Q The customer?

A Yes, sir.

Q Did you wad up Government's Exhibit 64?

A No, I did not.

Q Now, look at Government's Exhibit 67A.

A That also was what the customer had given to me. Of course, the serial numbers were to be placed on the license plates, each one.

Q Now, looking at 67B, the top of that appears to be the Seal of the President of the United States. Have you seen that item before?

A Yes, I have. That was the seal that he gave me, which I was to blow up and put on a sheet of letterhead stock and screen very lightly so that it could be visible but typed across.

Q And was that the item you referred to that the customer ate upon being arrested by the FBI agent?

A Yes.

MR. PYLITT: At this time, Your Honor, the government would offer Government's Exhibits 64 and 67A and B.

THE COURT: Show Exhibits 64 and 67A and B admitted.

(Government's Exhibits 64, 67A and 67B for identification received in evidence.)

Q Mr. Dottenwhy, on September 27th at that shop did anyone locate a set of keys?

A Yes, a customer that was making photocopies next to a trash can happened to notice a set of keys laying on the floor beside the wall, and he handed them to me and asked me if they were mine, and I said no.

Q What did you do with the keys, sir?

A Well, I occasionally -- we have customers walk in which have young children and any children, mine included, the keys I don't use I'll give them as a plaything. I thought they might have been someone's keys that had dropped off a photocopy and would come back or they were some children's keys, so I tossed them under the

counter and figured someone would claim them or they would just sit there.

Q The next day did you have contact with Special Agent Ben Niehaus of the Bureau of Alcohol, Tobacco and Firearms?

A Yes, I did.

Q Did you turn over two keys?

A Yes, I did.

Q I would like to show you what has been marked for identification purposes as Government's Exhibit 68. Do those look like the keys you turned over to Agent Niehaus?

A Yes.

MR. PYLITT: At this time, Your Honor, the government would offer Government's Exhibits 68 into evidence.

MR. PRITZKER: No objection, Your Honor.

THE COURT: Show Government Exhibit 68 admitted.

(Government's Exhibit 68 for identification received in evidence.)

MR. PYLITT: No further questions, Your Honor.

MR. PRITZKER: If I may, Your Honor, I Just have a couple of questions of Mr. Dottenwhy.

THE COURT: Proceed.

CROSS-EXAMINATION,

QUESTIONS BY MR. PRITZKER:

Q Apparently Mr. Kimberlin was arrested in the corner where the keys were found, is that correct?

A He was arrested in front of the counter. The keys were by a trash can next to a chair where the FBI man had set him down after they had - -

Q Arrested him?

A Arrested him.

Q And did he use the name Drew Jacobs?

A Yes.

Q And that was the name which he placed the order?

A Yes, sir.

Q Now, in your Grand Jury testimony and in the police report you didn't note any difference the uniform. As a matter of fact, you said he looked the same when he came back both times. Do you recall that?

A Yes, sir.

MR. PRITZKER: I have no other

(Trial resumed, 1:40 P.M.)

(Jury present.)

MR. PYLITT: The government calls Donnaleen Smith.

D O N N A L E E N S M I T H, called as a witness on behalf of the government, having been first duly sworn to tell the truth, testified as follows:

DIRECT EXAMINATION,

QUESTIONS BY MR. PHYLITT:

Q Could you tell the Jury your name, please?

A Donnaleen Smith.

Q Could you speak up a little louder so the people on the end can hear you?

A Donnaleen Smith.

Q How do you spell your first name?

A D-o-n-n-a-l-e-e-n.

Q The last name is common, Smith

A Yes.

Q Do you live here in Indianapolis?

A Yes.

Q Are you currently employed?

A Yes.

Q Where are you employed?

A Indianapolis Badge and Nameplate Company.

Q How long have you been employed there?

A Two years.

Q Were you employed there on September 18th, 1978?

A Yes.

Q What was your occupation or what generally did you do there in September of 1978?

A Salesperson and secretary.

Q On September 18th, 1978, did you have an occasion to sell a gentlemen in a uniform certain items?

A Yes.

Q Let me show you Government's Exhibit 66, if I can, for identification purposes, and have you seen a copy of that before?

A Yes.

Q Can you recognize any name or initials that belong to you on there?

A My initials are at the bottom.

Q What initials are those?

A DKS.

Q What is the date of the transaction?

A 9/18/78.

Q Was there a customer's name involved in that transaction?

A No.

Q What was that transaction for?

A The sale of six hat badges and six shirt badges.

Q In the two years that you have worked there is it normal that someone would walk in and order six hat badges and six shirt badges?

A No, we don't usually sell them in that large a quantity, just one or two at a time.

MR. PYLITT: At this time, Your Honor, the government would offer Government's Exhibit 66.

MR. PRITZKER: No objections, Your Honor.

THE COURT: Show Government's Exhibit 66 admitted.

(Government's Exhibit 66 for identification received in evidence.)

Q Let me show you now Government's Exhibit 76. Will you compare Government's Exhibit 76 with Government's Exhibit 66.

A O.K.

Q Can you tell the Jury if there is any resemblance between the two of those?

A They are identical.

Q Is Government's Exhibit 76 the original and Government's Exhibit 66 a Xerox copy?

A Yes.

Q What type of uniform was the customer wearing on that day?

A It was a uniform similar to that worn by the State Police; light blue shirt, dark blue pants.

Q Was there a hat?

A Yes.

Q Did you notice any insignia or any markings on the uniform?

A There was a patch on the uniform, but I don't recall what it said.

Q How long did the transaction take place?

A Approximately ten to fifteen minutes.

Q Did the customer refer to anything when he was making this order from you?

A He made reference to name bars, name tags to be worn by officers. He wanted them the same day, but we don't have the service of offering them the same day. He asked for marksman insignias, which would denote range and what weapon, pistol, revolver, and photo identification cards.

Q Will you please look around the Courtroom and see if you can identify anyone that was wearing the uniform that you refer to as the customer, today?

A Yes, I recognize that person.

Q Could you point him out for the Jury?

A Right there.

Q Of the three gentlemen there, looking left to right as you are looking at them, which person are you talking about?

A Light suit on the right.

MR. PHYLITT: Thank you. No further questions.

CROSS-EXAMINATION,

QUESTIONS BY MR. PRITZKER:

Q Did this customer use any names when he talked to you?

A No, sir.

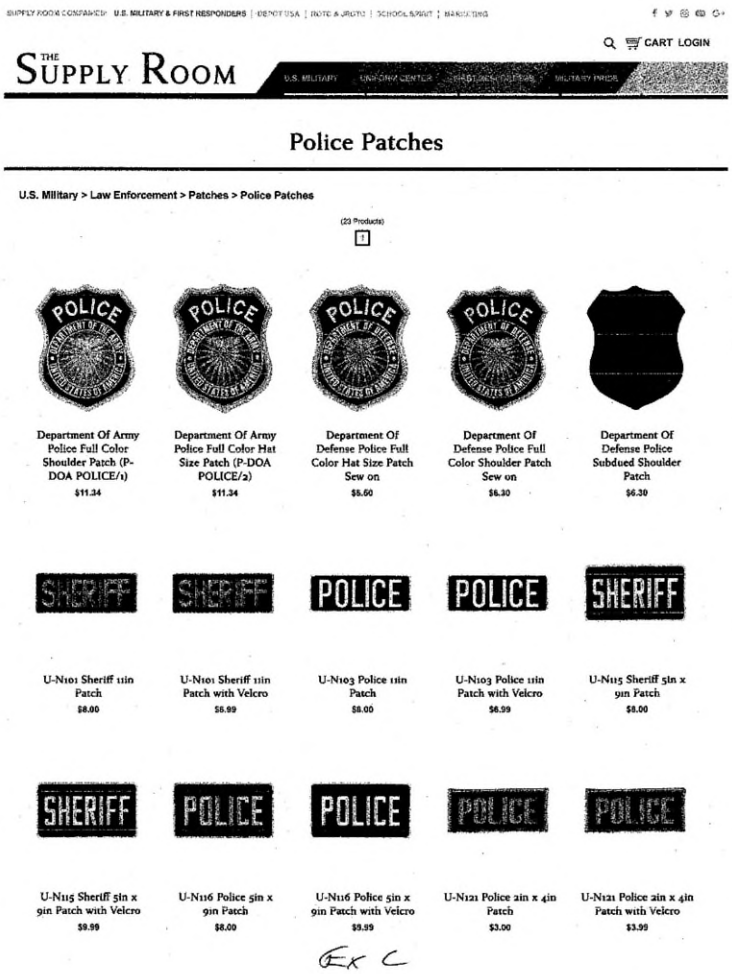
Q You didn't ask what his name was and he never told you the name Drew Jacobs?

A No. When we have a cash transaction it isn't usually customary to use a name.

MR. PRITKZER: Thank you, I have no other questions.

MR. PHYLITT: No further questions, Your Honor.

EXHIBIT C



Ex C

EXHIBIT D


Google
top secret rubber stamp
All
Shopping
Images
Videos
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More
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Tools
About 14,000,000 results (0.51 seconds)
Top Secret Rubber Stamp | Shop Low Prices & Top Brands | amazon.com
Ad www.amazon.com/popularitems
Rating for amazon.com: 4.7 - Order accuracy: 95-100%
Read Customer Reviews & Find Best Sellers. Free 2-Day Shipping w/Amazon Prime. Read Ratings & Reviews. Fast Shipping. Shop Our Huge Selection. Explore Amazon Devices. Try Prime for Free.
Custom Rubber Stamps | Order From Us Today | RubberStamps.net
Ad www.rubberstamps.net/
Personalize Text, Graphics & More. Free Shipping On Orders Over $30! Customization Leader.
1 x 1 Wood Rubber Stamp - from $7.95 - Art or 6 lines of text. More
Rubber Stamp Champ | Customizable Rubber Stamps
Ad www.rubberstampchamp.com/
Rating for rubberstampchamp.com: 4.8 - 2,749 reviews
Customize Any Type Of Stamp With A Text Or Logo For Free! Free Shipping $10+ Durable Rubber Stamps. Save With Bulk Orders. Free Customization. Top Brands Available. All Major Brands For Less. Upload Logo/Art/Text Free. Tons Of Ink Colors. Incredibly Low Prices. Perfect For Businesses.
Amazon.com : TOP SECRET Office Stock Self-Inking Rubber Stamp ...
https://www.amazon.com/TOP-SECRET-Office-Self-Inking-Rubber/.../B001W5AE8U
Rating: 3.9 - 34 reviews
TOP SECRET Office Stock Self-Inking Rubber Stamp. +. CONFIDENTIAL Self Inking Rubber Stamp - Red Ink. +. Top Secret Notebooks and Pencils 12 Pack.
Amazon.com : Top Secret Rubber Stamp : Office Products
https://www.amazon.com/NIC-Q39-Secret-Rubber-Stamp/dp/B06W73PPQK
Some information is just too important to be sent without the proper security classification. Our exclusive NIC rubber stamp collection contains some unique and ...
Amazon.com : TOP SECRET Self Inking Rubber Stamp - Red Ink ...
https://www.amazon.com/SECRET-Self-Inking-Rubber-Stamp/dp/B018J17YOQ
Rating: 4.4 - 29 reviews
TOP SECRET Self Inking Rubber Stamp - Red Ink (ExcelMark A1539) (Stamp Only. +. SyPen Invisible Disappearing Ink Pen Marker Secret spy Message Writer ...
Amazon.com : TOP SECRET Self Inking Rubber Stamp - Red Ink ...
https://www.amazon.com/SECRET-Self-Inking-Rubber-Stamp/dp/B003OF3LTA
Rating: 4.1 - 31 reviews
Ensure efficient communication and provide clear instructions with the use of this TOP SECRET self-inking rubber stamp. This stamp is ideal for rapid, repetitive ...
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TOP SECRET Rubber Stamp ...
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Special offer
Top Secret Rubber Stamp
$6.95
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TOP SECRET Self Inking...
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Amazon.com
Self-Inking Stamp; 1x2-1/2...
$21.49
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Special offer
TOP SECRET Self-Inking Sto...
$9.88
RubberStampC...
Your Custom Text
Customized Self-Inking Stamps -...
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Vistaprint
Xstamper Inspection Sta...
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Discount Rubbe...
Top Secret Self Inking Rubber...
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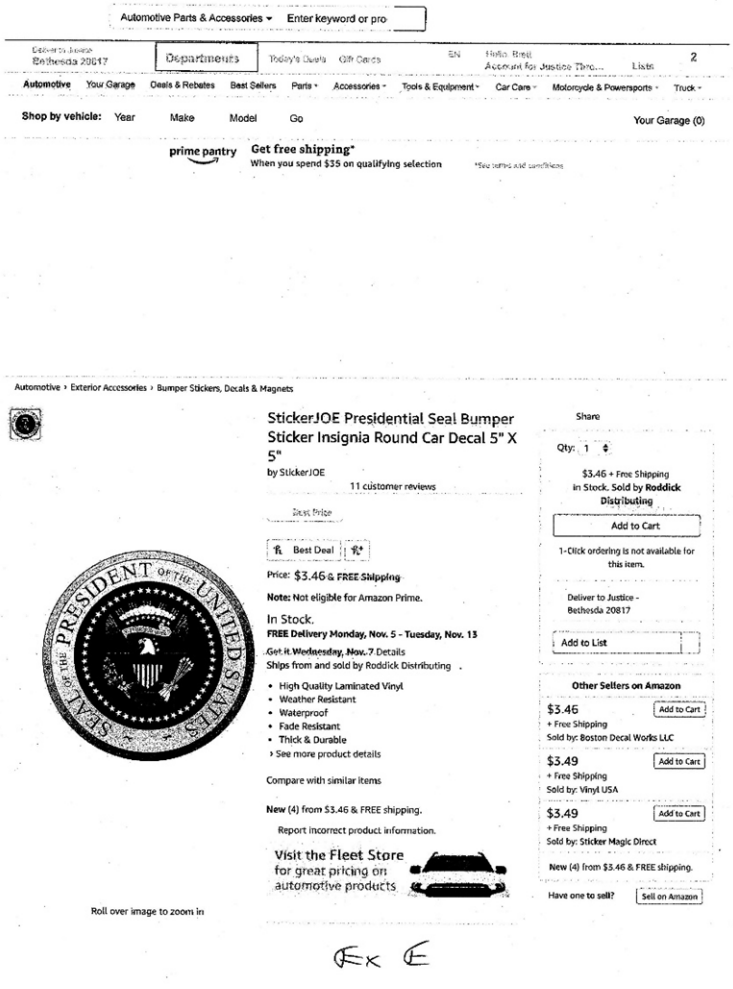
EXHIBIT E



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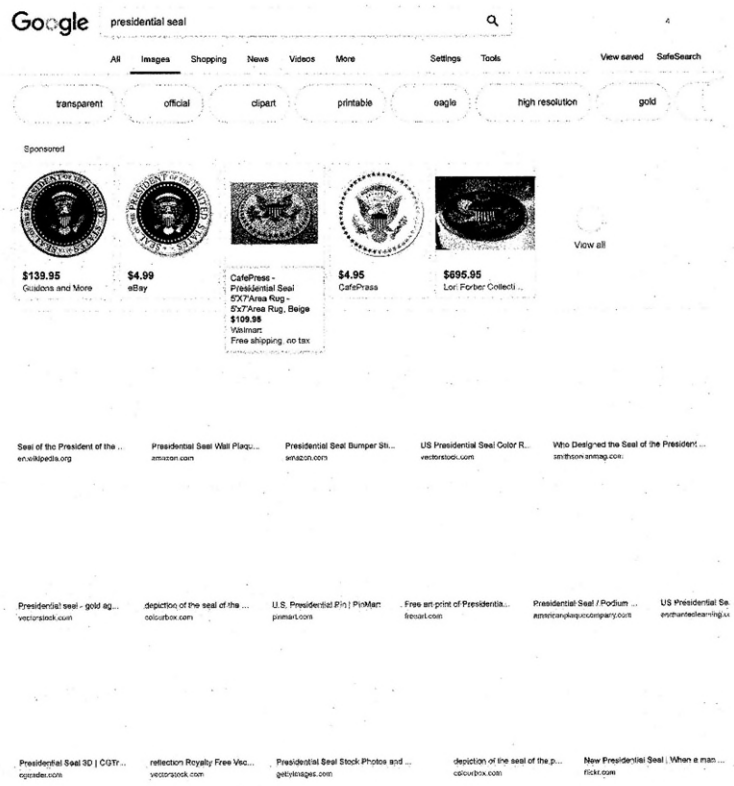
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high resolution
gold
Sponsored
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Gaiam and More
$4.99
eBay
CafePress - Presidential Seal 5'X7'Area Rug - 5'x7'Area Rug, Beige
$109.95
Walmart
Free shipping, no tax
$4.95
CafePress
$695.95
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Seal of the President of the ...
en.wikipedia.org
Presidential Seal Wall Plaqu...
amazon.com
Presidential Seal Bumper Sti...
amazon.com
US Presidential Seal Color R...
vectorstock.com
Who Designed the Seal of the President ...
smithsonianmag.com
Presidential seal - gold ag...
vectorstock.com
depiction of the seal of the ...
colourbox.com
U.S. Presidential Pin | PinMart
pinmart.com
Free art print of Presidentia...
fineart.com
Presidential Seal / Podium ...
americanjusticecompany.com
US Presidential Se...
enchantedlearning.com
Presidential Seal 3D | CGTr...
cgtrader.com
reflection Royalty Free Vec...
vectorstock.com
Presidential Seal Stock Photos and ...
gettyimages.com
depiction of the seal of the p...
colourbox.com
New Presidential Seal | When a man ...
flickr.com

EXHIBIT F

STATEMENT OF NILE STANTON

I, Nile Stanton, pursuant to the provisions of 28 U.S.C. 1746, hereby affirm under penalty of perjury that the following statements are true and correct to the best of my personal knowledge and belief:

1. I was licensed to practiced law in the State of Indiana in both its state and federal district and appellate courts and from 1980 through 1983 represented Brett Kimberlin in various trials, post conviction motions, and appeals arising out of the criminal case under indictment IP-79-7-CR. One of those appeals concerned his convictions on Counts 26, 30, 31, 32,33 and 34 of the indictment.

2. In that appeal, I failed to raise a First Amendment challenge to the validity of these charges. Had I done so, it seems very likely to me that the Seventh Circuit would have reversed the convictions on the basis later outlined by the Supreme Court in *United States v. Alvarez*, 567 U.S. 709 (2012). Specifically, the possession and wearing of a military sleeve patch, and the display of a facsimile of the Presidential Seal, are clearly expressive speech as outlined in *Alvarez*.

3. I have read both *Alvarez* and the Ninth Circuit's *en Banc* decision in *United States v. Swisher*, 811 F.3d 299 (9th Cir. 2016), and believe them to be dispositive of the issues raised in Brett Kimberlin's instant petition regarding the unconstitutionality of 18 USC 701, 713(a), and 912, as applied to him.

4. Government symbols, especially those denoting official sponsorship, have historically been used by American citizens to express themselves whether during protests of Government policies, in cartoons, or mass demonstrations. Indeed, the Supreme Court in *Texas v.*

Johnson, 491 U.S. 397 (1989), even held that the burning the American flag is a constitutional form of expressive conduct.

5. Brett Kimberlin's wearing of a military insignia and displaying a facsimile of the Presidential Seal was protected speech and should have been contested as such at both his trial and on appeal, and this omission was not due to any trial or appellate strategy or tactic but, rather, a major blunder by Brett's attorneys.

6. It is my opinion that Brett Kimberlin has suffered extreme prejudice from the unconstitutional convictions and will continue to suffer various spillover effects in the future. First, the unconstitutional charges were placed in front of the first jury that heard the Speedway Bombing case, which hung 9 to 3 for acquittal, and it may have acquitted him outright absent those. Second, he was given a severe 12-year sentence on those charges. Third, when the retrial occurred on the hung charges, he was impeached with the prior convictions on the unconstitutional charges. Fourth, when he was sentenced after that retrial, the trial judge considered those unconstitutional charges in imposing an extreme 50-year sentence. Fifth, the Government used those charges to paint him in an unfavorable light when he appealed his convictions. Sixth, the United States Parole Commission almost certainly considered those unconstitutional convictions to initially deny him parole. Seventh, numerous media outlets both during trial and on the Internet today use those convictions to harm his reputation. Eighth, these convictions, because they allege deceit, could be used to deny him government grants, bank loans, and employment licenses and opportunities.

7. I believe that I did not provide Brett Kimberlin with effective assistance of counsel due to my failure to contest

the charges at issue here during his retrial/sentence of the Speedway Bombing case. Specifically, I should have challenged the use of those convictions during his testimony, and I should have challenged them during the sentencing phase of that trial.

8. I also believe that I did not provide Brett Kimberlin with effective assistance of counsel on his appeal of those convictions, because I did not raise the issue of expressive speech under the First Amendment as later found in *Alvarez*. At the time of the appeal, it was black letter law that the First Amendment protected expressive speech including the display and possession of government symbols. See for example, *Stromberg v. California*, 283 U.S. 3S9 (1931), which invalidated a conviction for displaying a "red flag, banner or badge or any flag, badge, banner, or device" as a form of opposition.

9. In my view, my failure to challenge the convictions fell below an attorney's expected objective standard of reasonable competence.

Signed this 1st day of November, 2018,
in Algeciras, Spain, using my digital signature.

Nile Stanton
prof4u@gmail.com

EXHIBIT G

Washington, D.C.

April 20, 2015

FBI Testimony on Microscopic Hair Analysis Contained Errors in at Least 90 Percent of Cases in Ongoing Review

Contacts:

- Paul Cates, Innocence Project, pcates@innocenceproject.org
- Ivan Dominguez, NACDL, idominguez@nacdl.org
- Emily Pierce, Department of Justice, (202) 514-2007
- Michael P. Kortan, Federal Bureau of Investigation, (202) 324-5352

The United States Department of Justice (DOJ), the Federal Bureau of Investigation (FBI), the Innocence Project, and the National Association of Criminal Defense Lawyers (NACDL) reported today that the FBI has concluded that the examiners' testimony in at least 90 percent of trial transcripts the Bureau analyzed as part of its Microscopic Hair Comparison Analysis Review contained erroneous statements. Twenty-six of 28 FBI agent/analysts provided either testimony with erroneous statements or submitted laboratory reports with erroneous statements. The review focuses on cases worked prior to 2000, when mitochondria DNA testing on hair became routine at the FBI. The DOJ, FBI, Innocence Project, and NACDL have been working jointly on this review and share the same goal of ensuring the integrity of the American justice system in all respects. All of the parties are committed to addressing this situation properly and will continue to work together in a collaborative and professional manner.

"The Department has been working together with the Innocence Project and NACDL to address errors made in statements by FBI examiners regarding microscopic hair analysis in the context of testimony and laboratory reports. Such statements are no longer being made by the FBI, and the FBI is also now employing mitochondria DNA hair analysis in addition to microscopic analysis," said Amy Hess, Executive Assistant Director, Science and Technology Branch, FBI. "However, the Department and the FBI are committed to ensuring that affected defendants are notified of past errors and that justice is done in every instance. The Department and the FBI also are committed to ensuring the accuracy of future hair analysis testimony, as well as the application of all disciplines of forensic science. The Department and FBI have devoted considerable resources to this effort and will continue to do so until all of the identified hair cases are addressed."

"These findings confirm that FBI microscopic hair analysts committed widespread, systematic error, grossly exaggerating the significance of their data under oath with the consequence of unfairly bolstering the prosecutions' case," said Peter Neufeld, Co-Director of the Innocence Project, which is affiliated with Cardozo School of Law. "While the FBI and DOJ are to be commended for bringing these errors to light and notifying many of the people adversely affected, this epic miscarriage of justice calls for a rigorous review to determine how this started almost four decades ago and why it took so long to come to light. We also need lawmakers in Washington to step up and demand research and national standards to prevent the exaggeration of results in reports and in testimony by crime lab analysts."

Norman L. Reimer, Executor Director of NACDL added, "It will be many months before we can know how many people were wrongly convicted based on this flawed

evidence, but it seems certain that there will be many whose liberty was deprived and lives destroyed by prosecutorial reliance on this flawed, albeit highly persuasive evidence. Just as we need lawmakers to prevent future systemic failures, we need courts to give those who were impacted by this evidence a second look at their convictions."

The FBI and DOJ agreed to conduct a review of criminal cases involving microscopic hair analysis after the exoneration of three men convicted at least in part because of testimony by three different FBI hair examiners whose testimony was scientifically flawed. The Innocence Project and NACDL, with its partners David Koropp, Partner at Winston & Strawn LLP, and his colleagues, and Michael R. Bromwich, Managing Principal of The Bromwich Group, who served as the Inspector General of DOJ from 1994-1999, worked with the FBI and DOJ in determining the scope and protocols for the review. The review encompasses cases where FBI microscopic hair comparison was used to link a defendant to a crime and covers cases in both federal and state court systems. It does not, however, cover cases where hair comparison was conducted by state and local crime labs, whose examiners may have been trained by the FBI. The FBI has trained hundreds of state hair examiners in annual two-week training courses.

The government identified nearly 3,000 cases in which FBI examiners may have submitted reports or testified in trials using microscopic hair analysis. As of March 2015, the FBI had reviewed approximately 500 cases. The majority of these cases were trials and the transcript of examiner testimony was reviewed. Some of these cases ended in guilty pleas, limiting the review to the original lab report. In the 268 cases where examiners provided testimony used to inculpate a defendant at trial, erroneous

statements were made in 257 (96 percent) of the cases. Defendants in at least 35 of these cases received the death penalty and errors were identified in 33 (94 percent) of those cases. Nine of these defendants have already been executed and five died of other causes while on death row. The states with capital cases included Arizona, California, Florida, Indiana, Missouri, Ohio, Oklahoma, Pennsylvania, Tennessee, and Texas. It should be noted that this is an ongoing process and that the numbers referenced above will change.

All but two of 28 FBI examiners provided testimony that contained erroneous statements or authored lab reports with such statements. The review has shown that the FBI examiners testified in cases in 41 states.

In light of these findings, the Department of Justice and FBI have committed to working with the Innocence Project and NACDL to take the following steps:

- Conduct an independent investigation of the FBI Laboratory protocols, practices, and procedures to determine how this occurred and why it was allowed to continue for so long.
- Continue aggressive measures and review the process to determine whether additional steps could be taken to secure the transcripts and/or lab reports and review the hundreds of remaining cases that may contain invalid scientific statements.
- Strongly encourage the states again to conduct their own independent reviews where its examiners were trained by the FBI.

The Innocence Project, NACDL, and Winston & Strawn LLP are assisting the Department of Justice as it works to locate and notify defense counsel of the results of this review—especially critical in the cases of each person where error was identified in accordance with the

protocols established for the review. NACDL is working to ensure that all individuals who were defendants in affected cases will have access to a volunteer lawyer to review this new evidence, advise them on how it may impact their conviction, and challenge convictions based on the invalid evidence in appropriate cases. The legal groups are not releasing the names of the defendants affected at this time, leaving it to the defendants and their lawyers to determine what to do with the information and whether to disclose the error to the press.

The FBI has agreed to provide free DNA testing where there is either a court order or a request for testing by the prosecution. Additionally, in federal cases, DOJ will not raise procedural objections, such as statute of limitations and procedural default claims, in response to defendants' petitions seeking a new, fair trial because of the faulty evidence. But the majority of the FBI examiner testimony was provided in state court prosecutions, and it will be up to the individual states to determine if they will follow DOJ's leading in permitting these cases to be litigated.

Before mitochondrial DNA testing was used to analyze hair in criminal cases, prosecutors throughout the country routinely relied on microscopic hair comparison to link a criminal defendant to a crime. The practice was deemed "highly unreliable" in the 2009 National Academy of Sciences report on forensic science, *Strengthening Forensic Science in the United States: A Path Forward*. Nevertheless, some jurisdictions continue to use hair analysis where mitochondria DNA testing is deemed too expensive, time consuming or is otherwise unavailable. According to Innocence Project data, 74 of the 329 wrongful convictions overturned by DNA evidence involved faulty hair evidence.

Over the course of 25 years, the FBI conducted multiple two-week training courses that reached several hundred

state and local hair examiners throughout the country and that incorporated some of the same scientifically flawed language that the FBI's examiners had used in some lab reports and often in trial testimony. In response to the FBI/DOJ review, the Texas Forensic Science Commission has already begun a review of cases handled by analysts at state and local crime labs. Similar audits are needed in most other states.

- More on FBI/DOJ Microscopic Hair Comparison Analysis Review (https://vvwvv.fbi.govIservices/laboratory/scientific-analysisfibidoj-mkros-opk-hair-comparison-analysis-review)

EXHIBIT H

Lee Stranahan
@stranahan

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Reminder: in 2012 as the Arab Spring was gearing up, the Obama / Clinton State Department introduced visitors from " Saudi Arabia, Syria, Iraq, Egypt" and other counries to convicted Bomber Brett Kimberlin

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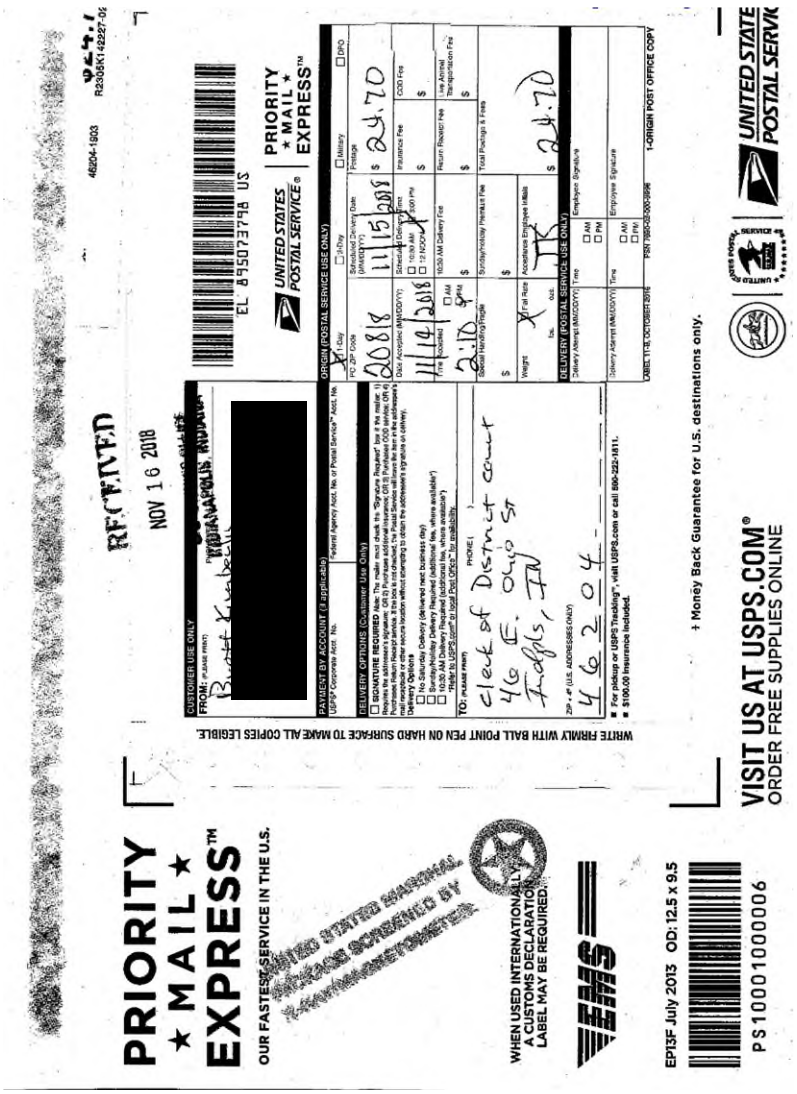
Ex H

EXHIBIT I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APPENDIX H

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

BRETT KIMBERLIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITIONER'S RESPONSE TO ORDER TO SHOW CAUSE

Petitioner Brett Kimberlin hereby responds to this Court's April 17, 2018 ORDER TO SHOW CAUSE why his petition should not be dismissed on jurisdictional grounds. This Court cited 28 USC 2255 as a bar to relief for persons not in custody. Petitioner hereby makes clear that this petition is brought under the All Writs Act, 28 USC 1651, and specifically as a *writ of error coram nobis*. Petitioner withdraws any reliance on Section 2255 for relief in this matter.

Coram Nobis Is The Proper Vehicle For Relief For A Person Not In Custody

In *United States v. Morgan*, 346 U.S. 502, 507, 510-11, 74 S.Ct. 247, 98 L.Ed. 248 (1954), the Supreme Court held that where a person is not in custody, he or she can challenge an illegal or unconstitutional conviction under the All Writs Act via a *writ of error coram nobis*. Accord *United States v. Chaldez*, 133 S. Ct. 1103, 1106 n. 1 (2013) ("A petition for a writ of *coram nobis* provides a way to

collaterally attack a criminal conviction for a person ... who is no longer 'in custody' and therefore cannot seek habeas relief under 28 U.S.C. § 2255 or § 2241.") The *Morgan* Court specifically stated that Section 2255 does not deprive the trial court of jurisdiction to consider a petition under *coram nobis*. ("We do not think that the enactment of § 2255 is a bar to this motion, and we hold that the District Court has power to grant such a motion. I*d*). In *United States v. Wilkozek*, 822 F.3d 364, the Seventh Circuit, as recently as 2016, followed *Morgan* holding that a person not in custody could challenge his unconstitutional conviction with a *writ of error coram nobis*.

The error Petitioner complains about is fundamental because under *United States v. Alvarez*, 132 S. Ct. 2537 (2012), his convictions related to possessing and wearing a uniform bearing a Department of Defense sleeve patch and possession of a copy of the Presidential Seal are unconstitutional on their face.[1] Moreover, Petitioner could not have raised this issue on appeal or under Section 2255 while he was in custody because *Alvarez* was not decided until decades after Petitioner's release from custody. Finally, Petitioner continues to suffer consequences from these convictions. For example, because these convictions bear on the issue of fraud, Petitioner is unable to apply for or successfully receive government grants. Moreover, these convictions are featured prominently on various social media pages including Wikipedia ("impersonating a federal officer, illegal use of the Presidential Seal") https://en.wikipedia.org/wiki/Brett_Kimberlin Finally, alt-right opponents of Petitioner's work as the director of a progressive non-profit have seized on these convictions

[1] Petitioner hereby adds a challenge to his conviction for possession of a copy of the Presidential Seal to this petition on the ground that it is also unconstitutional under *Alvarez*.

as part of their narrative to smear Petitioner and undermine his ability to fundraise for the non-profit.

Wherefore, this Court has jurisdiction to hear this case under the All Writs Act as *a writ of error coram nobis* and grant the requested relief.

Respectfully submitted,

s/ Brett Kimberlin
Brett Kimberlin
[redacted]

CERTIFICATE OF SERVICE

I certify that I mailed a copy of this motion to the United States Attorney for this Southern District of Indiana this 23th day of April 2018.

s/ Brett Kimberlin
Brett Kimberlin

APPENDIX I

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

BRETT KIMBERLIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

Order to Show Cause

Rule 4(b) of *Rules Governing Section 2255 Proceedings for the United States District Courts* states:

> If it plainly appears from the motion, any attached exhibits, and the record of prior proceedings that the moving party is not entitled to relief, the judge must dismiss the motion and direct the clerk to notify the moving party.

To be granted habeas relief, a petitioner must show that he is in custody in violation of the Constitution. 28 U.S.C. § 2255. Here, the petitioner challenges the constitutionality of his 1980 conviction for possessing and wearing a uniform bearing a Department of Defense sleeve patch. He states that he was sentenced to a 12-year prison term. The petitioner does not appear to be currently incarcerated and his prison term likely ended years ago.

The petitioner shall have through **May 23, 2018**, in which to show cause why he is 'in custody' for purposes of

28 U.S.C. § 2255 and why his motion should not be dismissed for lack of jurisdiction.

IT IS SO ORDERED.

Date: 4/17/2018

s/ Tanya Walton Pratt
TANYA WALTON PRATT, JUDGE
United States District Court
Southern District of Indiana

Distribution:

BRETT KIMBERLIN
[redacted]

APPENDIX J

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

BRETT KIMBERLIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

No. 79-7-CR

FILED
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U.S. CLERK'S OFFICE
INDIANAPOLIS, INDIANA

MOTION TO VACATE CONVICTIONS AS UNCONSTITUTIONAL

Now comes Petitioner Brett Kimberlin, pursuant to 28 USC 1651 and/or 28 USC 2255 and moves this Court to vacate his convictions on five counts of the indictment in this case after a jury trial on October 8, 1980. The Supreme Court's decision in *United States v. Alvarez*, 132 S. Ct. 2537 (2012), finding the Stolen Valor Act, 18 USC 704, unconstitutional, and a subsequent en banc case following *Alvarez*, *United States v. Swisher*, 811 F.3d 299 (9th Cir. 2016), holding that wearing a military medal or insignia constitutes speech and is therefore cannot be proscribed, provide the basis for this motion.

Facts

Petitioner was convicted of four counts under 18 USC 912 for wearing a uniform with a Department of Defense sleeve patch, and one count under 18 USC 701 for possessing the sleeve patch attached to that uniform. *United States v. Kimberlin*, 781 F.2d 127 (7th Cir. 1985). Initially, Petitioner was convicted of four counts of possession of the patch, but the Seventh Circuit vacated three counts on double jeopardy grounds because possession is a continuous offense. *Id.* He purchased the uniform at an army surplus store and wore it while engaging in purely commercial transactions. He never told anyone that he was an officer of any branch of the military but simply wore the uniform while going about his daily activities.

Petitioner was sentenced to four consecutive three-year terms for a total of 12 years on the Section 912 counts. A six-month sentence on the Section 701 count was ordered to run concurrently with the other sentences.

Argument

18 USC 701 provides the following:

> Whoever manufactures, sells, or possesses any badge, identification card, or other insignia, of the design prescribed by the head of any department or agency of the United States for use by any officer or employee thereof, or any colorable imitation thereof, or photographs, prints, or in any other manner makes or executes any engraving, photograph, print, or impression in the likeness of any such badge, identification card, or other insignia, or any colorable imitation thereof, except as authorized under regulations made pursuant to

> law, shall be fined under this title or imprisoned not more than six months, or both.

Petitioner was charged with possession by virtue of the fact that he was wearing a uniform with a "sleeve patch" of the design prescribed by the head of the Department of Defense.

18 USC 912 provides the following:

> Whoever falsely assumes or pretends to be an officer or employee acting under the authority of the United States or any department, agency or officer thereof, and acts as such, or in such pretended character demands or obtains any money, paper, document, or thing of value, shall be fined under this title or imprisoned not more than three years, or both.

Petitioner was charged with pretending to be a Department of Defense police officer simply by virtue of the fact that he wore a uniform with the Department of Defense sleeve patch on it while engaging in commercial transactions that did not defraud anyone.

Under *Alvarez*, as interpreted by *Swisher*, the simple wearing or possession of a military insignia or sleeve patch is not illegal, even if the statute charged is different and even if some action was taken because of insignia. In *Swisher*, the en banc court relied on *Alvarez* to invalidate another statute, and it held that wearing a military medal constituted expressive speech even though the defendant used that medal to defraud the Government of benefits.

In the instant case, Petitioner engaged in purely everyday commercial transactions while wearing a uniform with a Department of Defense sleeve patch. The uniform was not necessary for the everyday commercial activity alleged in the indictment. Therefore, Petitioner's

activity constituted expressive speech under *Alvarez* and *Swisher*.

Section 701 is in the same section of the criminal code as is the Section 704 statutes found unconstitutional in *Alvarez* and *Swisher*. Section 912, sometimes referred to as "impersonation" statutes, was referred to in *Alvarez* as distinguishable from the Section 704 Stolen Valor statute. However, in the cases the Court relied on, there was an act other than the "lie" that made them distinguishable. In the instant case, in contrast, it was Petitioner's mere wearing of the uniform that resulted in the charges. In fact, one of the charges was based on Petitioner's ordering of something from a print store and another was based on him returning there to pick it up. The other two charges were based on someone seeing him in the uniform while purchasing things off a store shelf. In short, but for the wearing of the uniform, Petitioner could not have been charged with any federal offense. Clearly, as in *Alvarez* and *Swisher*, the wearing, possession and use of the Department of Defense sleeve patch cannot be considered criminal.

The Action Is Not Time Barred

In *Swisher*, the court addressed the issue of whether the defendant could raise the issue of unconstitutionality since he did not raise it on direct appeal. In short, it found that because the federal criminal statute did not reach the defendant's conduct, the *Alvarez* holding was fully retroactive.

Wherefore, for all the above reasons, Plaintiff moves this Court to vacate the Section 912 counts (Counts 31 through 34) of the indictment as well as the remaining Section 701 count that resulted in a total sentence of 12 years.

Respectfully submitted,

s/ Brett Kimberlin
Brett Kimberlin
[redacted]

CERTIFICATE OF SERVICE

I certify that I mailed a copy of this motion to the United States Attorney for this Southern District of Indiana this 9th day of April 2018.

s/ Brett Kimberlin
Brett Kimberlin