

[DO NOT PUBLISH]

In the
United States Court of Appeals
For the Eleventh Circuit

No. 22-12483

Non-Argument Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DAVID PETERSEN,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Alabama
D.C. Docket No. 1:13-cr-00117-WS-N-2

Before LAGOA, BRASHER, and JULIE CARNES, Circuit Judges.

PER CURIAM:

Defendant David Petersen, a former federal prisoner proceeding *pro se*, appeals the district court's denial of his motion to vacate his conviction and sentence pursuant to a writ of *coram nobis* under 28 U.S.C. § 1651. After careful review, we affirm.

BACKGROUND

Defendant was convicted after a jury trial in 2013 of conspiracy to commit securities fraud in violation of 18 U.S.C. § 371, aiding and abetting securities fraud in violation of 15 U.S.C. § 77q and 18 U.S.C. § 2, and multiple counts of aiding and abetting wire fraud in violation of 18 U.S.C. §§ 1343 and 2. The conviction arose out of a Ponzi scheme that defrauded investors out of millions of dollars. Defendant participated in the scheme along with three other individuals, two of whom were tried along with Defendant in the same trial. The third individual, Timothy Durkin, fled the country and was not apprehended before trial.

The district court sentenced Defendant to 60 months for each count of his conviction, to be served concurrently and to be followed by three years of supervised release. The sentence reflected a substantial downward deviation from Defendant's recommended guidelines range of 135 to 168 months. This Court affirmed Defendant's conviction and sentence on appeal. Among other arguments, Defendant asserted on appeal that the Government had committed prosecutorial misconduct by failing to

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zealously seek the extradition of Durkin. This Court rejected that argument, noting that the Government “had taken numerous steps to alert domestic and international law enforcement agencies to Durkin’s pending arrest warrant” and that in any event Defendant “failed to articulate how the outcome of his trial would have been different absent this alleged misconduct, given the ample evidence supporting his conviction.”

Defendant subsequently filed several motions seeking additional information about, and challenging certain aspects of, his conviction. In one of those motions—a motion for new trial described by the district court as “a sprawling, 81-page” document that “in substantial part, reiterates and expounds on certain failed arguments and themes animating [Defendant’s] prior postconviction motion practice”—Defendant asserted a claim of “fraud on the court.” Defendant argued in support of the claim that his conviction was based on misrepresentations and false evidence concerning: (1) signed co-investment agreements related to the Ponzi scheme and (2) the Government’s “efforts to apprehend and prosecute the fugitive defendant Durkin.” As to the first argument, Defendant further specified that the Government falsely represented and fabricated evidence suggesting that the victims of the Ponzi scheme had signed co-investment agreements. Regarding the second argument, Defendant claimed the Government relied at trial on perjured testimony that the FBI had filed an Interpol Red Notice to apprehend and extradite Durkin and otherwise misrepresented its extradition efforts.

The district court denied all the post-conviction motions filed by Defendant. In its order denying the motion for a new trial described above, the court specifically rejected Defendant's fraud on the court arguments. The court explained that Defendant's argument as to the co-investment agreements "distort[ed] and mischaracterize[d] the evidence admitted at trial" and that, in fact, "there [wa]s no evidence that the Government engaged in fraud" with respect to any such agreement. The court also noted that Defendant failed to cite any testimony related to the Government's efforts to apprehend Durkin that was false, as would be required to sustain his request for a new trial. Further, the court held that Defendant would not be eligible for a new trial even if he had been able to establish that the Government's evidence as to this issue was false because the other evidence of Defendant's guilt was so compelling.

Defendant appealed the denial of his motion for a new trial, and this Court affirmed. Addressing the fraud on the court argument, this Court agreed with the district court that Defendant had failed to show the Government falsified evidence concerning the co-investment agreements, and it noted that Defendant was not entitled to relief on that ground in any event because he had access to the documents he cited in support of his motion before and during his trial. In addition, the Court rejected Defendant's argument related to Durkin, noting that: (1) Defendant failed to show that any trial testimony regarding the Government's efforts to extradite Durkin was false, (2) assuming there was untruthful or incorrect testimony as to Durkin's extradition, there was no evidence the

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prosecutors knew or should have known the testimony was false, and (3) further assuming the Government's efforts to apprehend Durkin "were lackadaisical," Defendant did not establish any impact on his trial "given the ample evidence against him."

While the appeal of his motion for a new trial was pending, Defendant moved to vacate his conviction and sentence pursuant to 28 U.S.C. § 2255. The district court adopted a Magistrate Judge's report and recommendation denying the motion and it also denied a certificate of appealability ("COA"), concluding that the motion lacked merit and that it "simply trot[ted] out the same failed arguments" about falsified evidence the court already had rejected. This Court likewise declined to issue a COA, explaining that Defendant's claims either had already been rejected or were barred. The Court also rejected Defendant's argument that the district judge should have recused in his case, explaining that the judge's "continued denial of [Defendant's] claims is not the kind of 'bias' that requires recusal."

Thereafter, and following his release from prison, Defendant filed the motion at issue in this appeal seeking a writ of error *coram nobis* pursuant to 28 U.S.C. § 1651. In support of his motion, Defendant again asserted a fraud on the court argument based on alleged evidentiary issues concerning the co-investment agreements and the Government's representations as to its efforts to extradite and prosecute Durkin. Expanding further on the extradition issue, Defendant argued this time around that the Government's false representations prior to trial that it had initiated extradition

persuaded Defendant to agree to a continuance in the case, giving the Government “a huge advantage in case preparation.” He suggested further that Durkin’s unavailability violated his Confrontation Clause rights because it denied him the opportunity to question and cross-examine Durkin during his trial. As relief for both alleged instances of fraud, Defendant requested that the court vacate his conviction. Defendant clarified in his motion that he was not seeking habeas relief under § 2255 because he was no longer in custody or under supervision when he filed his motion.¹ He argued that he nevertheless was entitled to relief under § 1651 because his convictions continued to impact his ability to obtain gainful employment and certain other rights and benefits.

The district court denied Defendant’s motion, finding his arguments “fatally flawed.” First, the court determined based on the record that the Government had “patently made no misrepresentation” as to its efforts to extradite Durkin and that the court had not relied on the status of Durkin’s extradition in granting a continuance in the trial as Defendant claimed. Defendant’s claim about the co-investment agreement evidence, the court observed, had also been raised and rejected in prior motions, and could not be reasserted “under the guise of a *coram nobis* petition.” As to Defendant’s Confrontation Clause argument, the court explained that the clause did not apply here, where Defendant acknowledged that the Government did not use testimony from Durkin at trial.

¹ Defendant was released from prison on November 21, 2018, and his three-year term of supervised release expired in November 2021.

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Defendant now appeals. In his appellate briefing, Defendant essentially reasserts his argument that the Government committed fraud on the court during his trial by falsely representing that all parties had signed co-investment agreements and by misrepresenting its efforts to extradite Durkin. Defendant also suggests again that the district court judge should have recused himself from ruling on the motion at issue in the appeal. The Government has filed a motion for summary affirmance, arguing that Defendant's appeal is frivolous and that the district court's ruling denying his motion for a writ of error *coram nobis* clearly is correct as a matter of law. We agree with the Government, and we grant its motion for summary affirmance.

DISCUSSION

I. Standards of Review

We review the district court's denial of Defendant's motion for a writ of error *coram nobis* for an abuse of discretion. *United States v. Bane*, 948 F.3d 1290, 1294 (11th Cir. 2020). "A district court abuses its discretion if it applies an incorrect legal standard, follows improper procedures in making the determination, or makes findings of fact that are clearly erroneous." *United States v. Harris*, 989 F.3d 908, 911–12 (11th Cir. 2021) (quoting *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259, 1267 (11th Cir. 2019) (quotation marks omitted)). "A district court also abuses its discretion when it commits a clear error of judgment." *Id.* at 912.

As noted, the Government has asked for summary disposition of the district court's denial of Defendant's motion for a writ

of error *coram nobis*. Summary disposition of an appeal is appropriate when “the position of one of the parties is clearly right as a matter of law so that there can be no substantial question as to the outcome of the case, or where, as is more frequently the case, the appeal is frivolous.” *Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1162 (5th Cir. 1969).²

Defendant is proceeding in this appeal *pro se*. Accordingly, we will construe his pleadings liberally. See *United States v. Holt*, 417 F.3d 1172, 1175 (11th Cir. 2005) (citing authority for the rule that “a *pro se* motion should be liberally construed”). But we are not authorized to rewrite Defendant’s pleadings merely to sustain his appeal, or otherwise to “serve as *de facto* counsel” for him. See *Campbell v. Air Jamaica Ltd.*, 760 F.3d 1165, 1168–69 (11th Cir. 2014).

II. Defendant’s Motion for *Coram Nobis* Relief

Federal courts have authority under the All Writs Act, 28 U.S.C. § 1651(a), to issue a writ of error *coram nobis*—that is, a writ vacating a conviction when the defendant has served his sentence and is no longer in custody, as is required to obtain habeas relief under § 2255. See *United States v. Mills*, 221 F.3d 1201, 1203 (11th Cir. 2000). But *coram nobis* relief “is an extraordinary remedy of last resort available only in compelling circumstances where necessary to achieve justice.” *Id.* at 1203. As such, it can be invoked only to review “errors of the most fundamental character.” *Id.* (quotation

² Decisions of the United States Court of Appeals for the Fifth Circuit issued before October 1, 1981, are binding on this Court. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

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marks omitted). “Such errors do not include prejudicial misconduct in the course of the trial . . . [or] newly discovered evidence” related only to the defendant’s guilt or innocence. *Id.* at 1204 (quotation marks omitted). See also *Moody v. United States*, 874 F.2d 1575, 1577 (11th Cir. 1989) (“A claim of newly discovered evidence relevant only to the guilt or innocence of the [defendant] is not cognizable in a *coram nobis* proceeding.”). Further, a court may only grant *coram nobis* relief when “no other remedy is available and the [defendant] presents sound reasons for failing to seek relief earlier.” *Mills*, 221 F.3d at 1204.

Applying the above principles, this Court has explained that the “bar for [obtaining] *coram nobis* relief is high.” *Alikhani v. United States*, 200 F.3d 732, 734 (11th Cir. 2000). Specifically, to prevail on a motion for such relief, the defendant must show that: (1) “there is and was no other available avenue of relief,” (2) such a fundamental error occurred during the defendant’s trial that it rendered the trial itself “irregular and invalid,” and (3) the error “has not been put in issue or passed upon.” *Id.* (quotation marks omitted). See also *United States v. Peter*, 310 F.3d 709, 711 (11th Cir. 2002) (concluding that *coram nobis* relief was warranted where, after the defendant had served his sentence for federal mail fraud, the Supreme Court issued a decision holding that the conduct for which the defendant was indicted and to which he pled guilty was not covered by the federal mail fraud statute).

Defendant has not established the essential elements required to obtain *coram nobis* relief here. First, he did not identify in

his motion below or in his appellate briefing any claims for which relief was unavailable through other means. On the contrary, and as the district court recognized, the claims underlying Defendant's motion for a writ of error *coram nobis*—claims related to an alleged fraud on the court concerning the co-investment agreements and the details surrounding Durkin's extradition—have been asserted through multiple other means, including Defendant's unsuccessful motion for a new trial described above. Not only were the claims "put in issue" by Defendant in his prior motions, they also were "passed upon" by both the district court and this Court in ruling on those motions. To the extent Defendant intended to raise new claims in the present motion—for example, by expanding his extradition claim to allege that he was lured into agreeing to a trial continuance or to argue that Durkin's absence somehow violated the Confrontation Clause—any such claims would have been available to Defendant when he filed his motion for a new trial, as well as when he filed his motion for relief under § 2255. Accordingly, Defendant is not entitled to *coram nobis* relief on those claims now. *See Moody*, 874 F.2d at 1578 (approving the denial of *coram nobis* relief where the defendant "was aware of the true basis of [his ineffective assistance of counsel claim] at the conclusion of the trial" and thus "should have articulated [the] claim" in an earlier motion).

Second, Defendant has not established any errors of the fundamental character that *coram nobis* relief contemplates. Again, the district court has rejected the arguments asserted in Defendant's motion multiple times on evidentiary grounds. But even assuming Defendant's factual assertions are true, he does not articulate an

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error of such magnitude that his trial could be considered “irregular and invalid.” *See Alikhani*, 200 F.3d at 734. On the contrary, and as this Court has already noted, Defendant failed to show that the Government’s alleged malfeasance concerning Durkin’s extradition made any difference whatsoever to Defendant’s trial. Defendant’s arguments concerning the co-investment agreements fail for similar reasons, this Court having rejected the claim that any evidentiary errors concerning such agreements warranted a new trial. *See id.* (“[T]he writ may issue only when the error involves a matter of fact of the most fundamental character[.]” (quotation marks omitted)).

Finally, we reject Defendant’s argument that the district judge should have recused himself. It is not clear whether Defendant raised the recusal issue below, but even if he did, he offers no basis for recusal here. Defendant has suggested in prior pleadings that the district judge should have recused himself simply because he consistently had rejected the arguments made by Defendant in the past. But adverse rulings “are generally grounds for appeal, not recusal.” *See In re Evergreen Sec., Ltd.*, 570 F.3d 1257, 1274 (11th Cir. 2009). Instead, recusal is only warranted when a statutorily specified circumstance establishes “partiality” on the part of the judge or when for other reasons the judge’s impartiality “might reasonably be questioned.” *United States v. Patti*, 337 F.3d 1317, 1321 (11th Cir. 2003) (citing 28 U.S.C. § 455 and noting that the statute “creates two primary reasons for recusal”). Defendant makes no showing that recusal was appropriate here for either reason.

CONCLUSION

For the reasons discussed above, we **GRANT** the Government's motion for summary affirmance and **AFFIRM** the district court's order denying Defendant's motion.

APPENDIX "C"

Judgment entered as to Appellant David Paul Petersen, I. [Entered: 05/30/2023 03:01 PM]

COVER

In the
United States Court of Appeals
For the Eleventh Circuit

No. 22-12483

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DAVID PETERSEN,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Alabama
D.C. Docket No. 1:13-cr-00117-WS-N-2

JUDGMENT

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It is hereby ordered, adjudged, and decreed that the opinion issued on this date in this appeal is entered as the judgment of this Court.

Entered: May 30, 2023

For the Court: DAVID J. SMITH, Clerk of Court

APPENDIX "D"

Petition for panel rehearing only filed by Appellant David Paul Petersen, I. [22-12483] (ECF: David Petersen) [Entered: 06/09/2023 04:31 PM]

COVER

No. 22-12483

**In the United States Court of Appeals for the
Eleventh Circuit**

David P. Petersen,
Appellant

v.
United States of America
Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF ALABAMA,
D.C. NO. 1:13-cr-00117-WS
Senior Judge William Steele

Petition for Rehearing

David P. Petersen, Pro Se
8109 South 194th Street
Gretna, NE 68028

Cover

Appellant David P. Petersen is pro se, and acting on his behalf under *Haines v. Kerner*, 404 U.S. 519, 30 L. Ed 2d (1972), and appears before this Court in this appeal, and requests the Court grant wide latitude to his pleadings under the Supreme Court holding in *Haines v. Kerner*, *supra*.

I, David Petersen, acting pro se, respectfully write this pleading to request a Petition for Rehearing as per Rule 40 of the Federal Rules of Appellate Procedure.

Statement of Facts:

1. The Appellant initiated an appeal in the Eleventh Circuit Court of Appeals subsequent to the unfavorable judgment issued by the District Court in Case No. 1:13-cr-00117-WS-N-2 on 07-20-2022.
2. On 05-30-2023, the panel affirmed the decision of the District Court. The Appellant contends that this affirmation was rendered without thorough analysis of the substantive grounds of contention articulated in the appeal.
3. In the original motion, the Appellee failed to assert any claim of relevance, and the District Court's judgment lacked any mention of the same. The Appellee also refrained from appealing the decision of the District Court to the Circuit Court to address any claims that might have been overlooked in prior courts.
4. The panel erred in its citation of *United States v. Peter*, 310 F. 3d 709,711 (11th Cir) by indicating that the Appellant had entered a guilty plea, an action the Appellant categorically denies. The incorrect citation and resultant misunderstanding may have improperly influenced the affirmation of the lower court's decision.

5. The focus of the Appellant's appeal was the order of the District Court, specifically countering the assertion that the Appellant's motion was frivolous.
6. Fraud on the court was not considered in the proceedings, significantly impacting the integrity of the court process. The misconduct involves reliance on a flawed indictment, a compromised trial record, and the inappropriate exercise of discretion premised on an incorrect record.
7. The panel's decision neglected to address the pivotal questions presented in the appeal, nor did it acknowledge the instances of discretionary abuse identified within the proceedings of the 11th Circuit, potentially introducing a novel form of misuse of discretion.
8. In context to the requirements to qualify for coram nobis relief as elucidated in *Alikhani v. United States*, 200 F.3d 732, 734 (11th Cir. 2000), the Appellant submits that a cardinal error occurred during the trial, undermining its validity and regularity. Furthermore, this error has not been disputed or decided upon.

Legal Grounds:

1. The Fourteenth Amendment of the United States Constitution provides a guarantee that no individual shall be stripped of "life, liberty, or property, without due process of law." This constitutional safeguard forms the core of the Appellant's argument.
2. The Appellant possesses a constitutional right to table his arguments before the appellate court and anticipates that these points of contention will undergo thorough review and adjudication. This appeal was launched specifically to question the District Court's order concerning the Coram Nobis Motion introduced by the Appellant.

3. The District Court Judge, in his opinion, refrained from labeling the claims made in the motion as "frivolous". Instead, he chose to address a majority of the claims, excluding those concerning "Abuse of Discretion" which were associated with the Appellate and Supreme Court's dependency on faulty record errors. It is noteworthy that the Appellee did not claim the original Coram Nobis motion filed by the Appellant to be "frivolous" in the District Court, and neither did the District Court decision, which is under appeal by the Appellant, make any "frivolous" findings.
4. The opportunity for the Appellee to assert such a claim has now lapsed, thus forfeiting any right to invoke a similar claim in the Appellate Court. Furthermore, the Appellee did not challenge the District Court's decision in the Circuit Court to address any concerns about claims which were overlooked by previous courts, nor any assertions made in the Appellee's response.

Reasoning:

As it currently stands, the panel's decision undermines the purpose of the appeal process as it fails to engage substantively with the issues raised on appeal.

The reference to fraudulent evidence concerning co-investment agreements, employed in the trial court, pertained to their presentation of a purported investment contract at trial, rather than the total non-existence of any engaged invest contract at all, as required by the jury instructions. (*See FOOTNOTE*) This distinction forms the basis of the claims made in the associated Coram Nobis motion under appeal. The unique aspects of the Coram Nobis claim include:

- a. There are no engaged investment contracts recorded as required by the jury instruction (*See FOOTNOTE*). This claim differs from a previously raised contention suggesting misrepresentation of an evidentiary testimony at trial.

b. Both the Grand Jury and the Trial Jury were obligated to verify the presence of a security in this case, as outlined in the Jury Instructions (*See FOOTNOTE*), prior to delivering a "guilty" verdict or initiating an Indictment.

c. The relevance of any opinion concerning evidence at trial is rendered moot without the necessary fulfillment of the required "Jury Instructions" (*See FOOTNOTE*).

Both the 11th Circuit Court of Appeals and the Supreme Court have relied on an "error-riddled" case record, which erroneously asserts that all victims had engaged in a Co-investment Agreement. This agreement was supposed to fulfill the "jury instruction requirement" (*See FOOTNOTE*), yet there is no record of a victim who had an engaged Co-Investment Agreement. This constitutes a substantial claim that the panel's opinion fails to accurately represent (*See page 4, Lines 4-8, 11-15, and 18-20, Doc. 24-1, Case 22-12483*).

Furthermore, the Appellate panel does not adequately address the known "faulty record errors" and associated abuse of discretion claims raised in the Appellant's Appeal Questions. In the "interest of justice," it's clear that an "abuse of discretion" occurred when the 11th Circuit Court of Appeals, while considering the Appellant's appeals, incorrectly asserted in the "Background" section of the Direct Appeal that "all parties signed an agreement" and the contract terms were in force. *For proof of claim see (Doc. 314 - see exhibit "A", Exhibit "E, 11th Circuit Case 14-12577 p.2-3". The 11th Circuit Court of Appeals used the error-filled record in its determination in the Direct Appeal "Background" Section, from Case 14-12577 p.2-3 when deciding Appeal #16-15603G and the U.S. Supreme Court also gave deference to the findings of both the District and Appellate Courts when reviewing Case #17-6837.*

The panel's opinion in *Case 22-12483 (Doc. 24-1)* does not make an adequate distinction between past claims and the distinct new claims made in the associated Coram Nobis motion currently under appeal.

The Appellant argues that the requirements of the jury instructions (*See FOOTNOTE*) cannot be altered by a judge's or panel's opinion deeming other evidence as sufficient, particularly when the specific evidence required by the "jury instruction" (*See FOOTNOTE*) is absent or non-existent.

Request for Relief:

The Appellant respectfully petitions this Honorable Court to reconsider the panel's decision delivered on 05-30-2023. Further, it is the Appellant's request that the panel thoroughly review and respond to all Appeal Questions and Claims outlined in the Opening Brief and Reply to the Appellee Brief.

The Appellant seeks acknowledgment and addressal of the proven "abuse of discretion" that led to significant material record errors, originating from the Grand Jury, the Trial Jury, the 11th Circuit Court of Appeals, and the U.S. Supreme Court, in the spirit of justice.

Additionally, the Appellant implores this Court to undertake a thorough evaluation of the case, offering a detailed, reasoned analysis that addresses the substantive issues highlighted during the appeal process.

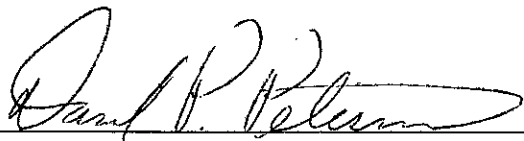
Possible remedies for the Appellant could include vacating the original judgment, retrial, or remand to the lower court with specific instructions. However, the specific relief would ultimately depend on the court's judgment upon reconsideration of the appeal.

Conclusion:

In consideration of the points raised herein, the Appellant respectfully appeals to this Court's sense of justice and requests the approval of this Request for Reconsideration. By granting the Request, the Court will afford the Appellant an opportunity to adequately present his case through a comprehensive review and response to the Appellants' Appeal questions while addressing the identified errors.

This reconsideration is vital in ensuring the preservation and safeguarding of the Appellant's constitutional rights, thereby reinforcing the fundamental principles of our judicial system.

This Petition for Rehearing is respectfully submitted on this 9th day of June, 2023.

By:  _____

David P. Petersen, Pro se, Individual, Appellant
8109 South 194th Street Gretna, NE 68028 (402) 983-6448

FOOTNOTE:

Case Jury Instruction:

*Securities Fraud: It is a federal crime for a person to use any form of interstate commerce or interstate communication to perpetuate a fraud scheme involving securities. **The Defendant can be found guilty of this crime only if all the following facts are proved beyond a reasonable doubt:** (1) The Defendant willfully offered to sell or actually sold a security through a means of interstate commerce; and (2) The Defendant knew that he was employing a statement containing either material misrepresentations or omissions of material fact.*

** **An investment contract is a "security" within the meaning of the term as it is used in this offense.***

APPENDIX "E"

ORDER: Petition for panel rehearing only filed by Appellant David Paul Petersen, I is DENIED.
[27] [Entered: 07/12/2023 11:42 AM]

COVER

In the
United States Court of Appeals
For the Eleventh Circuit

No. 22-12483

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DAVID PETERSEN,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Alabama
D.C. Docket No. 1:13-cr-00117-WS-N-2

Before LAGOA, BRASHER, and JULIE CARNES, Circuit Judges.

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Order of the Court

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PER CURIAM:

The Petition for Panel Rehearing filed by the Appellant is
DENIED.