

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI

UNITED STATES OF AMERICA

v.

CRIMINAL CASE NO. 3:07CR192-b-a

DAVID ZACHARY SCRUGGS

**DEFENDANT’S REPLY MEMORANDUM
IN SUPPORT OF HIS MOTION TO VACATE HIS CONVICTION**

Introduction: The Government’s Response in Opposition (D.E. 309) has dramatically narrowed the issues in this case. See, *U.S. v. Branch*, 91 F.3d 699, 752 (5th Cir., 1996)(where Government’s brief “did not contest” a point raised by a Petitioner, it “therefore effectively conceded that point”). Pursuant to 5th Circuit doctrine, the following claims are no longer contested issues:

- That, under *Whitfield v. U.S.*, 590 F.3d 325 (5th Cir., 2009), the Petitioner is innocent of the three counts of federal programs bribery alleged in the Indictment under 18 USC § 666. With these three counts legal nullities, all that can remain are the honest services counts – and after *Skilling v. U.S.*, these require beyond-a-reasonable-doubt proof that Petitioner bribed or conspired to bribe Judge Lackey.
- That, under *U.S. v. Skilling*, 130 S.Ct. 2896 (2010), the Court had no jurisdiction to accept a guilty plea nor pass sentence on the misprision of felony to which Petitioner pleaded guilty.
- That the Government misled the Court when it assured the Court that it had 404(b) testimony from Joey Langston that “implicated” Petitioner in any attempt to bribe Judge DeLaughter, a representation that it never sought to correct for two and a half years despite countless opportunities to do so.

Rather than apologizing to the Court for recklessly misleading it all this time, the Government now points to an out of context email written by Petitioner that it has never previously mentioned to the Court in support of 404(b), as if the single isolated document shows that Petitioner bears some guilt in the *Wilson* case, even though the Government’s interpretation is controverted by *both* of the Government’s own witnesses (Langston and Balducci) and every other witness in this case. That email has taken on new life as the Government’s needs – rather than the facts – dictate its response. Judge David Sanders, then-AUSA, has stated by sworn affidavit: “We discovered an email from Zach Scruggs to Attorney

Johnny Jones... After reading it in its entirety, I did not necessarily believe that it incriminated Zach Scruggs. It was not exculpatory by any means, but it was not something that changed our way of thinking.” Exh. D to Motion at 3.¹ Further, despite the Government’s current protestations about the “napkin” email and the *Wilson* case, when this Court inquired at Petitioner’s Change of Plea Hearing, “Do you have knowledge that he has information on other cases [*i.e. Wilson*]?” the Government responded: “We have no knowledge that he has any information on other cases at this time, Your Honor”. Ex. X to Motion at 14. The Court may decide for itself if the Government’s latest filing is thus yet another misrepresentation by the Government designed to thwart rather than further justice.

- That when Balducci went to talk to Judge Lackey about the case, and then later mentioned an of-counsel position with his firm, Balducci “did not consider the offer a quid pro quo,” and thus did not intend a bribe, and that no conspiracy to bribe existed until the Government created one. Opp., at 2.
- That Petitioner is actually innocent of the first wire fraud count that is based on a supposed May 4, 2007 email that was never found, because that fictitious email predated any bribery request from Judge Lackey and thus could not have been “in furtherance” of a criminal conspiracy to bribe Judge Lackey. Motion, at 20 (citing *Schmuck v. United States*, 489 U.S. 705, 710-711 (1989)).
- That the November, 2007 email was actually intra-state email, between Oxford and New Albany, Mississippi and Petitioner’s argument “this Court has no jurisdiction over alleged wire fraud consisting of intrastate emails” is legally correct. Motion at 17n6 (citing *U.S. v. Moody*, 903 F.2d 321,332 (5th Cir., 1990)).
- That when Judge Lackey demanded money to compel arbitration, he was in fact demanding money to grant what he had no discretion to deny under Mississippi law. Motion at 23-26 (citing *Barrett v. Jones, Funderburg, Sessums, Peterson & Lee*, 27 So.3d 363, 376 (Miss. 2009)). Thus, under U.S. Supreme Court and Fifth Circuit precedent, any payment to Judge Lackey was not a bribe and, under *Skilling*, not criminal.

Given these concessions, the relief requested by Petitioner must be granted, as will be explained in detail herein.²

¹ Strangely, the Government purports to rely upon this email, but declines to exhibit it for the Court. When one reviews it, as well as the emails from Mr. Jones to which Petitioner was responding, one inevitably joins Judge Sanders in concluding that it merely shows that Petitioner was expressing confidence about the *Wilson* case, because of the judge’s fairness and understanding of the case, as Petitioner says explicitly. See Exh. A attached hereto.

² The Government also notes that Petitioner seeks relief after having served his time. It is technically noteworthy that Petitioner was under supervised release (and thus legal custody), when he filed his §2255 petition,

Overall then, of the six predicate crimes alleged in the original Indictment and the superseding Information, the Government now concedes that five of them were illegal attempts to punish Petitioner for acts that were not Federal crimes – either because § 666 does not reach state court judges in their judicial capacities or because the predicate wire transmissions predated the existence of any bribery scheme.

The sixth charge involves a crime the Government admits it set up with one of its own agents (Judge Lackey) asking for money initially, and then used another agent (Balducci) to attempt to induce and ensnare “Sid Backstrom ... and possibly ... Richard Scruggs” and in which the Petitioner was an unintended target. *See* Exh. T to Motion at 2 (Nov.1, 2007 transcript). This sixth charge – because it is an honest services charge – requires proof that Petitioner participated in a bribe or in a conspiracy in which bribery was the purpose. All the Government can muster is the contention that Petitioner committed a single predicate act – a wire fraud based on a November email from a paralegal in Petitioner’s office to Balducci forwarding a trial transcript from a court employee in the Southern District, concerning a completely different case. The Government concedes by failing to contest it that this email was intrastate – between Oxford and New Albany. Even if this Court had jurisdiction because the email was interstate (and it does not), the Government’s papers have provided no proof that this email was in furtherance of any conspiracy.

As the local sage says: “Saying it don’t make it so.” But that is what the Government hopes. Indeed, the Government has not even pretended to prove that Petitioner had a part in a bribery conspiracy. Perhaps this is because the Government assured the Court in March, 2008 that “all the facts and circumstances” of this case amounted to merely misprision of earwigging.

but has since been released, making the relief he seeks more appropriate under *coram nobis*. As Petitioner noted in his Motion, and as the Government does not contest, this Court can grant the relief under either label. *See* Mot., at 1 (citing *U.S. v. Marcello*, 876 F.2d 1147 (5th Cir., 1989)).

See Motion, D.E. 303 at 19 (quoting the prosecutors). Either the Government can be trusted to tell this Court the truth – or it cannot be so trusted.

What is left? Atmospheric, resentment, animosity, vindictiveness. To that end, the Government reminds the Court that Petitioner has “considerable means,” complains that Petitioner showed a “lack of respect” for the state courts, and falsely presumes that Petitioner now seeks to “return to the practice of law.” None of these is a criminal act. The last is simply false.³

Whatever the Government wants to claim that Tim Balducci or Richard Scruggs or Sid Backstrom might have done, the Fifth Circuit has warned that the law does not permit the Government or this Court to “lightly infer [Petitioner’s] knowledge and acquiescence in a conspiracy.” *U.S. v. Jackson*, 700 F.2d 181, 185 (5th Cir., 1983). “The government must show beyond a reasonable doubt that the defendant had the deliberate, knowing, and specific intent to join the conspiracy.” *Id.* “It is not enough ... that the evidence places the defendant in a climate of activity that reeks of something foul.” Motion at 34 (quoting *U.S. v. Velgar-Vivero*, 8 F.3d 236, 241 (5th Cir.1993)).

Legal Standard: The parties agree that “[t]o prove actual innocence, the Movant ‘must demonstrate that, in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him.’” Motion at 13 (quoting *U.S. v. Jones*, 172 F.3d 381,384 (5th Cir. 1999)).⁴ Reasonable jurors would presume that Movant is innocent and hold the Government to proving its case beyond a reasonable doubt. *Coffin v. U.S.*, 156 U. S. 432, 453 (1895).

³ Only the Mississippi Supreme Court can permit a disbarred attorney to return to practice– and only if Petitioner seeks reinstatement. The Government was informed *prior to* the filing of the § 2255 Motion that Petitioner would agree never to seek reinstatement of his law license.

⁴ See also *Opp.*, at 9, 11-13 (agreeing with standard). The actual innocence standard, which arises from procedural default doctrine, is only necessary for review of non-jurisdictional problems. For jurisdictional defects, such as the fact that the Information and the Indictments failed to allege federal crimes, the procedural default

Actual Innocence: Now to the Government's evidence recited to defeat the Petitioner's claim of innocence. The Government opposes Petitioner's argument that he is actually innocent of one of the wire fraud charges in the original Indictment, and the conspiracy charge related to it. *See Opp.*, at 13.

First, the Government explicitly concedes that no crime was committed, nor was a conspiracy to commit a crime hatched at the March, 2007 meeting. The "original impetus for the conspiracy" was, the Government concedes, actually non-criminal earwiggling, a desire to utilize "Tim Balducci's friendship with Judge Lackey" to even the odds with the *Jones* plaintiffs, who had likewise already used a friendly attorney to engage in *ex parte* discussions with the judge. *Id.*, at 13. The Government concedes that when Balducci initially visited Judge Lackey about the case, and then later mentioned an of-counsel position with his firm, Balducci "did not consider the offer a quid pro quo," and thus did not intend a bribe. *Id.* at 2. The Government concedes that until Judge Lackey demanded money to do his job – in mid-September, 2007 – absolutely none of the Defendants intended to commit bribery, nor did they create a conspiracy to do so. Thus, the Government must also concede that Petitioner is actually innocent of the first wire fraud count that is based on the never found May 4, 2007 email, which predated any alleged criminal conspiracy and thus could not have been "in furtherance" thereof. A non-existent email related to earwiggling simply is not an instance of federal honest services fraud.

Second, this Court has no jurisdiction over the November 2 email, which the Government concedes was an intrastate email. Even aside from that facial infirmity, the Government has never shown how this alleged email was in "furtherance" of the Government's bribery conspiracy, another necessary predicate to vest this Court with jurisdiction. After all, the

problem does not even arise, making proof of actual innocence unnecessary. *United States v. Meacham*, 626 F.2d 503, 509-10 (5th Cir.1980).

email was not sent by Petitioner or any of the other alleged conspirators. The email said absolutely nothing about any money. And the email did not even pertain to the *Jones* lawsuit or Judge Lackey. Instead, the only email that Petitioner can find was sent by a paralegal in the Scruggs Law Firm to Tim Balducci, forwarding another email from a court official in the Southern District of Mississippi, who had provided a transcript from a Katrina insurance case. (See Exhibit B).

Third, no evidence connects the Petitioner with the conversation between Dick Scruggs and Balducci, which raised the additional \$10,000 payment and perhaps the prospect of a subsequent email. This conversation took place after Balducci had any conversation involving Petitioner.

Fourth, the attempt to tie the earlier conversation about “sweet potatoes” with the later agreement to pay \$10,000 fails both as a matter of chronology and because of the taped conversation itself. There is no evidence that Petitioner knew of or approved the additional payment. And there is no evidence that Petitioner knew about any bribe. The ellipsis on the Government’s “sweet potato” quote are telling. Those ellipsis fail to account for the substantial pause in the taped conversation, Petitioner’s clear concern that he had missed a call from “Tricia or Trent” Lott (the transcript says only (“UI” – unintelligible) and Petitioner’s obvious decision to leave the room while Balducci lowered his voice and Backstrom read the order. A fair *hearing* of the taped proceedings makes it doubtful that Petitioner, who had been an animated and active participant in the conversation, would suddenly become mute except because he was leaving the room. Nowhere on any tape was any reference to a payment of money to Judge Lackey made in Petitioner’s presence. From Balducci’s coded words, the Government apparently asks this Court to “lightly infer [Petitioner’s] knowledge and acquiescence in a

conspiracy,” as if this Court would simply ignore the Fifth Circuit’s explicitly condemnation of such reasoning. *U.S. v. Jackson*, 700 F.2d 181, 185 (5th Cir., 1983).

Still, the Government insists that a reasonable jury would convict Petitioner on this purported bribery scheme that it manufactured. To be sure, the Government does not allege that Petitioner approved any payment, cut the check, created the cover documents, or did any other *action* in furtherance of the Government’s bribery scheme. Instead, the Government argues: (1) that Petitioner believed that Balducci could use his friendship to influence Judge Lackey (not a federal crime); (2) that the earwiggling “ripened into an actual bribe” (because the Government orchestrated the bribe); and (3) that Petitioner knew of and acquiesced in the bribe. *Opp.* at 13.

The last of the arguments is the only one that matters. It is proved, according to the Government, because (a) Petitioner and Backstrom felt that they “could write the judge’s order any way they wanted” and (b) the November 1, 2007 taped conversation, which show “Petitioner’s knowledge of the quid pro quo and willful participation in the bribery.” *Opp.* at 13. The Government’s selective recitation of the evidence is unfortunate.

When the conversation between Balducci, Backstrom and Petitioner about Judge Lackey’s Order began, Balducci indicates that the Judge had authored an order but had not signed it. Petitioner does not believe he was to be a part of that conversation. He interrupts. “If y’all [referring to Balducci and Backstrom] need to just talk.” Balducci replies “Course not. Course not. Come on in.” *Doc.* 310-1 at 17. The reasonable inference is that Petitioner does not believe the conversation involving Judge Lackey or the Order was his business. It is true that once the Order was under discussion, Petitioner becomes an active participant. But the discussion of whether an order to send a pending case to arbitration should be a stay or a dismissal is a valid procedural question. If the case is to be finally determined by arbitration, a

dismissal reflects a court's lack of jurisdiction over the case at all. Petitioner's comments in that regard are appropriate inquiries about procedure, not a desire to change the outcome – which was the arbitration that Judge Lackey had already decided to order.

Further Balducci slips in his attempt to trap Backstrom. He indicates that the Judge wanted “me” to review the order. If Judge Lackey knew that the Scruggs Law Firm was involved, he would have asked Balducci to have “them” review it. But Balducci never says that. Instead, he says that “frankly, I just don't know enough about the facts to know if that was going to be ok ... I wanted somebody here to review it.” Doc. 310-1 at 18. Balducci, subsequently suggests that he might not have the same “stroke” (the friendship that started the earwiggling effort) if a new judge gets the case after arbitration. Doc. 310-1 at 28. No mention of a bribe.

At this point, the conversation is interrupted by a call for Petitioner. With Petitioner clearly distracted, and no longer talking about the order, Balducci lowers his voice, turns his attention to Backstrom, and makes the “sweet potatoes” comment. Petitioner never utters another word on the tape and subsequently leaves the room to take the call.

Presuming innocence, a reasonable jury would likely find, indeed could only find, that Petitioner was not part of any conspiracy. No mention of any payment is made while Petitioner is a participant in the conversation.

The Government insists that Petitioner is “guilty of bribing a judge based on the application of ordinary conspiracy law on a basic *Pinkerton* theory. As a coconspirator, he is responsible for what Timothy Balducci did, including the payment of \$40,000 to Judge Lackey.” *Opp.*, at 13 (citing *Pinkerton v. United States*, 666 S. Ct. 1180, 1184 (1946)). This of course presumes that Petitioner was part of the Government's conspiracy at the time of those payments. But where is the proof of that predicate fact? It is absent. The Government seems to concede

that Petitioner said absolutely nothing to join the Government's conspiracy; he said not a peep acknowledging, affirming, or condoning the Government's scheme. If the Government could have proven actual participation in a bribery conspiracy, then they would have done so two years ago rather than agreeing to an earwiggling charge and informing the Court that it had recited all of the facts it knew. Or, at the very least, the Government would have provided such proof in their Response to Petitioner's Motion *sub judice*. But the record is bare.

The Government's Misrepresentations: The Government offers no real factual or legal opposition to Petitioner's claim based on the Government's misrepresentation to this Court, but instead only raises waiver as a procedural bar to this Court's consideration. The Government simply ignores the procedural default doctrine, which Petitioner discussed in his Motion. Mot., at 35 n.19. As Fifth Circuit authority holds, a Petitioner can raise an issue for the first time in a §2255 motion if he shows either "actual innocence" (which is conclusively established above) or "cause" and "actual prejudice." *U.S. v. Guerra*, 94 F.3d 989,993 (5th Cir.1996). The issue of cause turns on whether "some objective factor external to the defense' prevented him from raising on direct appeal the claim he now advances." *Id.* Of course, Petitioner could not have complained of the Government's misrepresentation because Petitioner did not know that it was false. Only the May 2010 affidavits revealed the Government's falsehood, and revealed that Mr. Langston would have testified truthfully all along.⁵ The Government concedes that this misrepresentation was *deeply* prejudicial to Petitioner. In their own words, it was an "overwhelming force"; it constituted the "turning point in the case" and "substantially

⁵ The Government's waiver argument also ignores their own concession that this Court lacked jurisdiction to accept a guilty plea on the non-crime of misprision of earwiggling. "When a court without jurisdiction convicts and sentences a defendant, the conviction and sentence are void from their inception ..." *U.S. v. Peter*, 310 F.3d 709 (11th Cir., 2002). That plea had no force, and thus waived nothing.

contributed ... to the plea of ... Zach Scruggs.” Motion at 12-13 (quoting prosecutors). Thus, the Government’s misrepresentations are properly before this Court in this Motion.

Prediction of Outcome of *Skilling*: The Government accuses petitioner of sandbagging the Court because counsel for Petitioner somehow knew of the outcome of *Skilling* and this knowledge constitutes a knowing abandonment of the issue. Of course, this suggestion is just another form of waiver argument, which is in reality subsumed by the procedural default doctrine, which Petitioner has clearly satisfied. Nonetheless, it is ludicrous to say that Petitioner “knew or certainly should have known” of the outcome of *Skilling*. Opp. at 9. How could the Petitioner have known any more than the professional prosecutors who decided to charge Petitioner with misprision of earwigging? If that knowledge can be imputed to Petitioner, it can be imputed to the Government as well. And if it is imputed, the Government has conceded that it was willing to risk its conviction on the only crime it could prove – honest services misprision by earwigging. The Government did not prevaricate when it said that it could charge no other crimes. The Government does not contest the Petitioner’s argument that USDOJ policy required that any plea agreement reflect “the most serious readily provable charge consistent with the nature and extent of [Petitioner’s] criminal conduct.” Motion at 21 (quoting U.S. Attorneys Manual at 9-16.300,9-27.430). As this Court and the Government recognized in 2008, the charge of misprision of earwigging “adequately reflect[ed] the seriousness of a defendant's actual offense behavior.” *U.S. v. Smith*, 417 F.3d 483, 487 (5th Cir., 2005)(court should reject plea agreement if it believes otherwise).

Conclusion: For the reasons stated, Petitioner respectfully requests that his Motion pursuant to 28 U.S.C. § 2255 be sustained.

Respectfully submitted, this 9th day of November, 2010.

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CERTIFICATE OF SERVICE

I, Edward D. Robertson, Jr., hereby certify that on November 9, 2010, I served copies of this Reply Memorandum on the Office of the United States Attorney for the Northern District of Mississippi by way of the Electronic Court Filing (ECF) system.

/s/ Edward D. Robertson, Jr