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 MEMORANDUM OF AUTHORITIES IN SUPPORT OF HIS MOTION TO VACATE HIS CONVICTION PURSUANT TO 28 USC §2255

> We ... hold that [18 U.S.C.] §1346 [the honest services fraud statute] covers only bribery and kickback schemes. Because Skilling's alleged misconduct entailed no bribe or kickback, it does not fall within §1346's proscription.
>
> *Skilling v. United States*, __ S.Ct. __ (2010) Slip Op., at 1-2
>
> He's [David Zachary Scruggs is] not being sentenced for conspiracy to bribe a judge. … He hasn't pled guilty to being part of the bribery. And he's not being sentenced for part of the bribery. … And as far as the law is concerned, I'm going to base the sentence on that.
>
> The Honorable Neal Biggers, **Exh. "A"**, Sentencing Hearing Tr., 7/2/08 at 7-9.

Introduction

Based on the Supreme Court's decision in *Skilling* and on his actual innocence of any crime involving bribery or any kickback schemes, David Zachary Scruggs ("Movant") respectfully petitions this Court to vacate his conviction and sentence pursuant to 28 USC § 2255.

On March 31, 2008, Movant pleaded guilty to the crime of misprision of felony. The Information to which Movant pleaded guilty described the underlying felony as an "honest services fraud" crime. Specifically, the underlying offense consisted of Movant's failure to

report Timothy Balducci's earwigging of Judge Henry Lackey regarding a civil case pending before Judge Lackey in Mississippi state court.

The honest service fraud statute has now been severely cabined by the United States Supreme Court to include only bribery and kickback schemes and no other acts or failures to act. Because, as this Court expressly acknowledged, Movant's failure to report Balducci's earwigging did not constitute a bribery or kickback scheme, Movant committed no federal crime when he failed to report Balducci's earwigging. Indeed, as will be explained, he is actually innocent of all charges.

The factual contours of this case have changed just as dramatically as has the law. In 2008, the Government (under the direction of Tom Dawson) represented to this Court that Joey Langston implicated Movant in another bribery scheme involving Judge Bobby Delaughter. Mr. Dawson has claimed in subsequent court proceedings and in his self-published book that these representations "blew a hole" in Movant's defense and "compelled" him to plead guilty. Now, in sworn statements, former prosecutor (now judge) David Sanders and Mr. Langston have both repudiated the Government's representations to this Court. Both state that Mr. Langston *never* implicated Movant in the bribery scheme.

For the reasons that follow, this Honorable Court should apply the law as announced by the United State Supreme Court and vacate Movant's criminal conviction. When neither the law nor facts support a conviction, it must be overturned.

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I. JURISDICTION

A. RELIEF IS APPROPRIATE UNDER 18 USC §2255.

28 USC §2255 provides that any "prisoner in custody … may move the court which imposed the sentence to vacate, set aside, or correct the sentence."[1] Movant is presently in the custody of his probation officer, and such supervised release satisfies the "custody" requirement of §2255. *Coronado v. U.S. Bd. of Parole*, 540 F.2d 216, 217 (5th Cir. 1976).

This Petition is timely. Specifically, §2255(f) provides a one year statute of limitations, running from "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review …." 18 USC §2255 (f). Settled law holds that the 2010 *Skilling* decision must be applied retroactively because the decision is substantive, "explaining its understanding of what the statute has meant continuously since the date when it became law." *Rivers v. Roadway Express, Inc*., 511 U.S. 298, 313 n. 12 (1994). *See also Schriro v. Summerland*, 542 U.S. 348, 352 (2004); *Reyes-Requena v. U.S.*, 243 F.3d 893, 903 (5th Cir.2001). Thus, according to the plain language of § 2255, this Court has jurisdiction and Movant has a statutory right to move the Court to vacate or set aside his conviction and sentence.

B. THERE IS NO PROCEDURAL DEFAULT.

Movant's claims for relief are also not barred by the fact that Movant declined to appeal his conviction. A defendant may raise claims for the first time on collateral review if he shows (1) good cause for procedural default and actual prejudice resulting from the error *or* (2) that the constitutional violation has probably resulted in the conviction of one who is actually innocent.

[1] If for any reason §2255 is inadequate to provide Movant Scruggs the relief he seeks, he requests that the merits of this petition be considered under 28 USC §2241 or 28 U.S.C. §1651 (*coram nobis*). *See U.S. v. Marcello*, 876 F.2d 1147 (5th Cir. 1989) (granting *coram nobis* relief based on Supreme Court's decision in *McNally v. U.S.*, 483 U.S. 350 (1987), striking down prior honest services fraud theory).

U.S. v. Shaid, 937 F.2d 228, 232 (5th Cir., 1991) (en banc). Movant's claim that he was convicted of a crime that does not exist is a claim of actual innocence. *See U.S. v. Gobert*, 139 F.3d 436, 438 (5th Cir.,1998)("if a defendant has been convicted of a criminal act that becomes no longer criminal, such a conviction cannot stand"); *Bousley v. U.S.*, 523 U.S. 614, 621 (1998) (vacating plea and remanding for evidentiary hearing in light of case decriminalizing conduct). Thus, this Court "must examine the merits of the petitioner's claim to determine whether the intervening Supreme Court decision has rendered him actually innocent of the charges upon which he was convicted." *Christopher v. Miles*, 342 F.3d 378, 383 (5th Cir. 2003).

II. BACKGROUND

A. THE INDICTMENT

On November 28, 2007, Movant was indicted, along with his father Richard Scruggs, Sidney Backstrom, and Steven Patterson for an alleged bribery scheme to persuade Mississippi State Circuit Judge Henry Lackey to compel the arbitration mandated in a contract between John Jones and Richard Scruggs (and others) if a fee dispute arose between the parties. That contract became the subject of a civil case filed before Judge Lackey, styled *Jones v. Scruggs et al*. Indictment, D.E. 1. The grand jury handed down a six count indictment.

- Count One charged *conspiracy* (18 USC § 371) to commit federal program bribery and to commit honest services fraud. *Id.*, at 2-3.
- Counts Two, Three, and Four charged *federal program bribery* in violation of 18 USC § 666, all three counts being predicated on the assertion that Judge Henry Lackey "was an agent of a subdivision of the judicial branch of the state government of Mississippi, which received benefits in excess of $10,000 … from federal programs." *Id*., at 8-9. The Indictment alleged that the purpose of the bribe was to "influence and reward Henry L. Lackey in connection

with the Third Circuit court case styled *Jones, et al, v. Scruggs, et al*," and thus exclusively alleged business and transactions that were in Judge Lackey's judicial capacity. *Id.*

- Count Five and Six charged *honest services fraud*, in violation of 18 USC §§1343 & 1346, "to defraud and deprive the State of Mississippi of intangible right to the honest services of Judge Henry Lackey, Circuit Court Judge, performed free from deceit, bias, self-dealing, and concealment." *Id.*, at 10, 12 (emphasis added). The Indictment included no allegation that Movant or the other defendants deprived the State of Mississippi or anyone else, of any money or property. *See id*.

Movant retained Anthony Farese as his defense counsel, and pleaded 'not guilty' on November 28, 2007. *See* Minute Entry, D.E. 7. Richard Scruggs retained attorney Joey Langston, and likewise pleaded 'not guilty.' *Id.*

B. THE DELAUGHTER / WILSON MATTER

On December 10, 2007 the Government executed a search warrant on the law offices of Joey Langston, who was then serving as Mr. Scruggs's defense counsel in the federal criminal case involving Judge Lackey. The Government searched Langston's office to obtain evidence regarding an alleged bribery of Circuit Judge Bobby Delaughter in a civil case titled *Wilson v. Scruggs, et al*. On January 7, 2008, after three days of secret negotiations led by Mr. Farese and the prosecutors, Mr. Langston pleaded guilty to criminal conspiracy associated with the DeLaughter/*Wilson* case and, as related by the Government to this Court, agreed to cooperate with the Government by testifying that both Movant and Richard Scruggs had been involved in a scheme to bribe Judge Delaughter. Upon learning of Mr. Farese's concealment of these negotiations and his representation of Langston, Movant immediately fired Mr. Farese. *See*

Motion to Withdraw, D.E. 59. Movant retained new counsel, including the undersigned. *See* D.E. 71 & 171.

Although the Government never charged Movant with any crime in the DeLaughter / *Wilson* case, the Government proposed to introduce testimony from Mr. Langston about the Delaughter / *Wilson* case in Movant's trial in the Lackey / *Jones* case. Movant moved to exclude such testimony as irrelevant to him, prejudicial to him, and in any case unfounded. *See* Motion to Exclude, D.E. 176. In opposition, the Government assured this Court:

> The testimony at trial from Mr. Langston would be brief, about what you've heard from me this morning. That testimony would also implicate Zach Scruggs. Joey Langston is prepared to testify that Zach Scruggs was fully aware of what was going on in the *Wilson* case.

Exh. "B", Hearing Tr., 2/21/2008 at 21:15:20. This Court denied Movant's motion to exclude the evidence and explicitly relied on the Government's representation, stating in the Court's Order that "the evidence … implicates defendants Richard Scruggs and Zachary Scruggs." Order, D.E. 134 at 1. Further, the Court held that "the government has revealed that the evidence implicates Zachary Scruggs…" *Id.*, at 2 n.1. *See also id.*, at 3 (similar).[2]

C. THE PLEA TO MISPRISION OF THE FELONY OF HONEST SERVICES FRAUD

Although Movant knew that he had no part in any matter involving Judge Delaughter, Movant (and apparently the Court) had no choice but to take the Government at its word that "Joey Langston is prepared to testify that Zach Scruggs was fully aware of what was going on in the *Wilson* case." **Exh. "B"**, Hearing Tr., 2/21/08 at 21:15:20. As a result, Movant faced the prospect of a trial that included evidence of a bribery in another case altogether. In exchange for dismissal of all charges in his original Indictment, on March 31, 2008, Movant pleaded

[2] Movant also moved to sever his trial from that of his father, Richard Scruggs. *See* Motion to Sever, D.E. 87. In its opinion denying the motion, this Court again relied on the Government's misrepresentations. The Court wrote that, "The government has stated, however, that this [404(b)] evidence implicates Zach Scruggs[.]" Order, D.E. 132 at 4.

guilty to misprision of a felony, in accordance with a plea agreement that the Court accepted on that day. *See* Plea Agreement, D.E.189. As the underlying offense, the Information alleged only a violation of the honest services statute. The Information did not charge any facts regarding any attempt to bribe Judge Lackey. *See* Information, D.E. 188. Rather, as part of his plea, Movant admitted that he knew about and failed to report Tim Balducci's attempt improperly to use his personal relationship to influence Judge Lackey (earwigging), a purported violation of the federal honest services fraud statute. Specifically:

> David Zachary Scruggs, defendant herein, had knowledge of the actual commission of a felony cognizable by a court of the United States and concealed and did not as soon as possible make known to a judge or other person in civil or military authority under the United States, in violation of 18 USC § 4. Specifically …, [Zachary Scruggs attended a] meeting [where] it was decided that because of his close relationship with Judge Lackey, Tim Balducci would speak to the judge in an ex parte manner and ask him to rule in favor of the defendants. … Shortly thereafter Balducci met with Judge Lackey and discussed the *Jones v. Scruggs* lawsuit. … [O]n October 18, Judge Lackey gave Balducci a signed order ruling in favor of the defendants [on a motion to compel arbitration]. … [Zachary Scruggs] was aware that Judge Lackey's ruling was based, in part, on something other than the merits of the lawsuit; that is, Balducci's personal relationship with Judge Lackey. Scruggs was also aware that such an act deprived the State of Mississippi of its intangible right to the honest services of Judge Henry Lackey, performed free from deceit, bias, self-dealing, and concealment.

Factual Basis, D.E. 190 at 1-3 (emphasis added). Like the original Indictment, and the superseding Information, this Factual Basis disclosed no money or property fraud. *See id*. Nor did the Information or Factual Basis disclose any bribery. For this reason, the Court stated:

> He's not being sentenced for conspiracy to bribe a judge. … He hasn't pled guilty to being part of the bribery. And he's not being sentenced for part of the bribery. … And as far as the law is concerned, I'm going to base the sentence on that.

Exh. "A", Sentencing Hearing Tr., 7/2/08 at 7-9.

Rejecting the Government's recommendation that Movant serve a probated sentence, the Court sentenced him to 14 months imprisonment, supervised release of one year, a fine of $250,000, and a special assessment of $100. *See* Judgment, D.E. 236. As a result of that plea,

Movant lost his law license, paid the economic sanctions, and fully served his time of imprisonment. Movant remains under supervised release.

III. NEW DEVELOPMENTS

In the two years since Movant pleaded guilty, the legal and factual landscape has altered fundamentally. First, the United States Supreme Court struck down the application of the honest services fraud statute to all cases except those where the Government can prove that the defendant participated in a scheme of bribery or kickbacks. Additionally, David Sanders, formerly an Assistant United States Attorney (AUSA) assigned specifically to Movant's prosecution, and Mr. Langston have filed sworn affidavits stating that, contrary to the Government's February 21, 2008 representation to the Court (which the Court relied upon in three orders), Mr. Langston would *not* have implicated Movant in the Delaughter/*Wilson* matter after all. And, Tom Dawson, the lead prosecutor, has self-published a tell-all book revealing the inner workings of the Government's prosecution, including their secret negotiations with Movant's then-counsel, Mr. Farese, to procure a witness to testify against Movant. On top of all this, the Fifth Circuit has eviscerated the Federal programs bribery statute, and the Mississippi Supreme Court has declared that Judge Lackey should have compelled arbitration from the start.

A. SKILLING V. UNITED STATES

On June 24, 2010, in *Skilling v. U.S.*, the United States Supreme Court held that the honest services statute, 18 USC § 1346, proscribes only bribery and kickback schemes. Broader applications of that statute are unconstitutionally vague and violate due process.

The Government successfully prosecuted former Enron CEO Jeffery Skilling for conspiracy to commit multiple counts of honest services fraud. These convictions were based on the manipulation of Enron stock prices, along with various securities fraud counts. *Skilling* held:

> In proscribing fraudulent deprivations of "the intangible right of honest services," §1346, Congress intended at least to reach schemes to defraud involving bribes and kickbacks. Construing the honest-services statute to extend beyond that core meaning, we conclude, would encounter a vagueness shoal. We therefore hold that §1346 covers only bribery and kickback schemes.

Skilling, __ S.Ct. __, Slip Op., at 1-2 (emphasis added). Because the government had conceded that it had no evidence of any bribery or kickback scheme, the Supreme Court vacated Mr. Skilling's conviction for conspiracy to commit honest services fraud. *Id.*, at 49-50. The Court was unanimous in its disposition of the case, and Justices Scalia, Thomas, and Kennedy would have gone further to strike down the law altogether as unconstitutionally vague.[3]

As this Court acknowledged, Movant was convicted of failing to report earwigging. Earwigging is not bribery or kickback. *See* **Exh. "A"**, Sentencing Hearing Tr., 7/2/08 at 7-9 ("He hasn't pled guilty to being part of the bribery.") Thus, in the light of *Skilling*, when Movant pleaded guilty to misprision of a felony, he pleaded guilty to a non-crime.

It is true that during the sentencing hearing, this Court said: "The evidence in this case shows that you were fully aware of this corruption – attempted corruption of Judge Lackey. … [W]hether it was for money or whatever else is really immaterial; it was a corrupt order." *Id*., at 7:23-24. Though this Court could not have known of the outcome in *Skilling*, it is now a legal certainty that only an attempt to corrupt Judge Lackey for money violates the honest services statute. The "or whatever else," which is apparently a reference to an attempt to influence Judge Lackey by earwigging, is not a violation of that statute. Thus, it is quite material that Movant knew nothing about any scheme to bribe Judge Lackey, because only such knowledge would

[3] The Supreme Court also vacated the convictions of two other defendants whose cases had reached the Supreme Court on certiorari. *See id.*, at 11 n9 (referencing *Black v. U.S.*, No. 08–876 and *Weyhrauch v. U.S.*, No. 08–1196). In light of the *Skilling* decision, a few days later the Supreme Court also vacated and remanded the convictions of former Alabama Governor Don Siegelman and former CEO of HealthSouth Richard Scrushy. *Siegelman v. U.S.*, --- S.Ct. ----, 2010 WL 2571880 (Mem) (2010).

implicate the honest services fraud statute. And, as will be shown below, no evidence supports the conclusion that Movant knew about any scheme to bribe Judge Lackey.

B. THE SANDERS AND LANGSTON AFFIDAVITS

In December 2009, lead prosecutor Tom Dawson disclosed that while Mr. Farese was representing Movant, the Government worked closely with Mr. Farese to negotiate a plea for Mr. Langston in the Delaughter/*Wilson* case, which included cooperation adverse to Movant in the Lackey/*Jones* case. *See* **Exh. "C"**, Kings of Tort (2009) at 181-192. The book also shows that the Government understood that Mr. Langston's own jeopardy in Delaughter/*Wilson* created a conflict with Mr. Langston representing Richard Scruggs in Lackey/*Jones*, and of course the Government knew of Mr. Farese's similar problem of dual representation. *Id*., at 181. Still, the Government did not disclose the conflict to the Movant or the Court, but instead worked with Movant's counsel, Mr. Farese, to procure cooperation and testimony that the prosecutors later represented to this Court qualified for 404(b) treatment as to Movant. Only after the plea deal for Mr. Langston was done did Mr. Farese then persuade Movant to sign a waiver of "potential" conflicts of interest on January 7 (*see* D.E. 65), but still did so without disclosing this plea deal or the predicate facts of his prior and ongoing representation of Langston in the *Wilson* matter.

On the basis of Mr. Dawson's revelations, in March 2010, Movant filed a bar complaint against Mr. Farese. In May 2010, Mr. Farese filed a response to the bar complaint, and Mr. Farese attached several affidavits from Mr. Langston and the prosecutors which generally attempted to show that Mr. Langston's interests (and thus Mr. Farese's duties) were never actually adverse to those of Movant. Most strikingly, former AUSA (now U.S. Magistrate) David Sanders' sworn affidavit directly controverts the Government's 2008 representation to the Court that Mr. Langston's "testimony would also implicate Zach Scruggs" in the

Delaughter/*Wilson* matter. **Exh. "B"**, Motion Hearing Tr., 2/21/2008 at 21:15:20. Judge Sanders swears as follows:

> Joey Langston provided us with a great deal of information, but he always maintained Zach Scruggs was uninvolved in the *Wilson* matter. At no time did either Joey Langston or Tony Farese ever say anything to me that would have implicated Zach in the *Wilson* matter.

Exh. "D", Sanders Aff., 4/26/2010 at 3 (emphasis added). The prosecutors also make it clear that Movant "was not a target in *Wilson v. Scruggs*." **Exh. "E"**, Norman Aff., 4/26/10 at 4 ¶6.

Corroborating Judge Sanders, Joey Langston also submitted a sworn affidavit stating:

> [M]y statements and testimony exonerated Zach Scruggs in Scruggs II. … **All** of my statements regarding Zach were **exculpatory**. I had no knowledge of his involvement in *Wilson v. Scruggs*. … [A]s far as I knew, Zach was unaware of any criminal activity in that case. … I pled and agreed to give truthful testimony, which, as to Zach Scruggs, was that as far as I knew he had no involvement in *Wilson v. Scruggs.*

Exh. "F", Langston Aff., 4/27/10 at 5 (emphasis added). Notably, Mr. Langston's affidavit confirms that he never implicated Movant as being *involved in* much less *aware* of criminal activity. He affirmatively exculpates Movant. In a sworn deposition, Mr. Balducci has also exculpated Movant. *See* **Exh. "G"**, Balducci Depo. in *Eaton v. Frisby*, 6/10/09 at 135:12-136:3.

Likewise, Tony Farese, who represented Mr. Langston throughout his plea negotiations and subsequent cooperation with the Government, wrote that,

> Joey Langston consistently took the position that he had no information that Zach Scruggs was involved in the *Wilson v. Scruggs* bribery of Judge DeLaughter. Langston **never implicated** Zach Scruggs in that bribe; he stated only that Zach knew that Ed Peters had been hired because of his close relationship with Judge DeLaughter, but was unaware of any criminal activity.

Exh. "H", Farese Response to Bar Complaint, May 12, 2010 at 21 (emphasis added).

The Government's inaccurate assurances to the Court caused the Court to err in its 404(b) ruling, and Mr. Dawsons' book makes it clear that the Court's 404(b) ruling was an "overwhelming force" that effectively "compelled" Movant to plead guilty to avoid a trial on

such heinous testimony (for which there was no evidentiary basis according to Judge Sanders and Joey Langston). **Exh. "C"**, Kings of Tort at 161. The Government later informed the Court that Mr. Langston's proposed adverse testimony against Movant constituted the "turning point in the case" and "substantially contributed …to the plea of …Zach Scruggs." **Exh. "I"**, Government's 11/12/08 Motion for Downward Departure for Joey Langston. It now turns out that the representation was not accurate, and the prejudice to Movant is undeniable.

C. WHITFIELD V. UNITED STATES

On December 11, 2009, the Fifth Circuit decided *Whitfield v. U.S.*, a case involving Paul Minor's alleged bribery of Mississippi state judges John Whitfield and Walter Teel. 590 F.3d 325, (5th Cir., 2009). Like Movant, Mr. Minor was indicted for federal programs bribery under 18 USC § 666 on the factual allegation that the Administrative Office of the Courts ("AOC") received money from the federal government, making the state court judges "agents" whose alleged bribery thus affected a federal grant. To the contrary, the Fifth Circuit held that,

> Whitfield's and Teel's role as presiding judges … had no "connection with any business, transaction, or series of transactions" of the AOC. See 18 U.S.C. § 666(a)(1)(B), (2). Therefore, by its own plain language, section 666 applies neither to Whitfield's and Teel's acceptance of bribes nor to Minor's offering of bribes in connection with those cases. … As such, we hold that the district court committed plain error when it denied appellants' Rule 29 motions for judgment of acquittal on the section 666 counts of the indictment.

590 F.3d at 347. Likewise here, since Judge Lackey's order compelling arbitration in *Jones* "had no connection with any business, transaction, or series of transactions of the AOC," Movant was charged with something that was simply not a Federal crime. He is actually innocent.

D. BARRETT V. JONES

After the Indictment in this criminal case, the *Jones v. Scruggs* civil case was transferred to a new state court judge, William F. Coleman. Judge Coleman recognized that Judge Lackey

should have entered an order compelling arbitration, but Judge Coleman nonetheless sought to sanction the civil defendants with a default judgment. When the Mississippi Supreme Court heard the case (after the Scruggs Law Firm settled), it affirmed that the case should have been arbitrated, overturned the sanctions as to the remaining defendants, and held that "we remand this case for the entry of an order compelling arbitration." *Barrett v. Jones, Funderburg, Sessums, Peterson & Lee, LLC*, 27 So.3d 363, 376 (Miss. 2009). This is precisely what the Scruggs Law Firm sought from Judge Lackey all along – nothing more.

IV. MOVANT IS ACTUALLY INNOCENT OF THE CRIME TO WHICH HE PLEADED GUILTY.

A. LEGAL STANDARD

When the Supreme Court strikes down or narrows the reach of a criminal statute, such that it no longer touches a defendant's conduct, justice requires that the conviction be set aside. *See e.g., Gobert*, 139 F.3d at 438. This is true even for cases involving guilty pleas. As the Fifth Circuit has explained:

> At the core of our jurisprudence on this subject is a recognition that the guilty plea [is] perhaps the supreme instance of waiver known to our system of justice, one by which all of its trial rights and safeguards are voluntarily foregone, and the defendant deliberately submits to conviction. …Simply put, to convict someone of a crime on the basis of conduct that does not constitute the crime offends the basic notions of justice and fair play embodied in the Constitution.

U.S. v. Briggs, 939 F.2d 222, 227-228 (5th Cir.1991) (notes, quotations, and citations omitted). *Briggs* vacated a district court's order dismissing the defendant's §2255 petition and remanded the case for an evidentiary hearing. *Id.*

B. THE MISPRISION OF HONEST SERVICES FRAUD COUNT IN THE INFORMATION

There can be no doubt that Movant is actually innocent of the misprision of felony charge leveled against him in the Information. According to the Supreme Court, Federal law does not

provide a general anti-corruption statute that reaches every denial of the right to honest services. Rather, the law proscribes bribery and kickback schemes. *Skilling*, __ S.Ct. __ (2010). There has never been an allegation of a kickback scheme, so bribery is all that could be at stake here.

Again, Movant pleaded guilty to failing to report Mr. Balducci's earwigging of Judge Lackey – not bribery, but earwigging. *See* Factual Basis, D.E. 190 at 2-3 (Movant "was aware that Judge Lackey's ruling was based, in part, on something other than the merits of the lawsuit; that is, Balducci's personal relationship with Judge Lackey."). This Court expressly acknowledged as much when it accepted the plea. *See* **Exh. "A"**, Sentencing Hearing Tr., July 2, 2008 at 7-9 ("He's not being sentenced for conspiracy to bribe a judge…"). *See U.S. v. Davila*, 698 F.2d 715, 717 (5th Cir., 1983) (holding that when a court accepts a guilty plea it is making "a factual finding" regarding the factual basis of the plea) (citations omitted). On its face, the misprision statute, 18 USC §4, is limited to failing to report felonies "cognizable by courts of the United States." After *Skilling*, Balducci's earwigging of Judge Lackey is not a felony "cognizable by courts of the United States." Movant is actually innocent.

V. MOVANT IS ACTUALLY INNOCENT OF THE CRIMES THAT THE GOVERNMENT FOREWENT IN THE PLEA AGREEMENT.

A. LEGAL STANDARD

To secure relief under §2255, Movant must show that he is actually innocent of not only the misprision charge to which he pleaded guilty, but also all the other charges in the Indictment. *Bousley*, 523 U.S. at 624. On the other hand, the prosecutors are limited to the allegations in that Indictment. "The very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge." *Stirone v. U. S.*, 361 U.S. 212, 218 (1960). *See also Marcello*,

876 at 1152 ("[T]he court may not retrospectively redraft an indictment to support a conviction on facts or theories upon which the defendant was not charged, tried, and convicted.").

The Fifth Circuit has set forth an actual innocence test, based on Supreme Court precedent: "To 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.'" *U.S. v. Jones*, 172 F.3d 381, 384 (5th Cir. 1999) (remanding for an evidentiary hearing). Reasonable jurors would, of course, presume that Movant is innocent and hold the Government to proving its case beyond a reasonable doubt. "The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." *Coffin v. U.S.*, 156 U.S. 432, 453 (1895). *See also Taylor v. Kentucky*, 436 U.S. 478 (1978) (trial court's failure to give instruction on presumption of innocence resulted in violation of defendant's right to fair trial.)[4]

B. THE HONEST SERVICES FRAUD (BRIBERY) COUNTS IN THE INDICTMENT

The original (now dismissed) Indictment charged wire fraud on an honest services theory, predicated upon an alleged bribe of Judge Lackey, and charged Movant with conspiring to do the same. *Indictment*, D.E. 1 at 10-12. *Skilling* does not bar these charges as a matter of law; thus, the only remaining question for this Motion is whether there is sufficient evidence for those honest services fraud charges.[5] As a matter of fact, there is no evidence that Movant had

[4] The burden of proof should remain upon the Government, which has never proven its case. The fact that the Government compelled Movant to plead guilty to a non-crime, on the basis of a threatened 30-years imprisonment for another non-crime, with inaccurate representations about 404(b) testimony, should not shift the burden of proof. As the *Briggs* court says that Movant's plea was "not voluntary" and that it "offends the basic notions of justice and fair play embodied in the Constitution," (939 F.2d at 228) then how could such a conviction create a presumption of guilt? Instead, it is Movant's burden to show that he is actually innocent of the charge to which he pleaded guilty, at which point the burden shifts back to the Government. Still, Movant herein proves his own innocence of all charges.

[5] Movant was also originally charged with Federal programs bribery. *See* Indictment, D.E. 1 at 8-9. Movant asked the Court to dismiss the charges filed against him under §666, since the *Jones* case had no connection to any business of an agency that received Federal funds -- arguments ultimately adopted by the Fifth Circuit in

knowledge of, much less involvement in, any scheme to bribe Judge Lackey. If the prosecutors oppose this Petition, Movant requests an evidentiary hearing to prove his innocence.

As a threshold question, the Government must prove that the wires were used "in interstate commerce" specifically "in furtherance" of a scheme to defraud. *U.S. v. Izydore*, 167 F.3d 213, 218 (5th Cir.,1999) (reversing wire fraud convictions where evidence was lacking as to interstate nature of the phone calls, given that the interstate transmission requirement "is an immutable requirement" based in the Constitution). Since the Indictment alleges that there were only two emails, neither of which were interstate and neither of which discussed a bribe, the Government simply cannot establish this jurisdictional prerequisite.[6]

Even if the wires were used in interstate commerce, *Skilling* holds that in this honest services case, the Government must then prove that the emails were in furtherance of a scheme to defraud consisting of bribery (or kickback, which it has never alleged). A scheme to defraud must have a specific intent to harm the victim (or wrongly benefit the perpetrator), and the crime of bribery requires proof beyond a reasonable doubt that one used a payment of a thing of value, with the specific "corrupt" intent to "influence" the decision of an official. *U.S. v. Powers*, 168 F.3d 741, 746 (5th Cir., 1999); 18 USC §201(b).

Whitfield. See Motion, D.E. 95. This Court rejected those arguments. *See* Order Denying Motion to Dismiss, D.E. 133. It is now clear that this Court's ruling was "plain error" and that Movant is actually innocent of those charges. *See* Part III.C *supra* (discussing *Whitfield*, 590 F.3d at 347). The Indictment also charged principal-agent liability in violation of 18 USC § 2, for the purposes of committing federal program bribery and honest services fraud. *See* Indictment at 8, 9, 11, & 13. These secondary crimes are nullities when there are no predicate federal crimes. *See e.g., Skilling*, Slip Op., at 49-50 (vacating conspiracy conviction where honest services fraud was predicate crime).

[6] The Government alleges that there was a May 2007 email and another in November 2007, both from Oxford, Mississippi to New Albany, Mississippi. D.E. 1. at 11-13. *U.S. v. Moody*, 903 F.2d 321, 332 (5th Cir., 1990) ("[T]he government [has the] burden to demonstrate to the jury the use of … interstate wire communications beyond a reasonable doubt. [Ambiguous testimony about business practices does not suffice.] Absent … probative evidence …a jury cannot reasonably overcome the presumption of innocence."). *See also Circuit City Stores v. Adams*, 532 U.S. 105, 115 (2001) (holding that federal statutes like §1343 that require movement "in interstate commerce" have a more limited reach than those that apply to behaviors that may "affect" interstate commerce). Thus, this Court has no jurisdiction over alleged wire fraud consisting of intrastate emails.

For five reasons, those elements cannot be met here. First, even in 2008 when the prosecutors could hold a 404(b) allegation about a completely different case and a then-viable §666 charge over Movant's head, the Government agreed to plead to misprision of earwigging, recommending absolutely no prison time. Given the strict Department of Justice policies against "fact bargaining" this concession is revealing. Second, following the revelations contained in the Langston and Sanders affidavits, there is now no 404(b) evidence about a bribe of Judge Delaughter involving Movant. Third, the Mississippi Supreme Court has ruled definitively that the purpose of Balducci's earwigging – to obtain an order from Judge Lackey to send the *Jones v. Scruggs* dispute to arbitration – was what the law required. Thus there is no specific intent for fraud or bribery, since there was no need for "influence" and no "corrupt" purpose. It is undisputed that there was no attempt to use money to get the Judge to do what he otherwise should not do. Fourth, the totality of the evidence compiled in the Pre-Sentencing Report does not support the notion that Movant actually had knowledge of or participation in bribery. Fifth, this Honorable Court's own assessment of this case at the 2008 sentencing recognized that the plea did not involve bribery, and putting speculations aside, there is no evidence to the contrary.

1. The 2008 View of Their Case, Now Substantially Incorrect

As it approaches the evidence in this case, this Court should recall the Government's own assessment of the case in 2008, when it agreed to dismiss all the bribery charges against Movant in exchange for a recommendation that Movant serve a probated sentence, with absolutely no prison time. *See* Plea Agreement, D.E. 189. After several months litigating this case, the

Government eventually recognized that the proof favoring Movant's involvement in any bribery was wanting.[7]

To make this concession clear, the prosecutors stated on the record that their decision to dismiss the bribery charges reflected the Government's honest assessment of the case: "**after being fully advised of all the facts and circumstances** of the defendant's involvement, the Government will recommend a probated sentence" for misprision of earwigging. **Exh. "X"**, Hearing Tr. 3/21/2008 at 8 (Mr. Sanders). The Government drafted the Factual Basis and read it into the record, and in doing so disclosed absolutely no allegations that Movant was involved with bribery. *Id.*, at 11-13; Factual Basis, D.E. 190. In his colloquy with this Court under oath, Movant expressly asserted that he lacked any knowledge of bribery, and on this point the prosecutors stated no disagreement. **Exh. "X",** Hearing Tr. 3/21/2008 at 15. The Court recognized, "of course, this is quite a difference of charges from six felony counts involving conspiracy and related counts down to one count of misprision of felony." *Id.* at 14. At sentencing, Movant's attorney reiterated that Movant had no involvement with bribery, and the prosecutors reiterated that the Government's decision to dismiss the bribery charges was "**based on all the facts and circumstances**," which made mere probation appropriate. **Exh. "A",** Hearing Tr. at 5 (Mr. Dawson).

If the Government now opposes this Motion by alleging that it can prove bribery, the Court must then ask whether all that they said in 2008 was simply a ruse? At the very *least*, the Court should take those Government concessions as deeply undermining the credibility of any contrary representation the Government might now make in order to attempt to resuscitate this case. Indeed the Government should be altogether estopped from now "playing fast and loose"

[7] Nonetheless, Movant faced up to 75 years in prison if convicted at trial. *See* Pre-Sentencing Report at 16. Thus, even if he had only a 5% chance of losing at trial, it was rational for him to agree to a plea deal in which prosecutors agreed to no prison time on a crime (misprision) that had a maximum of three years.

with the court saying that "all the facts and circumstances" actually supported a bribery conviction instead. *U.S. v. McCaskey*, 9 F.3d 368, 378 (5th Cir., 1993) ("we believe that the underlying purposes of the [judicial estoppels] doctrine are the same in both civil and criminal litigation--to protect the integrity of the judicial process and to prevent unfair and manipulative use of the court system by litigants").

Further, if the prosecutors oppose this Motion, they would have to ignore not only their prior representations to this Court but also the mandates of the U.S. Attorney General and the policies of the U.S. Department of Justice ("DOJ"). As a matter of black-letter policy, the prosecutors were strictly prohibited from agreeing to a misprision of felony charge involving earwigging if they could have instead proven that Movant was involved in a bribery. The Attorney General commands:

> It is the policy of the Department of Justice that, in all federal criminal cases, federal prosecutors **must charge and pursue the most serious, readily provable offense or offenses that are supported by the facts of the case** … Once filed, the most serious readily provable charges **may not be dismissed** [except under limited conditions involving cooperation, etc] … Department of Justice policy requires **honesty in sentencing**, both with respect to the **facts** and the law: Any sentencing recommendation made by the United States in a particular case **must honestly reflect the totality and seriousness of the defendant's conduct** and must be fully consistent with the Guidelines and applicable statutes and with the **readily provable facts about the defendant's history and conduct**. …Likewise, federal **prosecutors may not "fact bargain,"** or be party to any plea agreement that results in the sentencing court having less than a full understanding of all readily provable facts relevant to sentencing.

Policy Memo. of the Attorney General, 9/22/2003 (emphasis added).[8] A plea to misprision and a sentencing recommendation of mere probation simply does not reflect the seriousness of a scheme to commit bribery. Instead, in 2008, the prosecutors understood that the "most serious charge" that was "readily provable" and "supported by the facts of the case" was Movant's failure to report Balducci's earwigging. That has not changed.

[8] Available at http://www.justice.gov/opa/pr/2003/September/03_ag_516.htm.

The U.S. Attorneys Manual sharpens this point, explaining that:

> Plea agreements should honestly reflect the **totality and seriousness of the defendant's conduct** … The Department's policy is to stipulate **only to facts that accurately represent the defendant's conduct**. … If a prosecution is to be concluded pursuant to a plea agreement, the defendant should be required to plead to a charge or charges: (1) That is the **most serious readily provable charge consistent with the nature and extent of his/her criminal conduct**… The charge or charges to which a defendant pleads guilty should be consistent with the defendant's criminal conduct, both in nature and in scope. … **In regard to the seriousness of the offense, the guilty plea should assure that the public record of conviction provides an adequate indication of the defendant's conduct.** … In addition, the Department's policy is only to stipulate to facts that accurately represent the defendant's conduct. If a prosecutor wishes to support a departure from the guidelines, he or she should candidly do so and not stipulate to facts that are untrue. **Stipulations to untrue facts are unethical.**

U.S. Attorneys Manual at 9-16.300, 9-27.430 (emphasis added). The prosecutors complied with this policy in 2008 -- Movant's plea agreement did in fact "reflect the totality and seriousness" of Movant's conduct. As of 2010, that conduct simply is not a Federal crime.

In short, if prosecutors oppose this Motion, they can only do so by stating that their original plea agreement was in direct violation of DOJ policy, and that the Factual Basis that Mr. Sanders drafted substantially misstated the seriousness of Movant's conduct.

Even if one were to forget the Government's inability to prove bribery in 2008, its case has only gotten dramatically weaker as of now. Not only does *Skilling* require proof of actual involvement in bribery, but now the Government's key 404(b) evidence is also gone; the federal programs bribery charge has been eviscerated by the Fifth Circuit; and the Mississippi Supreme Court has held that Judge Lackey should have simply compelled arbitration in the first place. Just as the Government did in *Reyes-Requena*, the Government should simply concede that "the facts of this case would not be sufficient to sustain a conviction" under the law as now stated by

the Supreme Court and the Fifth Circuit. 243 F.3d at 904 & n. 29. Likewise, in other honest services fraud cases, the Government is conceding that defendants should now go free.[9]

2. The Movant's Lack of Intent in the Government's Manufactured Crime

A finding that Movant had knowledge of a payment of money and corrupt intent is especially unlikely given the way this crime was created by the Government and the Government's concession that Movant originally had no criminal intent. AUSA Norman conceded that:

> We want to be the first to say, there was no mention of money at the March 15th meeting of the Scruggs Law Firm when these three defendants were present with Tim Balducci and Steve Patterson. These defendants wanted to corruptly influence the judge for free.

Exh. "K", Hearing Tr. 2/20/08 at 16:6-10 (emphasis added). *See also* **Exh. "O"**, Curtis Wilkie, The Fall of the House of Zeus (2010) at 337 (reporting that the prosecutors made a similar concession in March 2009 "that the Federal government had come to realize that none of the members of the Scruggs Law Firm had originally set out to bribe Judge Lackey.").[10] Mr.

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[9] *See e.g.*, *Geddings v. U.S.*, , 2010 WL 2639920 (E.D.N.C.,2010) (ordering the release of a man convicted of honest services fraud, where the Government conceded that the law no longer proscribed his conduct).; Dave Janoski, *Toole Will Face 3 Years, Not 23 Under Supreme Court Ruling*, THE CITIZENS VOICE, 8/2/2010, available at http://citizensvoice.com/toole-will-face-3-years-not-23-under-supreme-court-ruling-1.917419 ("Federal prosecutors agree the [*Skilling*] Supreme Court decision means Toole cannot be sentenced for honest services fraud [to which he pled guilty], the defense motion said."); Marc Perrusquia, *John Ford May Get Break On Prison Time*, *The Commercial Appeal*, 8/10/2010, available at http://www.commercialappeal.com/news/2010/aug/10/john-ford-may-get-jail-break/ ("Defendant's honest-services convictions must be vacated in light of the Supreme Court's holding," said a Government brief).

[10] The record supports these concessions. Balducci admits that in the initial March 2007 meeting at the Scruggs Law Firm, in which the defendants decided to allow Balducci to mention to Judge Lackey that he was representing Scruggs in the *Jones* case, there was no discussion of any money nor any crime contemplated. **Exh. "K"**, Balducci Testimony, Hearing Tr. 2/20/08 at 29:24-30:18; 53:4-6. The FBI's interviews with Balducci show him disclosing that at the initial meeting, Richard Scruggs explicitly told Balducci that he did not want him to do anything illegal. *See id*., at 50:12-19 (equivocating on this point); 176:9-177:9 (Agent Delaney confirming that he and another agent heard Balducci so disclose, and that it was reflected in their notes). *See also* **Exh. "L"**, Richard Scruggs Plea Hearing Tr., 3/14/08 at 15:16-16:4 (no initial intent to bribe); **Exh. "M"**, Patterson Plea Hearing Tr. 1/15/08 at 9 (same). Upon his visit to Judge Lackey's chambers, Balducci did not intend to offer a quid pro quo, or intend to do anything illegal. *See* **Exh. "K"**, at 17:5-6, 37:24-25; 58:5-13. He wasn't "there to bribe him." *Id.*, at 54:10-13. Judge Lackey also confirms that Balducci did not mention anything about money during that initial visit. *See* **Exh. "N"**, Lafayette County Circuit Court Hearing Tr. at 61-63.

Norman did not realize it at the time, but after *Skilling*, this concession means that Movant had no intent to commit honest-services fraud.

Judge Lackey recused himself from the case in late May 2007 because he was "frustrated" that Balducci had not tried to bribe him. *See* **Exh. "N",** Lafayette Co. Court Hr. at 72 . The record is clear that Balducci still contemplated no bribe at this point. **Exh. "K"**, at 63:10-17. This fact that no bribery scheme existed in May 2007 alone requires dismissal of Count 5 in the Indictment, which is predicated on a May 4, 2007 email (which the Government insists was sent even though they never found any such email). A wire transmission cannot be in "furtherance" or "for the purpose" of a scheme that does not exist. *See Izydore*, 167 F.3d at 218 ("A wire fraud conviction requires proof of … the use of interstate wire communications in *furtherance* of the scheme.)(emphasis added); *Schmuck v. United States*, 489 U.S. 705, 710-11 (1989) (it must be an "incident to an essential part of the scheme or a step in the plot").

At this point, there was neither an intent to commit a crime, nor even an opportunity to do so. Nonetheless, the Government insisted that Judge Lackey un-recuse himself, not with any intent of actually adjudicating the case according to the law, but only for the purpose of becoming a Government agent to try to develop evidence against his and their main target – Dick Scruggs. *See* **Exh. "N"** at 72-74 (Judge Lackey testifying that he was motivated by his thought Dick Scruggs was a "monster" who had "probably destroyed" lives); *id.*, at 75 (FBI Agent Delaney and AUSA John Hailman "encouraged" him to get back into the case because they wanted to indict Dick Scruggs). *See also* **Exh. "K"**, Testimony of FBI Agent Delaney, at 120:18-22 (explaining Lackey's non-judicial reason for re-inserting himself in the case). Many months passed, and Judge Lackey gave Balducci many more opportunities to display a corrupt intent. *See id.*, at 141:14-142:7 (taking Balducci out to lunch); 143:10-148:5 (calling him

repeatedly); **Exh. "N",** Lackey Testimony at 76-80 (same). But after six months of pursuit, Balducci never took the bait.

Agent Delaney and Judge Lackey realized that they would have to exploit Lackey's personal relationship with Balducci to transform the case from one of earwigging to one of bribery (or extortion), with a direct request for money. *Id.*; **Exh. "K",** Balducci Testimony at 73:19-22. To be sure, until that point, Balducci still had no intention to commit a crime. *Id.*, at 79:12-18. At the instigation of the Government, Judge Lackey initiated the bribe scenario, asking Balducci on September 18, 2007 "if I help them [the Scruggs firm], would they help me?" **Exh. "P"**, 9/18/07 Recording Tr. at 5; **Exh. "N"**, Lackey Testimony at 80 (the Government "encouraged" Lackey to request money). The Judge's comment surprised Balducci. **Exh. "K"**, at 70:7-71:2. Judge Lackey then began "pouring his heart out to" his good friend Balducci with a story about how he was desperate for money and asking Balducci to help him out of the jam. *Id.*, at 72:12-73:25. *see also* **Exh. "P"**, at 7. To further induce Balducci, Judge Lackey even insinuated that he would rule in favor of the opposing party if Balducci did not come up with the money, claiming that Jones's attorney "Grady [Tollison] is putting some pressure ... on me to get this thing done." *Id.*, at 6. When Judge Lackey asked for $40,000 in particular, Balducci agreed to help his friend out of what he thought to be a difficult financial situation, and Judge Lackey then tried to tie the payment to the order compelling arbitration, which the Judge had already agreed that he should enter for free. *See* **Exh. "Q"**, 9/21/2007 Recording Tr. at 10-13.

Through all this, Judge Lackey admits that Balducci never offered him any money for resolving the case favorably to the Scruggs Katrina Group ("SKG"). *See* **Exh. "N,"** at 76-80. Thus, on the undisputed facts, it was the Government, not the defendants, that "repeatedly played the role of inducers," and transformed this case from an incident of earwigging (a non-crime

under *Skilling*) to a demand for money. Order of Dismissal, *U.S. v. Weiner*, Case 2:09-cr-00087-NBB-DAS, D.E.128 (11/09/2009) at 4 (Biggers, J.).[11]

But even then, Movant had absolutely no connection to or knowledge of the Government's bribery scheme. The proof is documentary. While Balducci was unaware that he was on camera, he promised Judge Lackey that Dick Scruggs did not know about any of this and that he would never know of it. Balducci repeatedly made this point: "this is just between you and me…This is just between me and you. …There ain't another soul in the world that knows about this, ok?" **Exh. "R"**, 9/27/2007 Recording Tr. at 8-9. Even when Judge Lackey speculated to the contrary, "I would think Mr. Scruggs would have to know something," Balducci disabused him of the notion. *Id.* Likewise, the wiretaps show Steve Patterson telling Balducci that P.L. Blake, who was supposedly serving as an intermediary for Dick Scruggs, himself did not know of the purpose of the $40,000 that he would later ask Mr. Scruggs to pay to Mr. Balducci. **Exh. "S"**, 9/27/2007 Recording Tr. at 2-3. Of course, Movant was in even less of a position to know about the plot that Judge Lackey and the Government had hatched since Movant had no involvement with the money.

Only when Balducci was arrested and submitted to the Government's compulsion did his story change.[12] The Government thus not only created the crime, they also then wove a larger and larger net, until they caught their pre-chosen prey. But even then, Balducci did not even

[11] In *Weiner*, this Court dismissed a criminal indictment because the government "agents repeatedly played the roles of inducers in the present case. Their actions were nothing less than blatant, though unsuccessful, attempts to manufacture federal jurisdiction." Here the Government not only created the federal crime (bribery), but the Government also created the predicate wire transmission, which purports to create Federal jurisdiction. The November 1 email came into existence only because the Government contrived a $10,000 payment to Judge Lackey and then sent Balducci to try and ensnare others into the bribery scheme that it had invented. As in *Weiner*, this is grounds for dismissal. Now that the prosecutors' misrepresentation about 404(b) evidence is gone and "predisposition" is no longer an issue, an entrapment defense would also be quite viable for Movant Scruggs, if threshold questions of criminal liability could be established (and in any case they cannot).

[12] *See* **Exh. "U"**, Peter Boyer, *The Bribe*, THE NEW YORKER, 5/19/08 at 56 (After catching Balducci on tape paying Judge Lackey, the FBI arrested him and "escorted him to an interrogation room, where Dawson waited. Balducci was told that his life as he knew it was over. 'The only question is, will you see your children graduate from high school?' Dawson said. Balducci did not hesitate. 'What do you want me to do?'")

pursue Movant – walking up to the Scruggs Law Firm wearing a wire, he said that, "I am attempting to make a consensual recording of a conversation between myself and Sid Backstrom at the Scruggs Law Firm and possibly with Richard Scruggs." *See* **Exh. "T"**, 11/1/2007 Recording, D.E. 115-1 at 1. As explained in more detail below, during that November 1 visit, Movant never says a word about any bribe nor does he do anything in furtherance of the Government's conspiracy.

This evidence simply does not meet the burden of showing that Movant had a criminal intent. Facing this impasse, the prosecutors recognized that they needed more, so they invoked Rule of Evidence 404(b) and the Delaughter/*Wilson* case, since it purported to show that Movant had a *modus operandi* of bribing judges. The Government said:

> We spent yesterday hearing that Mr. Scruggs had no criminal intent. I took it as the gist of the motion to dismiss yesterday, that the Government had created some crime, that Mr. Scruggs had no intention of violating the law… And now we stand before you arguing the 404(b) that goes directly to that point.

Exh. "B", at 17:21-18:1. Thus, the Delaughter/*Wilson* allegations – to borrow a colorful phrase from Tom Dawson – "blew a hole" in the Movant's defense in this case. Indeed, that evidence would have been deeply prejudicial with the jurors, who would have assumed Movant was involved in a pattern and practice of bribing judges. Yet, Mr. Langston and Judge Sanders now confirm that the evidence never existed.

3. The Settled Expectation that the Case Would be and Should be Arbitrated

Even if one were to find a generalized criminal intent, one could not find the specific intent required for wire fraud and bribery. It is undisputed that the Scruggs Law Firm never sought anything more from Judge Lackey than an order compelling arbitration, as requested by SKG in its March 2007 Motion to Compel Arbitration and as required by their agreement with Jones. Another independent judge and the Mississippi Supreme Court have now resolved the

motion to compel arbitration in the underlying *Jones* case, holding that Judge Lackey should have simply compelled the case to arbitration from the outset, due to the unambiguous mandate of the Federal Arbitration Act and Mississippi law. *See Barrett*, 27 So.3d at 376. Of course this right to arbitration was settled Mississippi law well before the decision in *Barrett*, a point which Movant, Balducci, the other attorney-defendants, and Judge Lackey knew quite well. *See* **Exh. "J"**, 5/09/07 Recording Tr. at 26 (Judge Lackey on tape responding to Balducci's question about whether the Judge thought the matter "ought to be arbitrated": "It does. It does. It looks, it looks uh, uh, uh, like that's what they agreed to do.").

This legitimate expectation that the case should be arbitrated shows a lack of corrupt motive, an essential element of bribery. 18 USC §201(b) (requiring both "influence" and a "corrupt" motive for bribery). *See also U.S. v Partin*, 552 F2d 621, 642 (5th Cir., 1977), cert den 434 US 903 (because the statute includes the word "'corruptly' … it does not encompass an attempt to influence a witness to testify truthfully.").

Similarly, the wire fraud statute requires that, "the Government must prove that … the defendants intended that some harm result from the fraud." *Powers*, 168 F.3d at 746. Although the Government alleges that unsavory means were employed, the intended outcome would have only been enforcement of the law of Mississippi and the United States. Recognizing this shortcoming of their case, the prosecutors asked Balducci to try to persuade Backstrom to bribe Judge Lackey for a decision on the merits, which would have thereby deprived Jones and the State of Mississippi of its just deserts. *See* **Exh. C**, Kings of Tort (2009) at 165. But, Backstrom refused. *Id.* In the honest services fraud prosecution of *U.S. v. Brown*, the Fifth Circuit reversed a conviction because, while the alleged scheme was secret and unsavory, it did not actually cause the employee to act contrary to the interests of the employer. 459 F.3d 509 (5th, 2006).

Likewise in *U.S. v. McNeive*, the Eighth Circuit reversed an honest services fraud conviction where "there is no evidence that [the public official] deviated from the" law in his decisions in favor of the payor. 536 F.2d 1245, 1252 (8th Cir., 1976). *See also U.S. v. Starr*, 816 F.2d 94, 98 (2nd Cir., 1987) (conviction for wire fraud reversed where customers got received exactly what they were entitled to) (cited approvingly in *U.S. v. Stouffer*, 986 F.2d 916 (5th Cir., 1993).

The "influence" element of bribery is also missing. *Barrett* confirms the fact that the Federal Arbitration Act "leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration …" *Dean, Witter, Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985). Thus, Judge Lackey could have done nothing but compel arbitration. Of course, the idea of corrupt "influence" presumes such discretion to do otherwise. *See U.S. v. Marmolejo*, 89 F.3d 1185, 1195 n.14 (5th Cir., 1996) (holding that payments to jailers for conjugal visits were bribes precisely because jailors had "discretion" to refuse to allow the visits, based on jail policies); *U.S. v. Campbell*, 684 F.2d 141, 148 (D.C. Cir., 1982) ("Payments to a public official for acts that would have been performed in any event … are probably illegal gratuities [which are not federal crimes under *Skilling*] rather than bribes."); *See generally, U.S. v. Sun-Diamond Growers of California*,526 U.S. 398, 404-405 (1999) (distinguishing bribes from gratuities).

The Supreme Court's decision in *Barrett* also shapes the story of this case more generally, highlighting the fact that in creating any crime, the Government's role was exponentially more active than the role of Movant. Indeed, for more than six months, the Government took over the *Jones* case, obstructing the normal course it would have taken towards arbitration, and instead used Judge Lackey to create a Federal crime. At the very least, *Barrett*

shows that Movant had nothing to gain and no motive existed to bribe a judge to do what the law required, and which the state Supreme Court would force the judge to do if he refused.

4. Movant's Lack of Knowledge or Participation Reflected in the PSR

Even if one were to suppose that Movant had a generalized criminal intent, and even if one supposed that the Government could prove the specific intent required for fraud and bribery, there simply are no facts to show that Movant knew about any bribe or did anything in furtherance thereof. On this point, the Pre-Sentencing Report ("PSR") is perhaps the best summary of the Government's view of its own case. *See* **Exh. "V"**, PSR at 5 ¶11 - 9 ¶34 (filed in original proceeding under seal). Movant is mentioned only a handful of times, and none of these implicate him in bribery. Instead, if anything, they exculpate Movant.

Paragraph 11 alleges that Movant was an attorney, and member of the Scruggs Law Firm. Paragraph 13 alleges that in March 2007, "all of the co-conspirators" met at the Scruggs Law Firm and decided to send Mr. Balducci to "explore the possibility of corruptly influencing the judge." That is the predicate allegation for Movant's pre-*Skilling* honest services fraud plea to earwigging, and does not at all suggest bribery. Paragraph 15 says that Balducci alleged that it was Movant's idea to send Balducci to "have an off-the-record conversation with Judge Lackey about the case and see if [Balducci] could persuade him to rule in our favor" on the arbitration issue. (Brackets in original.) Even if taken as true (rather than being flatly contradicted by every other person at that meeting), the allegation contains no evidence of a bribery scheme involving Movant.[13] Indeed, this allegation actually helps exonerate Movant, since it shows that his intent and understanding were non-criminal. Indeed, the Government concedes that there was no criminal intent at that meeting. *See sources* cited *supra* Part V.B.2. With this non-

[13] In fact, Patterson would testify that *he* voiced the original idea that Mr. Balducci should mention to Judge Lackey that he was joining the case as an attorney for SKG, since Balducci was already planning to talk to Lackey on other business. *See* **Exh. "O",** Wilkie, Fall of House of Zeus at 145-146, 231.

criminal intent settled, subsequent evidence that Movant handled the proposed or amended order is not implicative of bribery or conspiracy thereof.[14]

For eleven paragraphs, the chronology then iterates interactions between Balducci, Lackey, Backstrom, and Richard Scruggs through March, April, May, June, July, August, and September, culminating in the exchange of money. There is no mention of Movant having any knowledge or involvement. Then Paragraph 26 alleges that on October 18, after receiving from Judge Lackey the signed order compelling arbitration, at the request of Richard Scruggs, Mr. Balducci came to the Scruggs Law Firm and happened to find Movant in the building working late. Mr. Balducci "delivered the order to Zach Scruggs," but the PSR does not even allege that Movant *did* anything nor that there was any discussion of, handling of, or knowledge of a bribe. Instead, Paragraph 25 clarifies that Richard Scruggs instructed Mr. Balducci to pick up a "package" (consisting of a check and documentation), not from Movant but instead from Richard Scruggs's own desk. These two paragraphs actually exonerate Movant, showing that even though he received the order, he was alienated from any monies paid to Balducci, which were instead concealed in a package on someone else's desk. If Movant had been involved in the bribery, he presumably would have simply handed the package to Mr. Balducci.

Paragraph 27 alleges that after delivering more money to Judge Lackey on November 1, Balducci was arrested and "confessed to conspiring with Scruggs, Zach Scruggs, Backstrom, and Patterson to bribe Judge Lackey." Even if it were an accurate reflection of Mr. Balducci's confession (and was not flatly contradicted by Balducci's own words on the wire that he intended to see Backstrom "and perhaps Richard Scruggs"), this statement provides no specific

[14] *See U.S. v. Guerrero*, 650 F.2d 728, 734 (5th Cir., 1981) (the fact that the patient was "an underweight young woman with low blood pressure, complaining of stress, nervousness, and a chronic backache" provided a legal purpose for prescribing the drugs, regardless of whether she was actually abusing them secretly).

evidence that Movant was aware of, much less participated in the bribery scheme. As incriminating evidence, this Paragraph is without force.

Paragraph 28 states that on November 1, "working under the direction of government agents, Balducci wore a body recorder and discussed the amended order with Zach Scruggs and Backstrom. During the discussions, Balducci stated, 'We paid for this ruling; let's be sure it says what we want it to say.'"[15] As will be explained, the tape reveals that Movant did not hear those words at all – he was leaving the room. However, this point must be set aside momentarily as a discussion of the Government's burden if Movant did hear those words must come first.

Taken out of context and without the benefit of the actual recording, this ambiguous comment could be made to appear damning. However it must be remembered that this was not a natural conversation, but one in which Mr. Balducci was working as a government agent with the express goal of implicating Mr. Backstrom (and later Richard Scruggs), while using coded language to avoid raising their suspicions. To be sure, Movant did not make this statement. Indeed, the recording discloses not a peep from Movant affirming, condoning, or even acknowledging any decision to provide money to Judge Lackey. Thus, *Balducci*'s statement alone does not show that *Movant* joined in any conspiracy to bribe Judge Lackey. As the Fifth Circuit has held, "we will not lightly infer a defendant's knowledge and acquiescence in a conspiracy. … The government must show beyond a reasonable doubt that the defendant had the

[15] The actual transcript and especially the recording itself show a different, muttered statement: "Get it how you want it 'cause we're payin' for it to get it done right." **Exh. "T"**, Recording Tr. at 30. Notably, the mere words "payin' for it" do not say anything about who is paying what to whom. It is also notable that on this point, Balducci perjured himself in his grand jury testimony, which led to Movant's indictment. Rather than reporting these ambiguous statements to the jury (and rather than the prosecutors simply playing the tapes so the grand jury could decide for itself), Balducci instead testified that at the November 1 meeting, he told Movant and Backstrom explicitly that "the judge was still inclined to do it, but that the judge wanted now an additional $10,000 to do it because he felt a little exposed on the facts now…" *See* Def. Mot. to Dismiss, D.E. 140 at 4 (quoting grand jury testimony) and Def. Reply on Mot. to Dismiss, D.E. 147 at 3. That is the *quid pro quo* that is missing from the real recorded conversation. Balducci also testified that Movant responded, "it was not a problem," when in fact Movant said nothing (because he had already left the room), and thus never joined Balducci's conspiracy. *Id.* Balducci and the prosecutors apparently understood that they could not get an indictment, much less a conviction, if the jury knew that Balducci was in fact speaking in muttered code and that Movant never said anything to join the conspiracy.

deliberate, knowing, and specific intent to join the conspiracy." *U.S. v. Jackson*, 700 F.2d 181 (5th Cir., 1983); *see Cacace v. U.S.*, 590 F.2d 1339, 1340 n1 (5th Cir., 1979) (in non-drug cases, the conspiracy law is even more onerous, requiring specific overt acts in furtherance of the conspiracy). Thus, the fact that Mr. Balducci muttered these four words does not show that Movant joined a bribery conspiracy.

The foregoing has assumed that Movant at least heard those words, "we're payin' for it." Even if the statement had strong probative value, the actual recording shows that Movant did not hear those words. Rather, Balducci uttered them after Movant was distracted by an assistant notifying him of a phone call, and while Movant was exiting the room to take the call. *See* **Exh. "T",** 11/1/2007 Recording, D.E. 115-1 at 29-30. This is even clearer on the recording than in the transcript where Balducci lowers his voice to a secretive level, and changes from talking in the plural "y'all" (referring to Backstrom and Movant), to merely "you" (referring to Backstrom alone). *Id.* If an evidentiary hearing on this Motion is necessary, Movant will provide further expert and eyewitness testimony showing that he did not hear this statement. To be sure, Backstrom's statements to the prosecutors after he pleaded guilty have confirmed that Movant was not implicated in this conversation, a point that this Court has recognized. *See* **Exh. "W"**, Backstrom Sentencing Tr., 6/27/08 at 11:1-5.

Paragraphs 29, 30, and 31 involve further interactions between Balducci, Backstrom, and Richard Scruggs, but do not mention Movant. Paragraph 32 provides the Probation Officer's summary of the case, and does not mention Movant by name. Paragraph 33 focuses on allegations that Richard Scruggs made false documents to cover up the crimes, and that Richard Scruggs "then and there knew he was reimbursing Balducci for the $40,000 cash bribes." There is not even an allegation that Movant had such knowledge.

Paragraph 34 (incorrectly) alleges that had the "conspirators been successful in their bribery scheme, Scruggs and Scruggs Law Firm would have benefitted by removing their exposure to a $5.3 million loss." This paragraph suggests that Movant may have had at least an attenuated motive to bribe Judge Lackey (to the extent that he was a 10% owner in the Scruggs Firm). However, the factual predicate is undisputedly false. In fact, a successful bribe would have only led to an order compelling arbitration, which is precisely what Jones, SKG, and the Scruggs Law Firm were entitled to, and which would not have changed his substantive legal claims against the Scruggs Law Firm or SKG.

In sum, at no point does the PSR allege that Movant did any act to join a conspiracy to bribe Judge Lackey, nor did anything in furtherance of such a conspiracy. It fails to allege that Movant knew anything about an amount involved either. Really, at most, this case hangs on a few words muttered by Balducci while Movant was clearly leaving the room to answer a phone call. As noted in Roger W. Shy, CREATING LANGUAGE CRIMES: HOW LAW ENFORCEMENT USES (AND MISUSES) LANGUAGE, Oxford U. Press (2005) 25, this is a technique employed to misuse recorded conversations made by an informant (who is "buying" mercy from the Government with his cooperation) with an unsuspecting target. "A variation of [the strategy of shielding targets from important information] takes place when the person wearing the mike utters the inculpatory statements after they notice that the target has moved to another physical location in the area." The bare record cannot support a Federal conspiracy felony.

5. The Court's Misapprehensions about the Case

To be sure, when they concluded this case the Movant and the Government agreed that there was no involvement in bribery. The only mention of Movant's supposed knowledge of a bribery scheme was by this Court: "it's kind of a stretch of credulity to believe that Backstrom

never mentioned that money was being sent down to Judge Lackey." **Exh. "A",** Sentencing Hearing Tr., 7/2/08 at 8:23-24.

First, respectfully, this sort of judicial speculation has been condemned by the Fifth Circuit. *U.S. v. Velgar-Vivero*, 8 F.3d 236, 241 (5th Cir.1993) ("It is not enough ... that the evidence places the defendant in a climate of activity that reeks of something foul."). Second, again respectfully, the Court's assumption was not founded on the evidence. As the Court noted with disappointment at the Backstrom sentencing, he never implicated Movant in any bribery scheme, even though Backstrom had every incentive to do so in order to gain a more lenient sentence. *See* **Exh. "W",** Backstrom Sentencing Hearing Tr., 6/27/08 at 11:1-4. In fact, Mr. Backstrom exculpated Movant. Indeed, the Mississippi Supreme Court correctly rejected this access-to-information/"guilt by association" view, despite a dissent from Justice Carlson that "a $40,000 bill paid out for *voir dire* services on a case that had not yet gone to trial should have raised red flags causing all members of SKG to question the payment." *Barrett*, 27 So.3d at 379 (Carlson, J. dissenting).

At sentencing, this Honorable Court also said that Movant "made comments" on the order that Mr. Balducci had induced Judge Lackey to sign (**Exh. "A",** Sentencing Hearing Tr. at 6:9), that Movant "said where commas should be," (*id*., at 6:10), and that Movant "helped write that order" (*id*., at 6:17). It bears emphasis that, even if these allegations were supported by the record, they are not implicative of a *bribery* or a conspiracy to *bribe*. Attorneys routinely draft proposed orders for state court judges, and even if that were somehow improper, it would not be an honest services fraud under *Skilling*. Moreover the placement of commas is completely inconsequential; even if it happened, it did not further a bribery conspiracy in any significant way. But more importantly, the Court simply erred in attributing these facts to Movant; he never

edited the order and no evidence supports that conclusion. Movant merely read the order and expressed consternation. *See* **Exh. "T"**, 11/1/2007 Recording Tr., at 21 (Movant agreeing that the proposed order "didn't make sense"); 22 ("I don't know how to clean it up other than, uh, 'cause I don't know what he is trying to say. I mean it is not bad, but I am not sure what his intent was.").

It is telling that these two allegations – mere association with Sid Backstrom and merely editing an order for grammar – were the most damning allegations this Court could summon to support its decision to depart from the sentencing recommendation of the prosecutors. Even if true (and they are not), these allegations do not support a conspiracy to commit *bribery* charge.

Based on the entirety of the PSR, and the evidence that it summarizes, along with the prosecutors' implicit admissions in 2008, and this Court's similar recognition then, it is clear that there simply is no evidence on which a reasonable jury could conclude that Movant committed any crime. Thus, "it is more likely than not that no reasonable juror would have convicted" Movant. *Jones*, 172 F.3d at 384. He is actually innocent.

VI. ALTERNATIVE BASES FOR RELIEF

The new Langston, Sanders, and Farese affidavits, along with the Dawson book, all revealed within the last year, create alternative bases for relief. First, Mr. Dawson's book details how the prosecutors co-opted Movant's counsel, Mr. Farese, by secretly negotiating with him to secure the cooperation (and allegedly, the testimony) from Mr. Langston adverse to Movant, while Mr. Farese was in fact representing Movant. This dual-representation created a *per se* conflict of interest, one that made Movant's counsel at that time constitutionally defective.[16]

[16] *See U.S. v. Newell*, 315 F.3d 510, 516 (5th Cir.,2002) (defendant's counsel "was in the unacceptable position of having his own attorney help the state procure a witness against him; "constitutional error has occurred, and prejudice is inherent in the conflict.").

The fact that Movant later signed an unknowing waiver of "potential" conflicts of interests and then subsequently fired Mr. Farese does not cure the problem, since the damage was done.[17]

Second, the Langston, Sanders, and Farese affidavits state that they in fact had no evidence that implicated Movant in any other bribery scheme. One can conclude from these sworn statements that the 404(b) evidence represented to this Court was a fabrication of the lead prosecutor, Thomas Dawson, whose personalized license plate reads "404B" and who used the fabrication to "compel" Movant to plead guilty. **Exh. "C",** Kings of Tort (2009) at 161. Indeed, the Government's assertion of Movant's involvement in another bribery scheme created a "suffocating force," which "blew a hole" in Movant's defense, according to Mr. Dawson. *Id.*, at 219. The Supreme Court has long recognized that "misrepresentation or other impermissible conduct by state agents" can make vulnerable "a voluntary plea of guilty," and thereby impinge due process. *Brady v. U.S.*, 397 U.S. 742, 757 (1970).[18] These revelations demand relief, and are properly before the Court.[19]

VII. CONCLUSION AND REQUESTED RELIEF

Movant's conviction simply cannot stand. He was convicted of knowing about and failing to report a crime that does not exist, and the other crimes on which he was indicted have also been nullified. Moreover, part of the prosecution team has now made a sworn statement that

[17] Mr. Farese had already violated his duty of exclusive representation and did not disclose these predicate facts at the time of requesting a waiver, making it uninformed. Thus, like *Newell*, "the scope of the waiver did not include the actual conflicts that arose." 315 F.3d at 519. *See also U.S. v. Coleman*, 997 F.2d 1101, (5th Cir., 1993)(waivers could not cure pervasive conflicts arising out of attorney's prior representation of client).

[18] "A situation in which a defendant is induced by deception, an unfulfillable promise, or misrepresentation to enter a plea of guilty does not meet the standard for voluntariness articulated by the Supreme Court. Such renders a plea involuntary." *U.S. v. Amaya*, 111 F.3d 386, 389 (5th Cir., 1997). To put it another way, "the Government ought not be allowed to lure the defendant into a plea on false information." *U.S. v. Battle*, 447 F.2d 950, 951 (5th Cir., 1971). Also: "Of course, the federal courts have power to investigate whether a judgment was obtained by fraud and make whatever modification is necessary, at any time." *U.S. v. Smith*, 331 U.S. 469, 476 n. 4 (1947).

[19] These grounds are timely. 18 USC §2255 (f) (4). As for procedural default, to satisfy the "good cause" standard, a Movant must "show that 'some objective factor external to the defense' prevented him from raising on direct appeal the claim he now advances." *U.S. v. Guerra*, 94 F.3d 989, 993 (5th Cir.1996). Only the May 2010 affidavits revealed the prosecutors' falsehood.

shows that this Court's opinions adverse to Movant were procured based on inaccurate representations, and that these inaccuracies were made with a purpose to create a "suffocating force" that "compelled" Movant to plead guilty. Accordingly, Movant asks this Court to vacate his conviction, dismiss the pending case, nullify his supervised release and all conditions pertaining thereto, and order the government to refund the fine and special assessment.

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Respectfully submitted, this 18th day of August, 2010.

/s/Edward D. Robertson, Jr.
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CERTIFICATE OF SERVICE

I, Edward D. Robertson, Jr., hereby certify that on August 18, 2010, I served copies of this Memorandum of Authorities 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.