

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,)	Civil Action No. 06-12072-RWZ
)	
Plaintiff,)	
)	
v.)	
)	
ALFRED TRENKLER,)	
)	
Defendant.)	
)	
)	

**OPPOSITION TO GOVERNMENT’S UNTIMELY AND FUTILE MOTION TO STAY
ORDER OF FEBRUARY 20, 2007 AND MOTION FOR LEAVE TO FILE A RESPONSE**

The Government, whose institutional negligence years ago resulted in the indisputably illegal sentence that Mr. Trenkler is serving, now implores the Court to excuse its negligence again by allowing it to file a grievously untimely response to Mr. Trenkler’s petition for a writ of *coram nobis*, after the Court has already granted it “based on its merits.” The Government’s request is inexcusably untimely, utterly futile, and, as the five pages of allegations regarding the nature and merits of the underlying convictions demonstrate, plainly vindictive. The Government should be elated by this Court’s patently correct decision to remedy what no one can dispute was an utter miscarriage of justice. Instead, sadly, the Government here goes to these extraordinary lengths to *thwart* the Court’s actions, and to fight to uphold a sentence imposed through manifest error, negligence, and in undeniable contravention of law. It is a sad day for our country indeed when the Government chooses to plug the wheels of justice with a stick of vengeance, rather than allow them to turn on the gears that the law has made for them.

**A. The Government’s Motion is Inexcusably Untimely, and Granting it Now
Would Deal an Unconscionable Blow to Mr. Trenkler and His Family**

The Government offers no justification for its failure to timely respond to Mr. Trenkler’s

petition, only thin excuses. The Government was given not one, but three opportunities to file a response to the petition—once upon its initial filing, a second time when the Court ordered a response on November 15, 2006, and a third time when, three weeks after the deadline imposed by that Order had passed, the Court gave the Government yet another chance to respond, which the Government again ignored. The Government blames its failure to respond on “institutional inadvertence,” i.e. negligence, contending that, even though the U.S. Attorney’s office admits to having received the original petition and both of the Court’s orders, the particular AUSA assigned to the case “apparently never received” them. The Government does not explain how this Court’s order granting the petition on the merits somehow *was* received by a person bearing enough authority and responsibility to immediately file the present post-grant motion, when the previous three documents were lost in the ether of the U.S. Attorney’s office. Nor does it explain why its negligence is in any way understandable or justified, let alone why it should be rewarded.

The U.S. Attorney is in the business of docketing and responding to court deadlines. There is no contention that it did not receive the petition or the two court orders requiring a timely response. *Someone*—and almost certainly multiple people—in the office was monitoring the deadlines and progress of this case, as the Government’s immediate filing of the present motion demonstrates. In fact, the petition and the Court’s orders (including the one granting the writ) were sent electronically directly to the attorneys of record for the Government, at least some of whom are still working in the office of the U.S. Attorney. The Government has failed to show any good cause for their failure, or its failure, to timely file a response, and has failed to even assert that its neglect is excusable, let alone why. *See, e.g., United States v. \$ 23,000 in United States Currency*, 356 F.3d 157, 164 (1st Cir. 2004) (Fed. R. Civ. P. 60(b)(1), for example, permitting a court to relieve a party from an order or judgment for “excusable neglect,” “is a

demanding standard” and “the reason-for-delay factor will always be critical to the inquiry.”) (emphasis added).

Nor is the Government’s negligence without consequence to Mr. Trenkler and his family. It was, after all, the Government’s negligence years ago that resulted in the manifest injustice of the patently illegal sentence that Mr. Trenkler has had to suffer for years. Its continuing negligence now should not be allowed to serve as a sword to inflict further harm on Mr. Trenkler and his family, which will be the inevitable result of granting the Government’s request. As the Court has now held, and as is beyond dispute, Mr. Trenkler is currently serving two illegal life sentences, which have now been vacated. Mr. Trenkler has waited long enough to receive a proper, legal sentence. Every moment that he is forced to remain in prison on the illegal sentence causes irreparable harm to him and his family. That time should not be enlarged by virtue of the Government’s failure to perform the most rudimentary functions of its job. At this point, the length of Mr. Trenkler’s proper sentence is undetermined and certainly has not been legally calculated under governing law. While the proper length and nature of his sentence is an issue to be decided later at the re-sentencing (at which the Government will have ample opportunity to be heard on that issue), as it now stands there is no legal sentence to serve. Every moment in prison thus works further manifest injustice. Indeed, no one can say until the arguments are heard that a proper sentence will not be “time-served.” The Government’s effort to keep Mr. Trenkler in prison on the present illegal sentence even longer, while it takes its time to “respond,” is unconscionable, and plainly violates Mr. Trenkler’s Eight Amendment right to be free of “cruel and unusual” punishment, as the Court has already ruled.

Likewise, it would be a blow beyond all conscience to Mr. Trenkler and his family to afford the Government another chance to keep Mr. Trenkler’s illegal sentence in place, after the

Court has already granted his petition. Mr. Trenkler and his family have waited patiently for years for the wheels of justice to start turning. To permit the Government's negligence to stop and reverse them now would inflict emotional torment and torture upon them both, which is no less "cruel and unusual" in its own way than the illegal sentence that Mr. Trenkler is currently serving.

B. Granting the Government's Motion Would Be Utterly Futile

Granting the Government's motion would not only reward its inexcusable negligence and inflict great additional harm on Mr. Trenkler and his family, but would also amount to an utter waste of the Court's time and resources. The Court's order makes eminently clear that it did not grant the petition simply because it was unopposed, but did so "based on its merits." The Court very carefully applied the *coram nobis* factors to the facts of this case, and on its own considered and rejected any legitimate argument that the Government can hope to make. Certainly, the Government does not and will not contest the illegality of the current sentence, that it constituted plain and manifest error, or that it exceeds the maximum allowable sentence under the applicable governing law. While it may argue (erroneously) that other relief was available to Mr. Trenkler, or that Mr. Trenkler should have sought earlier relief, the Court has already considered and rejected these arguments.¹

The only thing the Government can hope to accomplish through a late response is to attempt to confuse the issue here—the illegal sentence—with the merits of Mr. Trenkler's underlying conviction, in an effort to prejudice this Court's decision on the proper issue. Indeed, there is no other fathomable reason why the Government devoted the first four pages of its 7-

¹ On the latter point, if the Court were to permit the Government to file a response, it should be estopped from arguing that Mr. Trenkler should have raised the error earlier. If the Government's failure to respond to a petition and two orders of which it was plainly aware is held to constitute "excusable neglect" it is difficult to see how Mr. Trenkler's failure to notice an error that the Court, the Government, and his attorneys all missed is somehow inexcusable.

page motion to describing the details of the acts that resulted in his underlying conviction, and of the proceedings related to the conviction. Nor is there any other justification for the Government's plea on the last page of its brief that the Court decide the present motion, and ultimately the petition, based upon the seriousness of the charged crime and the impact on its victims. (*See* Government's Motion at 7 (Urging the court to grant the motion "because the defendant stands convicted of conduct that resulted in the death of one Boston Police officer and the serious injury to another" and because of the "important[ce] to the deceased victim's family, to the surviving victim, and to the public at large.")). What the Government seems not to comprehend is that the underlying crime and the merits of Mr. Trenkler's conviction, right or wrong, are utterly irrelevant to the issue raised by his petition. No person in this country, guilty or innocent, may be forced to continue to serve an illegal, unconstitutional sentence secured through gross negligence or worse, on account of the Government's apparent preference for victory and vengeance over justice and law.

Simply put, there is nothing the Government can say in any late response that ought legitimately to change the result of the petition. The fact and nature of the error is beyond dispute. The Court has carefully considered them, and the *coram nobis* factors, and has decided the petition "based on its merits." It has applied the correct applicable law, and has exercised its sound authority and discretion under its powers as a Court of law, equity and justice. The Government should be pleased that justice has been done, that the judicial system has worked as it was intended, and perhaps most of all the Government should recognize that "justice" does not always equate with prosecutorial victory.

II. CONCLUSION

For the foregoing reasons, and because justice has been aptly served by the Court's order granting the petition for *coram nobis*, Mr. Trenkler respectfully requests that the Court deny the

Government's inexcusably untimely and futile motion for a stay and for leave to file a response.

Dated: February 22, 2007

Respectfully submitted,

/s/ Joan M. Griffin

Joan M. Griffin (BBO# 549522)
MCDERMOTT, WILL & EMERY LLP
28 State Street
Boston, MA 02109-1775
Phone: 617.535.4000
Fax: 617.535.3800

Of counsel:

Corey A. Salsberg*
MCDERMOTT, WILL & EMERY LLP
28 State Street
Boston, MA 02109-1775
Phone: 617.535.4000
Fax: 617.535.3800

CERTIFICATE OF SERVICE

I, Joan M. Griffin, counsel for Defendant Alfred Trenkler, hereby certify that on February 22, 2007, a true copy of the above document was served upon all counsel of record for the other parties by ECF/mailing.

/s/ Joan M. Griffin

Joan M. Griffin (BBO# 549522)

* Admitted in California only (CA Bar#: 216544). Mr. Salsberg's application for admission *pro hac vice* is forthcoming.