UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

PETITIONER'S OPPOSITION TO AND MOTION TO STRIKE THE GOVERNMENT'S MOTION FOR RECONSIDERATION OF THE COURT'S FEBRUARY 20, 2007 MEMORANDUM AND ORDER GRANTING A WRIT OF *CORAM NOBIS* TO REOPEN SENTENCING[1]

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor -- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. *Berger v. United States*, 295 U.S. 78, 88 (1935).

> Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly *Brady v. Maryland,* 373 U.S. 83, 87 (1963).

The heart of the Government's argument is that Alfred Trenkler should bear the burden – a heavy one, the rest of his life in prison – for the Government's error in successfully urging the

[1] The Petitioner notes that the Court's Memorandum of Decision and Order was issued in a new civil action opened by the Court. The Petitioner points out that he filed his Petition as a motion in the original criminal case in accordance with his understanding of the directive of *United States v. Morgan*, 346 U.S. 502, 506, Note 4 (1954) which states that a motion for a writ of *coram nobis* "is a step in the criminal case and not, like *habeus corpus* where relief is sought in a separate case and record, the beginning of a separate civil proceeding....[T]he procedure by motion in the case is now the accepted American practice". *Accord United States v. Valdez-Pacheco*, 237 F. 3d 1077, 1079 (9th Cir. 2001)("A federal prisoner's right to petition for the …common law writ of *coram nobis*…is part of the original criminal case not a separate civil proceeding").

Court to sentence Mr. Trenkler to two life sentences despite the fact that it lacked authority to do so. The Government argues that Mr. Trenkler should bear this burden because he and his attorneys missed previous opportunities to bring this error to the court's attention. The Government's hard-line position on deadlines missed by Mr. Trenkler contrasts sharply with the leniency it claims for itself, in its filing of its opposition, despite missing three deadlines to respond to Mr. Trenkler's initial petition.

But far worse is the Government's modus operandi in this and other cases of placing the blame, and the consequences, of its own mistakes on the accused and the convicted. It is the Government which prosecuted Mr. Trenkler and which sought an illegal sentence after his conviction. The Government forgets its duty to all citizens, including those accused and even convicted of crimes, to ensure justice under the law.

The Government's position is not merely a bad faith attempt to win at all costs, rather than uphold the law; it is incorrect. Despite filing a 51-page brief, the Government buries in a footnote its response to the heart of the Court's decision allowing the petition. In footnote 15 of its Opposition, the Government acknowledges First Circuit case law permitting resentencing where, as here, the Government had requested and permitted the Court to impose a sentence where it lacked authority to do so and where remanding the case would require only a simple resentencing, grounds correctly relied upon by this Court in allowing the petition. The Government relegates its discussion of these cases to a footnote because it has no response to the Court's reasoning that issuance of the writ in these narrow circumstances is appropriate.

OPPOSITION

The petitioner believes that, for the most part, the arguments raised in the Government's Opposition were anticipated and addressed in Mr. Trenkler's Petition and in the Court's

Memorandum of Decision and Order dated February 20, 2007. The petitioner therefore makes only the following brief response to particular points raised in the Government's Opposition. If the Court desires further briefing on any particular issue, the petitioner will be happy to file a more detailed response. The petitioner will forego extensive briefing at this time, without further direction of the court, to devote his efforts to preparation for resentencing on April 4th:

(1) As the court stated in its Memorandum of Decision and Order, and as Mr. Trenkler argued in his Petition, granting the writ is appropriate here because the petitioner has no other remedy in that he does not meet the requirements for a successive petition under 28 U.S.C. 2255 and 2244;

(2) In arguing that the Court is prohibited from correcting its sentencing error through grant of the writ of *coram nobis*, the Government improperly elevates the congressional power to enact statutes over the judiciary's power to issue necessary writs under both the Court's inherent authority and the All Writs Act. Indeed, the First Circuit has specifically acknowledged that a petitioner can resort to the All Writs Act where "the restrictions . . . under the circumstances of the case, offend separation of powers principles or the Article III grant of judicial power." *United States v. Barrett*, 178 F. 3d 34 (1st Cir. 1999). Here, the writ of *coram nobis* plainly gives the court authority to correct its own sentencing error, and no interpretation of congressional statutes, including 28 U.S.C. 2255 and 2244, can deprive the court of that authority.

(3) The Petitioner is not limited to seeking a writ of *habeas corpus* under 28 U.S.C. 2241 where 2255 is inadequate or ineffective. See *United States v. Barrett* , 178 F. 3d 34, 56 (1st Cir. 1999) ("It may be that there are situations in which 2255 is not "controlling" despite the fact that the petitioner remains in custody – for instance, where 2255 is inadequate or ineffective.")

Barrett, 178 F.3d at 56. In that circumstance the petitioner may pursue either a writ of *habeas corpus* under 2241 or other relief available under the All Writs Act. *Id.* Because a *habeas corpus* petition under 28 U.S.C. 2241 is directed to the Court in the district in which the petitioner is held, rather than to the sentencing court, Mr. Trenkler's petition to correct the sentencing error is more properly brought by a writ of *coram nobis* in this court.

(4) As Mr. Trenkler pointed out in his petition, the government is incorrect in suggesting that *coram nobis* is not available when the defendant is in custody, or to correct purely legal errors. *See, e.g., United States v. Barrett*, 178 F. 3d 34, 52, 56 (1st Cir. 1999)(cited at p. 10 of Defendant's petition) and *United States v. Sawyer*, 239 F. 3d 31, 37-38 (1st Cir. 2001);

(5) The Government violates its duty to Mr. Trenkler to see that he is prosecuted and sentenced in accordance with applicable law in arguing, without citation to any authority, that the five Circuit Courts of appeal that have considered the issue are "wrong" in determining that "the plain language of [the statute] authorizes the imposition of a life sentence only by a jury recommendation in the absence of a plea", *United States v. Tocco,* 135 F. 3d 116, 131 (2nd Cir. 1996). The Government's proposed interpretation, based on <u>no</u> case or authority, contradicts the plain wording of the statute and ignores the clear legislative intent "to impose real limits on a district court's otherwise broad sentencing discretion. . . . not permit[ting] the defendant to be "subject" to a life sentence unless the jury so decided." *United States v. Martin*, 63 F. 3d 1422, 1434 (7th Cir. 1995). The Government's arguments are patently frivolous, in bad faith and violate of duty to Mr. Trenkler to ensure prosecution in accordance with the law.

(6) The Government essentially admits in footnote 15 of its Opposition that Mr. Trenkler has shown cause to excuse his procedural default under these circumstances. The Government's contention that defense counsel at trial intentionally failed to bring the error to the Court's

attention at sentencing is frivolous. The Government's suggestion that the Defendant should have requested a jury verdict imposing life imprisonment or a death sentence is ludicrous. It was the Government's burden to seek that jury finding if it sought to impose either sentence. But had the Defendant or his attorney been aware of the Government's error in seeking the imposition of a life sentence without a jury verdict, as the Government contends, clearly the Defendant and his counsel would have objected to the imposition of the life sentence at the time of sentencing. There would have been no strategic reason not to do so. The fact that neither the Defendant nor his counsel objected to the imposition of the life sentence at the time of his sentencing makes clear that neither were aware of the error. The Court has Mr. Trenkler's letter asserting that neither he nor his counsel were aware of the error prior to Mr. Trenkler's reading about the Barone case. The Defendant can provide an affidavit if necessary, but needless to say, if he had been aware of this clear cut legal error earlier, he certainly would have raised it.

(7) The Government cannot establish that the sentencing error was less than fundamental. On the day of his sentencing, the Court had no authority to impose a life sentence and yet that is what Mr. Trenkler is serving. That is as "actual" as prejudice can get. *Compare* Government Opposition, footnote 18. Moreover, this is clearly "a situation in which the circumstances call into question the fundamental basis of the Court's actions with respect to the Defendant." *Compare* Government Opposition at 43. The Government's argument that the Defendant might have received a life sentence from the Court had he plead guilty or waived a jury trial underscores the falsity of its position. As Mr. Trenkler did neither, the Court was without authority to impose the life sentence urged by the Government. That is a fundamental error.

(8) The Government is incorrect in asserting that the Defendant is not suffering ongoing collateral consequences from the error, because even if the writ is granted, the Court supposedly

would sentence him under the current statutory regime, rather than the one in place on the date of his original sentencing. The Government cites no case in support of its assertion. On the contrary, all of the cases in which courts have considered post-1994 challenges to a sentence imposed before the 1994 amendments, have ruled on the merits of the appeal in accordance with the statutes as they existed on the date of the original sentencing. None have found that the error was "harmless" because the new statute would apply on resentencing. *See e.g.*, *United States v. Martin*, 63 F. 3d 1422, 1434 (7th Cir. 1995); *United States v. Tocco*, 135 F. 3d 116, 131 (2nd Cir. 1998); *United States v. Gullett*, 75 F. 3d 941, 951 (4th Cir. 1996) (all cited in the Court's Memorandum of Decision and Order at p. 11). Indeed the Seventh Circuit in Martin specifically acknowledged that the case was "something of an historical oddity whose precise holding may have a limited reach" because the statutory language had since changed. Nevertheless, the court vacated the sentence and remanded for resentencing in accordance with the statutory provisions in effect on the date of the original sentencing. *Martin,* 63 F. 3d at 1432, note 6, and 1435.

Rather, the Government cites two cased from the Second and Eleventh Circuits addressing a different issue, specifically, the *ex post facto* implications of the 1994 change in the law on initial sentencings occurring after the amendments to the statute. The fact that the amendments to the statute may not create an *ex post facto* problem for initial sentencings held in connection with convictions for crimes which occurred before the statutory change, has little relevance to the issue presented by Mr. Trenkler's case.[2] There can be no doubt that, had the law

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[2] It is not clear that other Circuits would agree, had the situation arisen, that the statutory changes did not raise an *ex post facto* issue. Indeed, the law in the Second Circuit is unclear given that the Second Circuit in *Tocco* specifically held that the *ex post facto clause* prohibited application of the 1994 amendments to an act committed in 1992. *Tocco*, 135 F. 3d at 132. Given that the *Joyner* case was not decided *en banc,* and that another panel of the Second Circuit cannot overrule a previous panel decision of that Circuit under the established provision that the earlier panel decision controls, *Tocco* would appear to be the law of the Second Circuit on this issue. *BankBoston, N.A. v. Sokolowski*, 205 F. 3d 532, 535 (2d Cir. 2000)("[T]his Court is bound by a decision of a prior panel unless and until its rational is overruled,

been correctly applied on the date of his initial sentencing, Mr. Trenkler could not have been sentenced to two consecutive life sentences. Therefore he clearly continues to suffer the collateral consequences of that error, as he continues, for the rest of his life, to serve the unauthorized sentence. Assuming the defendant is resentenced in accordance with the Court's decision, the law to be applied on resentencing will be the law that should have been applied on the date of his initial sentencing and not the law as it may exist today. 18 U.S.C. 1342 (f)(1) and (g)(1)(applicable guidelines upon resentencing after remand following appeal are those in effect on the date of the initial sentencing;) *Martin,* 63 F. 3d 1422, 1434 (7th Cir. 1995).

MOTION TO STRIKE

The Government's opposition evinces a single minded effort to win at all costs and a corresponding abdication of its duty to Mr. Trenkler to seek justice under the law. The Government's position is nowhere clearer than in its failure to admit that it wrongly urged the Court to sentence Mr. Trenkler to a life sentence where it had no authority to do so. The Government clearly repudiated any duty to Mr. Trenkler in taking that position without citation to any authority and despite the opinions of the Five Circuits Courts of Appeal which have considered the issue and reached the opposite conclusion.

> A United States district attorney carries a double burden. He owes an obligation to the government, just as any attorney owes an obligation to his client, to conduct his case zealously. But he must remember also that he is the representative of a government dedicated to fairness and equal justice to all and, in this respect, he owes a heavy obligation to the accused. Such representation imposes an overriding obligation of fairness so important that Anglo-American criminal law rests on the foundation: better the guilty escape than the innocent suffer.

Dunn v. United States, 307 F.2d 883, 885 (5th Cir. 1962). Nor does the nature of the crime excuse the Government's violation of its duty to the Defendant. *Silva v. Brown,* 416 F. 3d 980,

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implicitly or expressly, by the Supreme Court or this Court *en banc.")*. The Government's citation to *Dobbert v. Florida,* 432 U.S. 282 (1977) is inapposite. In *Dobbert* the procedural change was beneficial to the defendant, not harmful, and therefore did not pose an *ex post facto* issue. *Id* at 296-297.

991-992 (9th cir. 2005)(The "atrocious nature of the crimes with which [a defendant] was charged cannot diminish the prosecutor's -- and our court's -- duty to ensure that all persons accused of crimes receive due process of law."). See also, *Brooks v. Kemp,* 416 F.3d 980, 991-992 (9th Cir. 2005)("The prosecutor . . . has a duty to guard the rights of the accused as well as those of society at large.").

The ABA model rules of professional conduct specifically provide that "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence." ABA Model Rule of Professional Conduct 3.8, Comment.

The Government's opposition should be stricken in its entirety and the Government should be admonished that it must consider its obligation to Mr. Trenkler in asserting any further arguments in connection with this proceeding. Alternatively, the Petitioner requests that the Government be required to state on the record that it understands its obligation to Mr. Trenkler under the case law and the Rules of Professional Conduct, that it will fulfill that obligation in future proceedings on this matter and how the positions it has taken thusfar in this proceeding fulfill that obligation.

CONCLUSION

For the foregoing reasons as well as those set forth in the Petition and the Court's Memorandum and Order allowing the Petition for writ of *coram nobis*, the Government's Motion for Reconsideration should be denied.

Respectfully submitted,

/s/ Joan M. Griffin

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March 21, 2007

CERTIFICATE OF SERVICE

I, Joan M. Griffin, counsel for Defendant Alfred Trenkler, hereby certify that on March 21, 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)

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