UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF MISSISSIPPI

UNITED STATES OF AMERICA

v. CRIMINAL CASE NO. 3:07CR192

DAVID ZACHARY SCRUGGS

**COMBINED MEMORANDUM OF AUTHORITY AND RESPONSE IN OPPOSITION TO DAVID ZACHARY SCRUGGS' MOTION TO VACATE CONVICTION PURSUANT TO 28 U.S.C. § 2255**

Having served his fourteen-month sentence to confinement, David Zachary Scruggs now moves to vacate and set aside his negotiated plea of guilty. He seeks to invoke the United States Supreme Court's recent decision in United States v. Skilling, 130 S. Ct. 2896, and he claims actual innocence in an effort to excuse his procedural default, as he prosecuted no direct appeal from his judgment of conviction. The petitioner also complains that his plea of guilty was involuntary, forced upon him as a result of what he perceives to be a misrepresentation by government counsel. Finally, he complains that his early representation by former counsel was ineffective, "secretly coopted" by the government in order to procure Joey Langston's testimony against him. The government respectfully differs.

**HISTORY OF THE CASE AND DISCUSSION OF THE EVIDENCE**

In March 2007 Richard F. "Dickie" Scruggs, David Zachary Scruggs, Sidney Backstrom, Timothy Balducci and Steven Patterson met in the conference room at the Scruggs Law Firm in Oxford, Mississippi. Among other things, they discussed a multimillion dollar lawsuit over attorneys' fees, Jones v. Scruggs, then pending in the Circuit Court of Lafayette County, Mississippi. Although Balducci and Patterson were not parties to the lawsuit, nor counsel of record, Zach Scruggs brought up Balducci's close relationship with Circuit Court Judge Henry

Lackey, suggesting that Balducci could corruptly influence the judge. There was no mention of money or bribery at that time; the consensus was that Balducci could simply use his friendship to corrupt the judge (Attachment A, pp. 27-32). Tim Balducci testified at the pretrial motions hearing conducted by the District Court on February 20 and 21, 2008, that he thereafter met with Judge Lackey on March 28, 2007, in the judge's conference room in Calhoun County, where they exchanged pleasantries and small talk.

> . . . . And I explained to him that I was there to discuss a case that was pending before him. And I told him that it was the Jones v. Scruggs case. And I told him that I was not an attorney of record in the case, that I wasn't representing either party, specifically not representing the Scruggs Law Firm; and that I personally had no interest in the outcome of the case; that they had asked me to come down there and to basically explain their side of the story to him. . . . And I told him what I knew and I told Judge Lackey that they the members of the Scruggs Law Firm wanted the case ultimately sent to arbitration, that there were some matters that they had been sued now [sic] outside of just the legal fee issue over the Katrina fees. It had now grown into a bigger lawsuit than just what their joint venture agreement share of fees would be. And I discussed with Judge Lackey the propriety of him based on that conversation, of him maybe dismissing those extraneous matters and sending simply the dispute over the fees to arbitration (emphasis added) (Attachment A, pp. 34-35).

Balducci further testified that toward the end of their meeting, he offered Judge Lackey a position "of counsel" in his new law firm, a position that would pay the judge approximately $1,000 a month, simply to allow his name to be used on the firm's letterhead (Attachment A, pp. 36-37). Balducci testified that he did not consider the offer a quid pro quo (Attachment A, p. 37), but looking back on it objectively, he could see how the judge might have (Attachment A, p. 38). That summer Judge Lackey recused himself from the case for a short period of time. His recusal prompted a "frantic and angry" call from Sid Backstrom inquiring about what was going on.

According to Balducci, Backstrom demanded, "Well, find out. Get ahold of the situation and find out what's going on, and let us know." (emphasis added) (Attachment A, pp. 38-39)

Judge Lackey was unsure about whether the "of counsel" offer was a quid pro quo, but he was offended by the overture and heartbroken that his young friend appeared to have lost his way. He and Tim Balducci exchanged telephone calls and met with each other several times over the summer of 2007. Finally, on September 18, 2007, Judge Lackey (and government investigators) had to know. Lackey tested the water in a telephone call to Balducci. "If I help the Scruggs Law Firm, will they help me?" he asked. (Attachment A, p. 70) Three days later the two men met, and Judge Lackey told Balducci that he needed $40,000 to get "over a hump." The judge asked if Balducci thought Scruggs would give him $40,000 if he entered an order favorable to the Scruggs firm. The judge hoped Balducci would respond that he'd been misunderstood. Instead, Balducci responded that he thought ". . . it would not be a problem." (Attachment A, p. 83) Balducci has since explained that the reason he did not believe it would be a problem is because he had been involved in another case in which Mr. Scruggs had spent a million dollars to corruptly influence another judge in return for a favorable outcome (referring to the case of Wilson v. Scruggs in the Circuit Court of Hinds County, Mississippi) (Attachment A, p. 83). Balducci wasn't freelancing; the moment he left the judge's chambers he telephoned Sid Backstrom at the Scruggs Law Firm. Balducci informed Backstrom that the judge wanted to enter the order but wanted $40,000. Balducci asked Backstrom, "Is that something that y'all want me to go forward with, and if so, how do you want me to handle it? Are y'all going to cover it if I do?" (Attachment A, pp. 76-77). Backstrom wasn't about to make that call on his own; he indicated he'd have to get back to Balducci, and within a day or so, he did call back.

Balducci testified, "And I understood in the response from Mr. Backstrom that all three of the defendants had talked about it and agreed to it, and that I was to go forward and give the judge some money." (Attachment A, p. 76) Balducci's business partner, Steve Patterson, wanted more direct confirmation from Dickie Scruggs himself, and knew that the way to get it was to go through a shadowy intermediary, P. L. Blake.

A few days later, when Patterson and Balducci were in Oxford they stopped by the Scruggs Law Firm on other business, and were greeted by Dickie Scruggs who immediately indicated that he knew they had talked to P. L. Blake and that he had talked to P. L. Blake. Balducci testified that Dickie Scruggs confirmed that he understood they needed 40 and that they would be covered, not to worry about it. In fact, the Patterson Balducci firm was reimbursed $40,000 by the Scruggs Law Firm. (Attachment A, p. 84)

Tim Balducci was videotaped paying the judge $40,000 in three installments. When he was arrested November 1, 2007, he immediately agreed to cooperate with government investigators. He gave FBI agents and government prosecutors a statement which clearly admitted guilt and incriminated the other four co-conspirators; he agreed to wear a body transmitter in an effort to prove that what he was saying was true. Within a few hours of his arrest, he had Dickie Scruggs, Sidney Backstrom, and David Zachary Scruggs on tape, clearly implicating themselves in the conspiracy (Attachment B).[1] At the Scruggs Law Firm, wearing the wire, Balducci produced a proposed order and asked Zach Scruggs and Sid Backstrom

[1]Attachment B is the transcript of the November 1, 2007, undercover tape. It was previously made a part of the record in this case as an attachment to document 115-2, the government's response to the defendant's Motion to Dismiss for "Outrageous Government Conduct."

whether they wanted the court to dismiss the action outright or send it to arbitration. Zach Scruggs opined that an outright dismissal would be preferable, as he believed arbitration could result in various issues being returned to the circuit court where some other "asshole" who could not be corrupted might by then have taken over the case. It was clear from the conversation that both Zach Scruggs and Sid Backstrom believed they could write the order any way they wanted and get it signed. It was also clear that Sid Backstrom was not trying to hide any part of the conversation from Zach Scruggs. Neither of them questioned Balducci's involvement and both of them seemed to appreciate Balducci's illicit role in the conspiracy. Balducci even commented to both men, "Get it how you want it, 'cause we're paying for it." (Attachment B, p. 30) The petitioner now contends that he had conveniently stepped out of the room when those words were spoken, but a few moments earlier the following exchange occurred, clearly in his presence:

> ZACH SCRUGGS: It could be . . .
>
> BALDUCCI: . . . get it how you want it, because I've got to, uh, I've gotta go back for another delivery of, uh, another bushel of sweet potatoes down there.

(Attachment B, p. 30) To miss that thinly coded reference to a judicial bribe, petitioner would have to have bolted from the room with his fingers in his ears.

Sid Backstrom attempted to corroborate the petitioner's denials, but failed an FBI polygraph on that question.[2] David Zachary Scruggs also failed an FBI polygraph showing

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[2]The Fifth Circuit Court of Appeals has removed the per se prohibition against polygraph evidence, holding that it may be admissible, particularly in the absence of a jury, after an appropriate Daubert hearing and Rule 403 analysis, in the discretion of the Court. United States v. Posado, 57 F.3d 428 (5th Cir. 1995), Gibbs v. General America Life Ins. Co., 210 F.3d 491 (5th Cir. 2000).

deception when he said that he knew nothing about money changing hands.

Finally, after visiting with Zach Scruggs and Sidney Backstrom, Timothy Balducci met briefly with Richard F. "Dickie" Scruggs and improvised an incriminating conversation with the self-styled King of Torts, saying that the judge felt exposed and needed an additional $10,000. The elder Scruggs didn't ask what Balducci was talking about (or throw him out of the office); he responded that he would take care of it (and he did). (Attachment B, p. 77)

On November 28, 2007, the federal grand jury for the Northern District of Mississippi returned a five-count indictment against the petitioner and his father, Richard F. "Dickie" Scruggs, their law partner Sidney A. Backstrom, attorney Timothy R. Balducci, and former state auditor Steven A. Patterson, charging them with conspiracy to bribe and corruptly influence a state circuit court judge. (See Attachment C)

By December 10, 2007, both Timothy R. Balducci and former Hinds County District Attorney Ed Peters were cooperating with the government. Based on information obtained from both men, the FBI obtained and executed a search warrant at Joey Langston's law office in Booneville, Mississippi. The primary purpose of the search was to obtain documentary evidence of the one million dollars paid to Ed Peters in exchange for his influence over Hinds County Circuit Judge Bobby B. DeLaughter, who sat as the presiding judge in Wilson v. Scruggs, another multimillion dollar lawsuit over attorneys' fees. Langston probably realized that he would be a target of the expanding government investigation in Wilson v. Scruggs. Other than representing Dickie Scruggs on the federal indictment, Joey Langston had not been involved in Jones v. Scruggs in Lafayette County Circuit Court. David Zachary Scruggs had no active involvement in Wilson v. Scruggs although there was evidence, principally in the form of an e-

mail, that he had knowledge of that debacle. Joey Langston represented Dickie Scruggs and Anthony Farese represented David Zachary Scruggs, but Langston sought his old friend's counsel and Mr. Farese announced to government prosecutors that he had verbal waivers from both the petitioner and Langston authorizing him to represent both men. A meeting occurred at the U. S. Attorney's Office between prosecutors, Joey Langston and Anthony Farese on Friday afternoon, January 4, 2008. It resulted in several weekend telephone calls and a Langston plea of guilty on Monday, January 7, 2008. Anthony Farese was still representing the petitioner at that time, but announced that he had asked for and received written conflict waivers from both lawyers (see Attachment D). As part of his plea, Langston agreed to testify, not against Zach Scruggs, but against Zach's father, Dickie. The petitioner then fired Farese.

The government filed a notice of its intention to use the Wilson v. Scruggs case as 404(b) evidence, and the defendants moved in limine to exclude that evidence. The matter was set for hearing February 21, 2008. At that hearing the undersigned prosecutor argued to the Court that the case of Wilson v. Scruggs should be admissible against Dickie Scruggs but would require a limiting instruction with regard to defendant Sidney Backstrom who had no known involvement in or knowledge of that case. When the court asked about defendant David Zachary Scruggs, the undersigned prosecutor responded that Joey Langston would testify that Zach Scruggs had been aware of what was happening in the Wilson case.[3] The petitioner now contends that if Langston was going to testify that the petitioner was involved in Wilson v. Scruggs then the government

[3]The prosecution was focused on Dickie Scruggs, who had hired a formidable array of lawyers and who was at that time still very much in the fight. Almost as an afterthought, counsel undersigned asked Langston that morning whether Zach Scruggs had been aware of Wilson v. Scruggs. Langston responded that Zach Scruggs had to have been aware of Wilson v. Scruggs.

improperly "coopted" Farese to obtain Langston's testimony, or, if Langston was not going to testify against Zach Scruggs, then the undersigned prosecutor lied to the court. Government counsel and Joey Langston may have miscommunicated, but neither the government nor Langston ever took the position that Zach Scruggs was actively involved in Wilson v. Scruggs. And the government's belief that Zach Scruggs had knowledge of the Wilson v. Scruggs matter was based primarily upon an e-mail obtained from one of the attorneys representing the Scruggs firm in Wilson v. Scruggs. Zach Scruggs authored that e-mail, opining that the case was in a posture where Team Scruggs could get anything they wanted, signed on the back of a napkin. The attorney who received that e-mail responded that he hoped that the petitioner misunderstood Tim Balducci's and Joey Langston's role in Wilson v. Scruggs. He didn't. It was the government's position that Zach Scruggs' apparent knowledge of the corrupt influence being exerted in Wilson v. Scruggs, even without any active involvement, was enough to make evidence of that corruption admissible against him, to show knowledge and intent.

However, when Dickie Scruggs and Sidney Backstrom pled guilty, that left David Zachary Scruggs the only remaining defendant facing trial. That was a substantial change of circumstances; petitioner then moved for reconsideration of the 404(b) issue. The renewed 404(b) motion was set for a hearing the same day petitioner entered his plea of guilty to a lesser offense for a recommendation of probation. It is quite likely that the significant change of circumstances, coupled with petitioner's mere knowledge of the Wilson v. Scruggs case, might well have resulted in a different ruling from the court, but we will never know; the petitioner foreclosed that possibility by pleading guilty, moments before the Court was set to re-hear the 404(b) issue.

Ultimately Richard F. "Dickie" Scruggs and Hinds County Circuit Judge Bobby B. DeLaughter were indicted in connection with the Wilson v. Scruggs matter, both men pled guilty and both men are presently serving sentences to confinement. Zach Scruggs was not charged in Wilson v. Scruggs, Joey Langston never testified against him, and no actual conflict ever occurred. History now bears out the accuracy and validity of the waivers both Zach Scruggs and Joey Langston signed. There was no conflict.

As a practicing attorney, represented by prominent attorneys, Zach Scruggs knew or certainly should have known when he entered his plea of guilty that the United States Supreme Court would likely grant certiorari on the Skilling issue. (Attachment E is a transcript of petitioner's plea of guilty and Attachment F is a transcript of his sentencing hearing.) In fact, both the petitioner and his attorney repeatedly represented to the Court that he knew nothing about money changing hands. Obviously the defense was aware of the Skilling issue, as they vigorously asserted it at every opportunity at the trial court level. Petitioner's unconditional plea to a negotiated lesser felony, together with his failure to prosecute a direct appeal, therefore constitute a knowing abandonment of that issue. He has waived any right to raise it at this time, unless he can show either "just cause" for the default together with actual prejudice, or that the Court's failure to consider his claim will result in a miscarriage of justice because he is "actually innocent" of the misprision and "actually innocent" of the greater offenses that were dismissed by the government in exchange for his plea. By the time Zach Scruggs pled guilty there had been widespread media coverage of the bribery, at least two days of testimony, and his four co-conspirators, including his father, had pled guilty to a Skilling-proof judicial bribery involving an actual quid pro quo. Everyone knew that $40,000 had actually changed hands. This does not

become a Skilling case just because petitioner says it is.

On March 14, 2008, the lead defendant in this case, Richard F. "Dickie" Scruggs, pled guilty. His law partner, Sidney A. Backstrom, also pled guilty. The petitioner and his attorneys were present for Dickie Scruggs' plea, and afterward counsel for the petitioner specifically renewed the petitioner's objections to the use of 404(b) evidence against him, telling the Court that the guilty pleas of Dickie Scruggs and Sid Backstrom gave a whole new meaning to the defendant's motion in limine to exclude the government's 404(b) evidence: "The 404(b) evidence, I think, takes on a whole different light." (Attachment G, p. 3)

On March 19, 2008, petitioner, through counsel, filed a renewed motion in limine "to exclude extrinsic evidence pursuant to Rule 404(b)," noting that Zach Scruggs had no direct involvement in the Wilson case but was aware of it.[4] Petitioner's renewed motion in limine recited the fact that government counsel had told the Court that Joey Langston was prepared to testify that Zach Scruggs was fully aware of what was going on in the Wilson case. It also acknowledged the now infamous "napkin" e-mail Zach Scruggs sent to Johnny Jones, but the defense argued that even the e-mail did not demonstrate knowledge of a criminal quid pro quo (See Attachment H). The Court thereafter set the Rule 404(b) issue for rehearing on Friday, March 21, 2008 (See Attachment I).

However, on March 21, 2008, the petitioner pled guilty to an information charging him with misprision of a felony, in exchange for dismissal of the greater offenses and a government recommendation of probation. In doing so, he walked away from (and thereby forfeited) his renewed motion in limine to exclude 404(b) evidence, set to be heard that same morning.

[4]Which is consistent with what Joey Langston says in his affidavit of April 27, 2010.

Petitioner did not prosecute a direct appeal.

**STATUTE OF LIMITATIONS**

The conspiracy to bribe Judge Lackey, as charged in the indictment, involved an actual quid pro quo, the payment of money to a public servant, for the specific purpose of corruptly obtaining his judicial favor. If Skilling does not apply, the one year statute of limitations set forth in 28 U.S.C. § 2255 has expired, and David Zachary Scruggs' petition is time-barred. If Skilling does apply, the petitioner benefits from a new one-year statute of limitations commencing on the date of the Skilling decision, June 24, 2010.

**FIRST ASSIGNMENT OF ERROR**

In United States v. Bousley, 523 U.S. 614, 118 S. Ct. 1604 (1998), the United States Supreme Court considered a habeas petition stemming from a guilty plea to possessing drugs with intent to distribute, as well as "using" a firearm during and in relation to a drug trafficking crime. After Bousley's plea, the Court decided Bailey v. United States, 516 U.S. 137, holding that the word "use" in § 924(c) means active employment of a firearm, and does not criminalize mere possession of the firearm for the purpose of emboldening a drug trafficker. As applied to the 924(c) portion of the petitioner's plea, the high court found that he had pled guilty to something that was not a crime. However, Bousley had not perfected or pursued a direct appeal, and the Supreme Court found that his Bailey claim was therefore procedurally defaulted:

> . . . there are significant procedural hurdles to consideration of the merits of petitioner's claim, which can be attacked on collateral review only if it was first challenged on direct review. Since the petitioner appealed his sentence, but not his plea, he has procedurally defaulted the claim he presses here. To pursue the defaulted claim in habeas, he must first demonstrate either "cause and actual prejudice" (citations omitted) or that he is "actually

> innocent," (citations omitted). His arguments that the legal basis for his claim was not reasonably available to counsel at the time of his plea and that it would have been futile to attack the plea before Bailey do not establish cause for the default . . . . [furthermore] actual innocence means factual innocence, not mere legal insufficiency. Accordingly, the government is not limited to the existing record but may present any admissible evidence of the petitioner's guilt. Petitioner's actual innocence showing must also extend to charges that the government has foregone in the course of plea bargaining. Bousley, 523 U.S. at 615. (emphasis added)

Noting that a procedural default would only be excused for cause and actual prejudice or because of actual innocence, the court examined both possibilities. Bousley argued that the legal basis for his claim was not reasonably available to him at the time his plea was entered. The court rejected that argument, holding that the claim was not ". . . so novel that its legal basis was not reasonably available to counsel." Bousley, 523 U.S. at 623. Bousley next argued that his default should have been excused because pre-Bailey any attempt to attack his guilty plea on that basis would have been futile. The court rejected that logic as well, holding that futility doesn't constitute cause if it simply means that a claim was unacceptable to that particular court at that time. Noting that no one wants to convict a person who is actually innocent, the Supreme Court concluded that actual innocence trumps even a default. However, it is incumbent upon the petitioner to establish actual innocence, in light of all the evidence, demonstrating to the Court that "it is more likely than not that no reasonable juror would have convicted him." Bousley, 523 U.S. at 623. Finally the Supreme Court noted that actual innocence means factual innocence, not mere legal insufficiency, and the Court held that the government is not limited to the existing record in its rebuttal of actual innocence. Perhaps more importantly, the Supreme Court specifically noted that "in cases where the government has foregone more serious charges in the

course of plea bargaining, petitioner's showing of actual innocence must also extend to those charges." Bousley, 523 U.S. at 624. Only if the petitioner can convince the court that he is actually innocent of all charges, is he entitled to have his defaulted claim of an unintelligent plea considered on its merits.

The evidence would show that the original impetus for the conspiracy sub judice was Zach Scruggs' belief that Tim Balducci's friendship with Judge Lackey could be used to corruptly influence the judge. As the "earwigging" ripened into an actual bribery, David Zachary Scruggs' conduct evidenced knowledge of, and wilful acquiescence to, the bribery. He obviously felt that he and his co-conspirators could write the judge's order any way they wanted, either dismissing the plaintiff's claim outright or sending the matter to arbitration. His language evidenced no respect for the Court or the legal system, and Tim Balducci's testimony, together with a fair interpretation of the November 1, 2007, undercover tape, clearly establish Zach Scruggs' knowledge of the quid pro quo and wilful participation in the bribery.

Zach Scruggs is not actually innocent and he has therefore procedurally defaulted, forfeiting any Skilling claim he might otherwise have prosecuted. Parenthetically, he is also guilty of bribing a judge based on the application of ordinary conspiracy law on a basic Pinkerton theory.[5] As a co-conspirator, he is responsible for what Timothy Balducci did, including the payment of $40,000 to Judge Lackey. Fifth Circuit Pattern Instruction 2.22 says that " . . . if you find beyond a reasonable doubt that during the time the defendant was a member of that conspiracy, another co-conspirator committed the offenses . . . in furtherance of or as a foreseeable consequence of that conspiracy, then you may find the defendant guilty of [that count], even though the defendant

[5]Pinkerton v. United States, 666 S. Ct. 1180, 1184 (1946).

may not have participated in any of the acts which constitute the offenses described . . ."

The petitioner was charged by indictment with very serious offenses involving the actual delivery of a bribe for the purpose of corruptly influencing a sitting judge. Because petitioner was, in the end, the last defendant standing, his attorneys negotiated for him an extremely favorable plea agreement. By taking advantage of that opportunity he caused the government to move to dismiss the more serious charges, and he avoided exposure to a much more onerous sentence. Now that he has served his time, he seeks to set aside his conviction and resume the practice of law. But the record is more than sufficient to show that he is not "actually innocent." There should be finality. His Skilling claim is forfeited. As the Supreme Court noted in Bousley:

> we have strictly limited the circumstances under which a guilty plea may be attacked on collateral review. "It is well settled that a voluntary and intelligent plea of guilty made by an accused person, who has been advised by competent counsel, may not be collaterally attacked" (citations omitted) and even the voluntariness and intelligence of a guilty plea can be attacked on collateral review only if first challenged on direct review. Habeas review is an extraordinary remedy and "will not be allowed to do service for an appeal" (citations omitted). Indeed, "the concern with finality served by the limitation of collateral attack has special force with respect to convictions based on guilty pleas" (citations omitted). Bousley, 523 U.S. at 621.

In other words, enough is enough. Petitioner's first assignment of error is without merit and should be denied and overruled.

**SECOND AND THIRD ASSIGNMENTS OF ERROR**

There is no reason to believe Anthony Farese was ever "coopted" by anyone; no actual conflict occurred, and the petitioner was never deprived of the honest and effective assistance of

counsel. Joey Langston was never asked to testify against Zach Scruggs and he never did. His sworn affidavit does make it clear that he and the undersigned prosecutor probably miscommunicated. When he said that Zach Scruggs knew about the Wilson v. Scruggs case, he apparently meant that petitioner knew about the case, not about the criminality that occurred behind the scenes. However, the government's position that Zach Scruggs did know of that criminality remains undiminished, in light of the e-mail he sent to Johnny Jones. Whether mere knowledge of that criminality would have been sufficient to support the admissibility of 404(b) evidence against the petitioner standing alone is arguable, but the petitioner waived that argument by pleading guilty the morning of the 404(b) hearing. Zach Scruggs knows whether or not he knew about the criminality behind Wilson v. Scruggs. If he did not, he should have litigated the renewed 404(b) motion before making the decision to plead guilty. His guilty plea waived the issue. United States v. Cothran, 302 F.3d 279 (5th Cir. 2002), United States v. Owens, 996 F.2d 59 (5th Cir. 12993). In Cothran the Fifth Circuit held that objections to Miranda warnings and coerced confessions, perjury and unlawful search and seizure are all waived by a plea of guilty. Cothran, p. 286. In Owens the Fifth Circuit found that the defendant's guilty plea waived his objections to search and seizure, as well as his argument that the federal prosecutor chose to prosecute him in federal court because of his race. Owens, p. 60.

The two men who signed conflict waivers releasing Anthony Farese to represent them both were lawyers. It is reasonable to assume that they knew what they were signing, and indeed subsequent events have proven them correct; no actual conflict ever existed between Joey Langston and David Zachary Scruggs. After firing Anthony Farese on January 9, 2008, the petitioner employed other representation. Using his considerable means, it is reasonable to

assume that he hired what he thought were the best lawyers he could find, a former Mississippi Attorney General, a former United States Attorney, and a former Assistant United States Attorney. All three attorneys represented him throughout the critical stages of his case, the filing of pretrial motions, the hearings conducted on February 20 and 21, 2008, the negotiations which led to his very favorable plea agreement with the government and his plea and sentencing. No Strickland v. Washington error occurred.[6]

**CONCLUSION**

The petitioner's protestations notwithstanding, Zach Scruggs is unable to show actual innocence of the charges dismissed by the government in exchange for his plea to a lesser offense. By the entry of his plea he has waived all other non-jurisdictional defects. United States v. Bell, 966 F.2d 914 (5th Cir. 1992). Hoping for a sentence to probation, but receiving instead the sentence to fourteen months confinement, the petitioner is aggrieved and he would also like to restore his status as a practicing attorney. That doesn't change the fact that he is a convicted felon whose conviction should stand. The rule of finality should now apply.

Respectfully submitted,

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[6]Strickland v. Washington, 466 U.S. 668 (1984).