UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI

UNITED STATES OF AMERICA

v. NO. 3:09CR002-GHD

RICHARD F. SCRUGGS

PETITIONER'S MOTION FOR JUDGMENT ON THE PLEADINGS

Petitioner respectfully requests that this Court enter judgment on the pleadings. No evidentiary hearing or complicated legal analysis is required to resolve this case, as it is undisputed that the Government's continued prosecution of Petitioner is in violation of the First Amendment to the United States Constitution. Petitioner's 2255 Petition plainly argued that, apart from all other questions and contentions, his political endorsement ("recommendation") of then Judge Bobby Delaughter was protected speech. In other words, even if Petitioner had intended for his endorsement to influence the judge's ruling, such verbal advocacy was insulated from prosecution by the First Amendment. Petitioner's Petition pointed out that this position is consistent with the protection given pure political speech aimed at influencing other types of governmental decision-makers. It would be "preposterous," as one noted jurist wrote, to prosecute the same type of endorsement made to influence a governor to veto a bill. *United States v. Thompson*, 484 F.3d 877, 883 (7th Cir. 2007). Petitioner's argument explains why no one has ever before

been prosecuted for bribery (or other crimes) for making his political support conditional upon a public official's actions.

The Government refused to even address the First Amendment issues in its Response, even though those issues were squarely raised in the Petition, and this Court ordered a response to the Petition. Since the Government "did not contest" the First Amendment allegation, it "therefore effectively conceded it." *U.S. v. Branch*, 91 F.3d 699, 752 (5th Cir. 1996). "If a party fails to assert a legal reason why summary judgment should not be granted, that ground is waived and cannot be considered or raised on appeal." *Vaughner v. Pulito*, 804 F.2d 873, 877 n. 2 (5th Cir.1986); *Correia v. Lappin*, 375 Fed.Appx. 378, 379 (5th Cir.,2010) (affirming trial court's dismissal of a complaint where party failed to respond to motion to dismiss).[1]

When this case was originally brought in 2008, the Government prosecuted Petitioner for a range of unethical conduct, including *ex parte* conversations between Ed Peters and Bobby DeLaughter, and the Government relied on several federal crimes, including the Federal Programs Bribery Statute, 18 USC § 666. Now, however, the Fifth Circuit's decision in *Whitfield v. U.S.*, 590 F. 3d 325 (5th Cir. 2009) has made 18 USC § 666 inapplicable to state court judges like Bobby DeLaughter, causing the Government to narrow its focus to a single federal crime, that of honest services fraud, 18 USC § 1346. In turn, *Skilling v. U.S.*, 130 S. Ct.

[1] *See also U.S. v. Fowler*, 891 F.2d 1165, 1167 (5th Cir., 1990)(Granting *coram nobis r*elief where "the government did not contest the appropriateness of such relief before the district court or in its briefs on this appeal."); *Mullins v. TestAmerica, Inc.*, 564 F.3d 386, 417 (5th Cir.2009) ("[W]e deem this issue waived due to inadequate briefing."); *Payne v. District of Columbia*, --- F.Supp.2d ----, 2011 WL 3890671, *8 (D.D.C., 2011) ("By failing to present the Court with any legal argument regarding his due process claim, Payne effectively conceded it").

2896, 2932-33 (2010) held that this statute was facially vague, and in narrowing the statute the Supreme Court forced the Government to narrow its factual allegations to focus only upon Petitioner's verbal endorsement of DeLaughter for public office. Such an endorsement is indisputably core political speech.

Thus, in short, the Government is now prosecuting one behavior -- core political speech, with one criminal statute that is facially vague. From the perspective of the United States Constitution, this is not even a close case. "If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech." *Citizens United v. Federal Election Comm'n*, 130 S.Ct. 876, 904 (2010). "At the very least, our cases recognize that disciplinary rules governing the legal profession cannot punish activity protected by the First Amendment, and that First Amendment protection survives even when the attorney violates a disciplinary rule he swore to obey when admitted to the practice of law." *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1050 (1991) (striking down a speech restriction as unconstitutionally vague and prohibiting discipline based thereupon).

The Supreme Court and the Fifth Circuit Court of Appeals have been outspoken in their protection of the First Amendment. Petitioner will not reiterate the extensive argument and many authorities set forth in the Petition (pp26-32) and Reply (p5) that are incorporated here by reference. Petitioner will provide supplemental authorities.

Just a few weeks ago, on September 27, 2011, the Fifth Circuit affirmed a district court's dismissal of an indictment, in which the Government sought to criminalize speech. *U.S. v. O'Dwyer*, Slip Op, 2011 WL 4448739 (5th, 2011). There, the Government at least used an unambiguous statute, 18 U.S.C. § 875(c), which criminalizes the interstate communication of certain threats. Dwyer sent an email to the chambers of a federal bankruptcy judge, trying to influence him to grant certain relief, including the following language: "suppose I become 'homicidal'? Given the recent 'security breach' at 500 Poydras Street, a number of scoundrels might be at risk if I DO become homicidal." *Id.*, at *1. The trial court and the Fifth Circuit held that even this scary language designed to influence a judge was protected by the First Amendment, such that the Government's indictment must be dismissed. O'Dwyer was granted a judgment on the pleadings. *See also Morgan v. Swanson*, --- F.3d ----, 2011 WL 4470233 (5th Cir., Sept 27, 2011) (granting judgment on the pleadings, holding that elementary school principal violated the first amendment).

Earlier this year, the Fifth Circuit struck down as violating the First Amendment several provisions of Louisiana's amended Rules of Professional conduct, including a rule that prohibited attorneys from using testimonials about past successes, a rule that prohibited attorney advertisements that portrayed a judges or a jury, a rule that prohibited attorneys from using trade names to suggest that they could get results, and a rule that dictated the font size and speed of speech

used in disclaimers. *Public Citizen Inc. v. Louisiana Attorney Disciplinary Bd.*, 632 F.3d 212 (5th Cir., 2011).

At least Louisiana's rules were quite explicit about what was and was not prohibited, unlike the facially vague statute that the Government is trying to use here. *See SEIU Local 5 v. City of Houston*, 595 F.3d 588 (5th Cir.,2010) (striking down ordinances holding that, "regulation of speech must be through laws whose prohibitions are clear.") The honest services fraud statute obviously is not clear, as evinced by the Government own inability to consistently specify its scope.[2]

For the purposes of a First Amendment overbreadth challenge, in contrast to a Due Process vagueness challenge as in *Skilling,* it does not matter whether Petitioner's own case could be constitutionally prosecuted. The First Amendment context creates even greater concerns about fair notice, the chilling of speech, and discriminatory enforcement. *See U.S. v. Stevens*, 130 S.Ct. 1577, 1587 (2010) (striking down an overbroad statute, without determining whether application to the criminal defendant would have been constitutional.).[3] Arguably, the defendant in *Stevens* should have known that his behavior, involving videotaping the crushing of small animals, was wrongful, but the statute was struck down nonetheless. The mere fact that the honest services fraud statute is vague prevents it from being

[2] Compare Brief for the United States Government in *Weyhrauch v. U.S.*, 2009 WL 3495337, 45-46 ("Honest-services fraud **does not** embrace allegations that purely **political** interests may have influenced a public official's performance of his duty. The core interests that give rise to the divided loyalties covered **are personal financial interests** of the official, his family, or his associates that raise a conflict with official duties.") and its Response in this case (arguing that a non-financial political endorsement could form the basis for honest services fraud) .

[3] *See Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 483, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989) ("Ordinarily, the principal advantage of the overbreadth doctrine for a litigant is that it enables him to benefit from the statute's unlawful application to someone else "); *see also Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 462, n. 20, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978) (describing the doctrine as one "under which a person may challenge a statute that infringes protected speech even if the statute constitutionally might be applied to him").

applied in the First Amendment context. If Congress wishes to regulate in this area, it needs to do so carefully and explicitly.

Here, the Government's prosecution of Petitioner shows a quite real problem of discriminatory enforcement, which is a primary concern for First Amendment jurisprudence. The Supreme Court has said that,

> The prohibition against vague regulations of speech is based in part on the need to eliminate the impermissible risk of discriminatory enforcement, for history shows that speech is suppressed when either the speaker or the message is critical of those who enforce the law. The question is not whether discriminatory enforcement occurred here, and we assume it did not, but whether the Rule is so imprecise that discriminatory enforcement is a real possibility.

Gentile, 501 U.S. at 1050. *See also Skilling v. U.S.,* 130 S.Ct. 2896, 2904 (2010) (similar). Of course, there are innumerable instances of attorneys or litigants endorsing and even contributing to judges' campaigns while cases are pending before those same judges, and the Government has provided no explanation as to why it chose Petitioner's case to prosecute. And, there are innumerable instances in which political advocates – whether the National Rifle Association or Planned Parenthood – condition their endorsement of a gubernatorial or senate candidate on promises that he will conform to their policy preferences. Indeed, the Government has tacitly conceded that in the entire history of the United States, it has never before prosecuted the use of a political endorsement as a bribe.

More particularly, in the weeks since Petitioner filed his Reply, in a strikingly similar case involving an honest services fraud prosecution for misconduct by a state court judge, the Government has agreed to dismiss all

charges in the wake of *Skilling*.[4] This case involves Brooks Blitch III, formerly a Georgia state court judge, who exploited his office to fix multiple cases, and then pled guilty to honest services fraud. After *Skilling*, Blitch filed a 2255 Petition, not unlike the present one. Strikingly, the Government simply conceded that Blitch was entitled to relief on the basis of *Skilling*, the very relief Petitioner seeks. Even though Blitch's case involved 16 other "foregone" charges, the Government did not insist upon the "actual innocence" analysis they demand here. *See* Exh. A (indictment). Unlike the present case, the Blitch indictment explicitly alleged a quid pro quo bribe, in the form of free legal services that were provided "in exchange for" Blitch's official decisions, which arguably satisfies *Skilling*. Exh. A, at 7. In Petitioner's case, the Government instead stretches to transmogrify a political endorsement into a bribe. And, the Government had explicitly alleged that Blitch "did devise a scheme and artifice to defraud and to obtain **money** by means of false and fraudulent pretenses and representations," which arguably takes the case out of the ambit of *Skilling*. Exh. A., at 17 (emphasis added).

In Petitioner's case, the Government tries to invent a money fraud claim *ex-post-facto* (and contrary to the testimony of its immunized witness and the Government's representations in open court), and then argues that it bars relief. Most strikingly, unlike the present case, Blitch's did not involve constitutionally protected speech. Thus, for on any objective analysis, the Blitch case should be an easier case for the Government to continue prosecuting than the present one.

[4] *See* Russ Bynum, *Feds ask court to toss Ga. ex-judge's conviction*, Associated Press, 9/29/11 available at http://www.chron.com/news/article/Feds-ask-court-to-toss-Ga-ex-judge-s-conviction-2195010.php.

Instead, the Government reverses its priorities. The Government insists that Mr. Blitch should go free, while the Government continues to prosecute Petitioner for his constitutionally-protected behavior.

One can only speculate as to the reasons the Government has chosen to apply the facially-vague honest services fraud statute so disparately, and then refused to even explain or defend its behavior in briefing, when this Court ordered it to do so. Regardless, the Court now has the power to do what the Government seems unwilling or unable to do in this case – address the First Amendment claim on the merits and dismiss the prosecution against Petitioner.

Respectfully submitted, this 17th of October, 2011.

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

I, Edward D. Robertson, Jr., hereby certify that on October 17, 2011, I served copies of this Motion 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.