IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 94-7317

(CR-87-123; CA-92-45-N)

UNITED STATES OF AMERICA,

Plaintiff,

v.

MORTON M. LAPIDES,

Defendant-Petitioner

INFORMAL BRIEF FOR THE UNITED STATES

Petitioner, Morton M. Lapides, the Chairman of what was then known as Allegheny Bottling Company ("Allegheny Pepsi") was indicted on October 14, 1987, for conspiring to fix prices for soft drinks sold by Allegheny Pepsi and its chief competitor, Mid-Atlantic Coca-Cola Bottling Company ("MAC"). The evidence at his trial in April and May of 1988 established that Lapides not only knew about and participated in the conspiracy, but that he instigated it by ordering Allegheny Pepsi's President, James Sheridan, to meet with MAC President, James Harford, to secure an agreement to refrain from price discounting. In affirming Lapides' conviction, this Court held that "[t]here was sufficient evidence to convict Lapides by what he did, what he said, and the orders he gave his employees in furtherance of the conspiracy." United States v. Harford, CA 4 No. 88-5139 et al. (Jan. 11, 1989) (unpublished) (Govt. Exh. 20 at 7).

In 1992, Lapides filed a petition for a writ of error coram nobis (28 U.S.C. 1651) in which he argued that his 1988 conviction should be set aside because his Fifth and Sixth

Amendment rights were violated. The petition alleged that Lawrence I. Weisman, whom Lapides claimed was his attorney, communicated to government agents, including the FBI, the SEC, and the Department of Justice, a "wide range of topics" "including Lapides' . . . strategy for the defense of the antitrust case." Lapides' Informal Brief ("Inf. Br.") 2. This allegation was based primarily on an affidavit executed by Lawrence Weisman on October 11, 1991, in exchange for Lapides' dismissal of a multimillion dollar lawsuit against Weisman. Lapides also relied on an affidavit of Weisman's wife, Joy, secured by Lapides shortly after Joy and Lawrence Weisman separated.

The trial court examined the Weisman affidavits, as well as other statements of the Weismans that contradicted or negated their affidavits. The court also reviewed additional affidavits and documentary evidence submitted by both sides. This evidence established:

l. In the only meetings Weisman attended that were claimed to be the source of privileged attorney-client information, the only "defense strategy" discussed was that co-defendant Allegheny Pepsi would plead "not guilty" and that Lapides would (or would "likely") testify in his own defense. Order and Opinion of Oct. 21, 1994 ("CN Order") at 9-10, 45.

2. There is no credible evidence that even this limited so-called "defense strategy" was ever relayed to government prosecutors prior to or during Lapides' trial. Id. at 18-29.

3. Although, prior to the antitrust trial, Weisman did communicate with SEC representatives concerning securities matters, and with Neil Walsh, a friend of Weisman's said to have FBI contacts, there is no evidence that any antitrust defense strategy was discussed in these communications or that any matters discussed were ever relayed to the Department of Justice prosecutors prior to or during Lapides' trial. Id. at 22-29.

The trial court thus held that Lapides had failed to raise a sufficient claim to warrant an evidentiary hearing or to justify the extraordinary remedy of entry of a writ of error coram nobis.

In this appeal, Lapides challenges an Order and Opinion filed May 22, 1992 denying a motion for recusal ("Recusal Order"), an Order filed July 20, 1993, denying a motion to take discovery ("Discovery Order"), and the coram nobis order ("CN Order") filed October 21, 1994. We discuss these orders in parts A (Recusal), B (Discovery), and C (Coram Nobis), below.

A. THE RECUSAL ORDER

l. DID THE DISTRICT COURT FAIL TO CONSIDER IMPORTANT GROUNDS FOR RELIEF. IF SO, WHAT GROUNDS?

Petitioner claims that the trial court "failed to consider the inferences to be drawn" from the incidents petitioner relied on in support of the recusal motion. Inf. Br. 5. The court, however, gave thoughtful analysis to each of petitioner's allegations, and the refusal to grant the recusal motion was not an abuse of discretion. See United States v. Carmichael, 726 F.2d 158, 160 (4th Cir. 1984).[1]

2. DID THE DISTRICT COURT INCORRECTLY DECIDE THE FACTS?

In his recusal motion, Lapides alleged that three incidents, taken together, raised an appearance of bias: (l) a newspaper report of remarks made by Judge Doumar in sentencing Armand Gravely, an Allegheny Pepsi employee convicted of price-fixing prior to Lapides'

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[1] An order denying a motion to recuse is reviewable by mandamus. In re The Aetna Casualty and Surety Co., 919 F.2d 1136, 1142-1143 (6th Cir. 1990); In re Beard, 811 F.2d 818, 827 (4th Cir. 1987) (refusal to recuse can be reviewed by mandamus); but see, People Helpers Foundation Inc. v. City of Richmond, Va., 12 F.3d 1321, 1325 (4th Cir. 1993) (reviewing refusal to disqualify on appeal). Petitioner never sought mandamus; rather, he waited to see how the court would rule on the coram nobis petition and now, having lost that petition, seeks a second chance before a new tribunal.

indictment and trial. The judge reportedly commented that the evidence at trial showed that Gravely's company and its competitor should be indicted (Inf. Br. 13-14); (2) Judge Doumar's remarks at a pretrial hearing where, in response to a remark by Lapides' counsel that "[government prosecutor] Jordan is an extremely capable lawyer," Judge Doumar responded "I think he is pretty capable, too" (Inf. Br. 15); and (3) alleged statements by Joy and Lawrence Weisman that they had ex parte communications with Judge Doumar or his law clerk concerning Lapides. Inf. Br. 8-12. Although not raised below, Lapides claims for the first time on appeal that remarks made by Judge Doumar at the recusal hearing also evidence bias. Inf. Br. 16-19.

The trial court examined each of the bases for recusal before it -- both individually and as part of an alleged pattern of bias -- and concluded that no basis for recusal existed. Recusal Order 5-8, 10, 15, 20, 23, 24 (court repeatedly examines each allegation, not only on its own merit, but as part of complete set of allegations). Lapides' assertion that the court failed to give deference to the "cumulative force of a number of different events" (Inf. Br. 7) is thus contradicted by the record. Similarly, Lapides' assertion that the court demanded "actual" partiality, as opposed to the "appearance of fairplay" (Inf. Br. 7) misstates the record. See Recusal Order 17, 20, 22, 23, 24 (finding no violation of either 28 U.S.C. § 144 (actual bias) or § 455(a) (appearance of bias)).

(a) Remarks at the Gravely Trial

Judge Doumar correctly found no appearance of bias in the remarks made at the Gravely trial. The challenged remarks expressed the court's opinion, reached after hearing the evidence in the Gravely case, that if Gravely was involved, his company, Allegheny Pepsi, must have been involved as well. Mem. in Support of Recusal Motion, attachment l. Thus, Judge Doumar never

referred to Lapides at all, but only to his corporation. Moreover, the court's remarks were based on evidence adduced at the trial over which Judge Doumar presided. Accordingly, they are not evidence of extrajudicial or personal bias against Lapides, and nothing in those remarks indicates that Judge Doumar was incapable of making a fair judgment with respect to Lapides during his initial trial or in this post-conviction proceeding.[2] Recusal Order 16-18. Liteky v. United States, 114 S. Ct. 1147, 1157 (1994) ("opinions formed by the judge on the basis of facts introduced or events occurring in the course of current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible"); United States v. Morris, 988 F.2d 1335, 1337 & n.2 (4th Cir. 1993) ("Absent extraordinary facts . . . a nonjudicial source must be present to raise the appearance of impropriety"); accord, United States v. Carmichael, 726 F.2d 158, 160-162 (4th Cir. 1984) (rejecting claim of bias based on court's remark that "a grand jury . . . should consider whether there has been a subornation of perjury or an obstruction of justice on the part of anyone involved").

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[2] Lapides relies for the first time on appeal on remarks made by Judge Doumar at an ex parte hearing on the morning of October 13, 1987 ("A.M." hearing). Inf. Br. 14. Since this argument was never made to the district court it cannot be relied on now. United States v. Washington, 852 F.2d 803, 805 (4th Cir. 1988). In any event, there is no merit to the claim of bias. At that hearing, and a hearing later that day with government counsel present ("P.M." hearing), Lapides argued that the grand jury should consider the results of a polygraph examination that he claimed was "exculpatory" -- but which the court found to be "vague and squishy" (P.M. Tr. 23-24) -- in a last-ditch effort to stave off an indictment that Lapides' counsel knew was impending. P.M. Tr. 23-26, 37, 43. Lapides asked to exclude the press from the hearing and the court agreed, but remarked that the press would likely know in any event that Lapides would be indicted if it had "listened to the [Gravely] trial." A.M. Tr. 6-7. These remarks, based on evidence adduced at the Gravely trial, raise no inference of actual or apparent bias. Indeed, Lapides never complained of them until filing his appellate brief now, eight years after the remarks were made.

Finally, the remarks complained of took place in May 1987, eleven months before Lapides was tried. Yet no motion to recuse Judge Doumar was filed until 1992, years after conviction and after Lapides' sentence had been fully served. See United States v. Owens, 902 F.2d 1154, 1156 (4th Cir. 1990) (one must raise the disqualification issue at the earliest moment after knowledge of the facts tending to prove disqualification). Accordingly, Lapides should not be permitted to complain about these remarks at this late date.

(b) Comments Concerning Prosecutor David Jordan

Judge Doumar's remarks at a pretrial hearing in December 1987, four months before the trial of this case, in which he simply agreed with defense counsel's assertion that prosecutor David Jordan was "pretty capable," create no appearance of bias and were never challenged in a timely motion for recusal. Contrary to Lapides' suggestion (Inf. Br. 15-16), Judge Doumar's remark did not suggest that the court had any opinion about David Jordan's "credibility" or that the court was predisposed to rule favorably for the government on issues of credibility.[3] Shaw v. Martin, 733 F.2d 304, 308 (4th Cir. 1984) (comment that trial attorney was outstanding member of the bar was not extrajudicial source from which bias or prejudice should be inferred); see also In re Beard, 811 F.2d 818, 828 (4th Cir. 1987) (judge's statement that major stockholder of defendant corporation was a "neighbor" and a "fine man" did not require recusal).

(c) Ex Parte Communications

The trial court properly found that the allegations of ex parte communications between

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[3] Indeed, while Lapides claims that the government's credibility was the key issue, the claim rests on the erroneous premise that the court decided the coram nobis petition by automatically crediting the government's affidavits and rejecting those of the defendant (Inf. Br. 15). See pages 20-34, infra.

Lawrence and/or Joy Weisman and Judge Doumar or his clerk provide no basis for recusal, whether considered alone or in conjunction with the other challenged conduct. The allegations rested on hearsay declarations in an affidavit of petitioner Lapides (Recusal Order 8-10).[4] However, telephone records and the statements of Lawrence and Joy Weisman on which the Lapides affidavit relied established that neither of the Weismans ever communicated with Judge Doumar or anyone else in his chambers before Lapides' trial and sentencing. The only telephone records produced by Lapides showed calls from the Weismans' number to Judge Doumar's chambers beginning on August 26, 1988, the day after Lapides was sentenced. Lapides Aff. ¶4, attachment 2 to Mem. in Support of Motion for Recusal.[5] There is no evidence that either of the Weismans talked to Judge Doumar personally in any of these calls, that any communications were relayed to Judge Doumar, or that they affected the judge's ability to rule impartially on any matter concerning Lapides. Recusal Order 10-12.

Moreover, Joy and Lawrence Weisman provided conflicting information concerning who made the calls and what was discussed. Joy said her husband told her he had called Judge Doumar's "office" because "[h]e wanted Mort sentenced," but she admitted she had no personal knowledge of the call. Govt. Exh. 13 at 49-52. Lawrence Weisman, however, never said in his affidavit that he had spoken to the district court prior to sentencing; and at his deposition he testified that he had never called Judge Doumar's chambers at all prior to the summer of 1989 (a

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[4] To the extent that the claim of ex parte communications rested on hearsay statements in Lapides' affidavit, the claim could be disregarded. United States v. Balistrieri, 779 F.2d 1191, 1204 (7th Cir. 1985), cert. denied, 475 U.S. 1095 (1986).

[5] August 26, 1988 was the day of Lapides' bond revocation hearing; Lawrence Weisman's allegations that Lapides held a Haitian passport and was planning to flee the country led to the government's move to revoke Lapides' bail. See note 17, infra.

year after Lapides was sentenced). Govt. Exh. ll at 162, 169-172, 175, 254-256. Moreover, Lawrence Weisman claimed in his affidavit that his wife told him that she had telephoned Judge Doumar's chambers and spoke to Judge Doumar personally on August 26 and 29, 1988. Def. Exh. B at 5. Joy, however, said that she never spoke to Judge Doumar personally. She said she spoke to Judge Doumar's "clerk" to try to get Lapides' attorneys to leave her husband alone. Govt. Exh. 12 at 143-145; Govt. Exh. 13 at 52.[6] There is no indication that these communications were relayed to Judge Doumar or that they influenced his actions in any way. As Judge Doumar stated, "If district court judges are required to recuse themselves every time an interested party contacts the judge's chambers, the federal court system would grind to a halt." Recusal Order 11.

The last claimed contact between Lawrence Weisman and Judge Doumar allegedly occurred on May 15, 1989, nine months after Lapides was sentenced. Weisman claimed in his affidavit supporting the coram nobis petition that he had called Judge Doumar and was told about "an expunged proceeding in Anne Arundel County in Maryland involving Mr. Lapides, which [Judge Doumar] said figured significantly in his decision to sentence Mr. Lapides to prison." Def. Exh. B ¶9. At his deposition, Weisman offered conflicting and confusing testimony concerning whether he learned about this "expunged record" from Judge Doumar or

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[6] Lapides speculated that Judge Doumar's "angry" remarks to Lapides' counsel at a bench hearing on August 26, 1988 must have been prompted by a call from the Weisman home (Inf. Br. 11-13). But the transcript of the hearing (Bench Conference F, attached to US Opposition to Motion for Recusal) demonstrates, as the trial court found, that the court's questioning of A. Raymond Randolph was prompted by a communication from a stock brokerage firm, not by any call from the Weisman's. See also Govt. Exh. 11 at 104 (Lawrence Weisman refers to Brean Murray letter that prompted court's questioning of Randolph). In any event, the court's shortness with defense counsel provides no basis, of itself, or in conjunction with other allegations, for recusal. Liteky, 114 S. Ct. at 1157.

from Joe Townsley, an associate of Lapides and Weisman. Govt. Exh. 11 at 31-34, 132, 161, 195-197, 412-414. At her deposition, Joy Weisman said that her husband in fact had learned of Lapides' expunged record from Townsley. Govt. Exh. 12 at 21-24, 82-83. And Lawrence Weisman's belief that he probably had learned of the "expunged record" from Judge Doumar was based on his recollection that Judge Doumar had referred him to the public record of Lapides' bail hearing which contained the information about Lapides' 1978 conviction that was the subject of this expunged record. Govt. Exh. 11 at 196-198. Lawrence Weisman also said that Townsley had told him the conviction had been expunged illegally, and not pursuant to any court order. Govt. Exh. 11 at 132, 195-196.

No matter how Weisman learned about the "expunged record," it is irrelevant. As Lapides concedes (Inf. Br. 9), Judge Doumar could rely on the expunged conviction in sentencing. Williams v. New York, 337 U.S. 241, 247 (1949); United States v. Bowman, 926 F.2d 380, 381 (4th Cir. 1991); United States v. Hillsberg, 812 F.2d 328, 335 (7th Cir.), cert. denied, 481 U.S. 1041 (1987)). And whether or not Judge Doumar communicated to Weisman matters that were part of the public record of the bail hearing, there is no showing that Judge Doumar had or would reasonably appear to have a personal bias that affected his sentencing of Lapides or his impartiality in this proceeding. While Lapides claims that the mere allegation that Judge Doumar discussed with Weisman the contents of an expunged record creates an appearance of partiality (Inf. Br. 9-10), this is incorrect. A court need not and ought not recuse itself on the basis of legally insufficient allegations. See Sine v. Local No. 992 international Brotherhood of Teamsters, 882 F.2d 913, 914 (4th Cir. 1989) (it is equally a judge's duty to deny a motion to recuse if the facts stated in an affidavit are legally insufficient as it is to grant relief if

they are sufficient); El Fenix de Puerto Rico v. The M/Y Johanny, 36 F.3d 136, 140 (lst Cir. 1994) ("`A trial judge must hear cases unless some reasonable factual basis to doubt the impartiality of the tribunal is shown by some kind of probative evidence'") (emphasis in original).[7]

(d) The May 4, 1992 Hearing

Finally, while Lapides did not argue it to the trial court, he now asserts that Judge Doumar's remarks at the recusal hearing of May 4, 1992, indicate an appearance of bias. Inf. Br. 16-19. The claim is insubstantial. United States v. Washington, 852 F.2d 803, 805 (4th Cir. 1988) (matters not raised in the district court may not be raised for the first time on appeal).

At the recusal hearing the court would not permit defense counsel to supplement the insufficient allegations in Lawrence and Joy Weisman's affidavits by allowing defense counsel to testify about what "Mrs. Weisman told me [defense counsel] personally." May 4, 1992 ("Recusal") Tr. 16; see Inf. Br. 17. The court correctly held that defense counsel could not act as counsel and witness at the same time, particularly since his testimony was hearsay. The court invited defense counsel to call Joy Weisman as a witness and offered to hold an evidentiary hearing. Recusal Tr. 19, 20. Defense counsel responded that he did not intend to call Joy Weisman, but then continued to flout the court's directive by attempting to inject the same improper hearsay. Id. at 16, 17, 18. While the court was understandably upset by defense

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[7] Motions to vacate a sentence must be brought in the first instance before the judge that handled the trial and sentencing. Rule 4(a), Rules Governing Proceedings Under Section 2255 of Title 28 United States Code; Carvell v. United States, 173 F.2d 348, 348-349 (4th Cir. 1949); United States v. Parker, 742 F.2d 127, 129 (4th Cir.), cert. denied, 469 U.S. 1076 (1984); Korematsu v. United States, 584 F. Supp. 1406, 1412 (N.D. Cal. 1984).

counsel's tactics,[8] nothing in the record demonstrates the court's unwillingness to consider relevant evidence, if properly presented, or to decide the recusal motion impartially.[9]

3. DID THE DISTRICT COURT APPLY THE WRONG LAW?

Lapides concedes that the district court cited the proper legal precedent in its recusal order, but claims that the court gave inadequate weight to cases that Lapides has cited. Inf. Br. 26-27. In fact, those cases support the district court's conclusion that recusal is not warranted on the facts presented here. In Liteky, for example, the Court expressly stated that mere "expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display" do not establish bias or partiality. 114 S. Ct. at 1157. "[J]udicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge." Ibid. Similarly, in Beard the trial court's reference to the defendant as a neighbor and "a fine man" (811 F.2d at 827), and its denunciation of one of the plaintiff's attorneys in strong language (811 F.2d at 830),

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[8] Persisting in this vein, Lapides' brief states that "Joy Weisman, a key witness in this case, had given information that she spoke on at least one occasion directly to the Court concerning the Petitioner." Inf. Br. 5. No statement of Joy Weisman was ever proffered to substantiate this claim (as defense counsel conceded, Recusal Tr. 20), and the defendant refused the court's invitation to have Joy Weisman testify personally about this allegation. Accordingly, Lapides cannot rely either on the allegation itself, or on the court's refusal to permit its introduction through the hearsay claims of defense counsel, as a ground for recusal.

[9] Lapides erroneously suggests that, because the court's remarks show a "direct[] and personal[]" involvement by the court, an appearance of bias is established. Inf. Br. 17. By its very nature, a recusal motion "directly and personally" involves a judge in the matter. That does not divest the court of the duty to decide the motion in the first instance, always subject to appellate review. While Lapides claims that defense counsel declined the court's offer for an evidentiary hearing on the recusal motion because such a hearing would have been futile (Inf. Br. 18 n.16), Lapides could have, and should have, made a record for this Court to review if he truly had any support for his allegations.

did not warrant recusal. And in Carmichael, the Court found that, while the district court might "have been overly sensitive to what he considered personal criticism of his handling of the case, the record reveals no personal bias." 726 F.2d at 162.[10]

The court's denial of the recusal motion was thus proper.

B. THE DISCOVERY ORDER

1. DID THE COURT FAIL TO CONSIDER IMPORTANT GROUNDS FOR RELIEF?

Lapides' claim that the trial court failed to consider the "limited nature" of the discovery order as a grounds for relief (Inf. Br. 6, emphasis in original) seriously understates the breadth of his discovery request.[11] Moreover, as discussed below, the court was within its broad discretion

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[10] In those cases where recusal was ordered (see Inf. Br. 26-27), the facts were far different from those presented here. In Rice v. McKenzie, 581 F.2d 114 (4th Cir. 1978), the federal judge reviewing a habeas corpus petition had been a judge on the state court whose opinion was under review; in United States v. Ritter, 540 F.2d 459, 464 (10th Cir.), cert. denied, 429 U.S. 951 (1976), the court of appeals had twice before found that the trial court could not be impartial; in In re IBM Corp., 1995 U.S. App. LEXIS 825 (2d Cir. 1995), a judge was recused because of "judicial and extrajudicial actions" following the dismissal of an earlier, related case; and in both Roberts v. Bailar, 625 F.2d 125, (6th Cir. 1980), and Haines v. Liggett Group Inc., 975 F.2d 81, 97-98 (3d Cir. 1992), the trial court, based on nonjudicial sources, had expressed an opinion on the ultimate issue in the case.

[11] In addition to seeking to depose six government prosecutors and FBI agents, the discovery motion sought: (l) "Any and all documents relating to the investigation of this matter by the Attorney General's Office or the Office of Professional Responsibility, including, but not limited to reports, draft reports, witness statements, notes, transcripts of interviews and notes of interviews;" (2) "Any and all documents relating to the investigation of this matter by the Federal Bureau of Investigation's Office of Professional Responsibility, including, but not limited to, reports, draft reports, witness statements, notes, transcripts of interviews and notes of interviews;" (3) "Any and all documents relating to Lawrence I. Weisman and/or Joy Day Weisman;" (4) "Any and all documents referring or relating to any role played by Neil Walsh in connection with Morton M. Lapides." Mem. in Support of Motion To Take Limited Discovery, App. A at 3-4. In addition, movant reserved the right to "seek additional discovery." Id. at 7 n.3.

to deny discovery where it found that Lapides had already had extensive discovery in a prior civil case on the very issues involved in the coram nobis proceeding, that none of the vast evidence accumulated to date from that extremely wide-ranging civil discovery supported the allegations in the coram nobis petition, and that Lapides had not made the "good cause" showing required to grant additional discovery. Discovery Order 13-14.

2. DID THE DISTRICT COURT INCORRECTLY DECIDE THE FACTS?

Lapides first claims that the district court erred in finding that "defendants already substantially have obtained such discovery with regard to the issues raised in their motion for writ of error coram nobis." Inf. Br. 19. But the district court correctly found that Lapides had already had "extraordinary" discovery in the related case of Lapides v. Weisman, which involved, among other things, the very issue presented in this case. Discovery Order 13; see Govt. Exh. 5 ¶26 (complaint in Lapides v. Weisman). Lapides used the broad civil discovery available in that case to obtain not only the depositions of Lawrence and Joy Weisman, Neil Walsh, Thomas Walsh, and other FBI agents and SEC officials identified as possible government contacts, but also the files of all government agencies, including the SEC, FBI, and Department of Justice, that might possibly have had anything whatever to do with Lapides and Weisman. Among the documents that Lapides obtained were: (l) all DOJ and FBI documents relating to communications between the DOJ and Weisman or Neil Walsh regarding Lapides or his company, and the identity of every DOJ attorney or investigator who participated in the antitrust investigation or received information about any of the targets of the investigation; (2) all DOJ documents relating to the targets of the investigation received by the SEC, Weisman's communications with probation officers in Norfolk and Alexandria, Weisman's communications

with any U.S. Attorneys Office, Weisman's communications with Judge Doumar or any witnesses in any litigation involving Lapides and his company, and documents identifying all DOJ agents or attorneys who communicated with Weisman or Walsh; (3) all FBI documents relating to communications between the FBI and the SEC regarding Lapides and his company; (4) all DOJ recorded statements of Neil Walsh regarding Lapides or his company; (5) all DOJ and FBI recorded statements of Weisman regarding Lapides or his company. Discovery Order 11-12. In addition to this evidence, Lapides had obtained affidavits from the principal Justice Department officials and FBI agents whom he was now seeking to depose. Discovery Order 13. The court's finding, therefore, that extensive discovery had already been obtained was not clearly erroneous.

Lapides next suggests (Inf. Br. 20) that privileged documents withheld from him in the civil case would be discoverable in this quasi-criminal case.[12] See United States v. Balistrieri, 606 F.2d 216, 221 (7th Cir. 1979), cert. denied, 446 U.S. 917 (1980). In fact, however, discovery in coram nobis and habeas corpus proceedings is narrower than the broad discovery available in civil cases. Compare Fed. R. Civ. P. 26(b)(1) ("Parties may obtain discovery regarding any matter not privileged, which is relevant to the subject matter"), with Rule 6(a), Rules Governing §2255 Proceedings (discovery available "if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise")

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[12] These documents included information relied on by the Justice Department's Office of Professional Responsibility ("OPR") which had conducted two investigations into Lapides' allegations of misconduct by prosecutors David Jordan and Terrence McDonald. OPR concluded that the allegations were without foundation and "that the evidence overwhelmingly supports the conclusion that all conduct by the Department of Justice was proper." Govt. Exh. 17; Dec. 16, 1992 Tr. 87-92.

(emphasis added). Thus, the broad-ranging discovery permitted in civil cases is "neither necessary nor appropriate" in habeas corpus and coram nobis proceedings. Harris v. Nelson, 394 U.S. 286, 297 (1969); Balistrieri, 606 F.2d at 221. In any event, the privileged documents Lapides seeks to discover (Inf. Br. 20-21, note 12 supra), were turned over to the trial judge who examined them in camera and found that they did not support Lapides' claims. Discovery Order 13.

Finally, Lapides claims that the court erred in failing to grant "limited" discovery concerning two interrogatories that were part of the discovery motion. Inf. Br. 22-24. The interrogatories sought to find out whether a GSA telephone number at Buzzards Point was used by the FBI, and whether the FBI agent who conveyed information to Terrence McDonald after Lapides' trial was Thomas Walsh. Inf. Br. 22-23. Even if the interrogatories (which were based on pure speculation) could have been answered in the affirmative, they would not have advanced Lapides' petition because Lawrence Weisman called government agencies all the time about all kinds of matters, most of which had absolutely nothing to do with Morton Lapides or his antitrust case. See note 24, infra. Contacts with the FBI establish nothing in the absence of evidence that the nature of the communication was privileged and that it was passed on to government prosecutors before Lapides' trial.

3. DID THE DISTRICT COURT APPLY THE WRONG LAW?

Lapides' claim that "[i]t is unclear what legal standard the court used" in denying discovery (Inf. Br. 27) is simply wrong. Discovery Order 10 (citing same authorities on which Lapides relies).

A moving party must show "good cause" for discovery in a coram nobis proceeding and

the district court has broad discretion in ruling on such discovery requests. Rule 6(a), Rules Governing §2255 Proceedings; Smith v. United States, 618 F.2d 507, 509 (8th Cir. 1980) (per curiam); Barry v. United States, 528 F.2d 1094 (7th Cir.), cert. denied, 429 U.S. 826 (1976); United States v. Balistrieri, 606 F.2d 216, 221-222 (7th Cir. 1979) (insofar as coram nobis motions are made long after judgment of conviction, they are a peculiarly appropriate candidate for use of discretion; "if examination of only the most relevant materials fails to turn over any relevant new stones, the coram nobis proceedings may be brought to a speedy conclusion").

Notwithstanding extensive discovery in Lapides v. Weisman, Lapides has not uncovered any evidence to substantiate his claim that Lawrence Weisman communicated privileged information to government prosecutors. See Dec. 16, 1992 ("Discovery") Tr. 101-102. The district court thus properly denied discovery because it reasonably concluded that discovery would add little or nothing to the evidence already available to Lapides. United States v. Wilson, 901 F.2d 378, 381-382 (4th Cir. 1990) (denial of further discovery is proper where lack of specific allegations in an affidavit concerning communications with government agents "assures [the court] that rather than representing a tip on an iceberg, the few bits of relevant information contained in [the] affidavit probably represent an exhaustion of the relevant information [affiant] has to offer").

C. THE CORAM NOBIS ORDER

I. DID THE DISTRICT COURT FAIL TO CONSIDER IMPORTANT GROUNDS FOR RELIEF?

Lapides claims that the trial court "focused" on the strong evidence of guilt adduced at his trial instead of considering the public's right to a criminal justice system free of government misconduct. Inf. Br. 6. This misconstrues the court's legal analysis. Point (C)(3), below. It also

ignores the district court's factual findings that the government did not engage in any misconduct whatever. Point (C)(2), below. Lapides also claims that the court "accepted Government affidavits at face value, and summarily rejected affidavits proffered by Petitioner Lapides." Inf. Br. 7. This claim misstates the court's actions and ignores the court's careful scrutiny of every one of Lapides' allegations. Point (C)(2), below.

2. **DID THE DISTRICT COURT INCORRECTLY DECIDE THE FACTS?**

Lapides recognizes that the trial court found the critical facts against him in this proceeding. Inf. Br. 25. He does not seriously try to challenge those factual findings directly by claiming that they are "clearly erroneous." See, e.g., United States v. Costanzo, 740 F.2d 251, 254, 255 (3d Cir. 1984), cert. denied, 472 U.S. 1017 (1985). Rather, Lapides claims that the court erred as a matter of law in deciding any factual issues at all without an evidentiary hearing. Inf. Br. 25. As we show at point (C)(3)(a) below, however, an evidentiary hearing was unnecessary because petitioner's submissions were insufficient on their face to establish any constitutional violation. See, e.g., Taylor v. Alabama, 335 U.S. 252, 262 (1948); Rohrbough v. Wyeth Laboratories, Inc., 916 F.2d 970, 976 (4th Cir. 1990). Specifically, an evidentiary hearing was not required because the record before the court established that Lawrence Weisman did not convey, and could not possibly have conveyed, any privileged defense strategy to government prosecutors prior to conviction.

a. What "Defense Strategy" Did Weisman Learn?

According to Lapides' submissions, Lawrence Weisman attended two meetings at which privileged attorney-client matters were discussed. Def. Exhs. C-J; see CN Order 45. The first meeting occurred on July 13, 1987, three days after Lapides was notified that he was a target of

the antitrust investigation. This was three months before Lapides was indicted and nine months before his trial. While there was a vague allegation that Lapides' "defense to the pending criminal investigation" was discussed (Def. Exh. H (Morse Decl.) ¶3; also Def. Exh. I ¶3), no details of that discussion were provided.[13] No defense strategy related to subsequently filed charges was alleged to have been discussed, and no trial strategy could have been discussed meaningfully at that time. See CN Order 9.

Weisman attended a second meeting on February 24, 1988, six weeks before trial. The only subjects reportedly discussed at that meeting were: (l) the fact that co-defendant Allegheny Pepsi would plead not guilty to the charges; (2) that Morton Lapides "would" (Def. Exh. D) or "appeared likely that he would" (Def. Exh. H) testify at trial; (3) Judge Doumar's potential bias; (4) whether Mr. Peters of Williams & Connolly should appear as a witness or represent the company at trial; and (5) that Jerry Pollino had in the course of government interviews changed his recollection of the date of the initial conspiratorial meeting (a fact obviously known to the government). There was also discussion about a civil antitrust case in Baltimore. Deft. Exh. D-H, J.

Even if Weisman had conveyed to the government all he had learned at these meetings, the most he could have told government prosecutors about Lapides' "defense" was that Lapides would "likely" testify in his own behalf (a contingency that the government certainly would have

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[13] The only specific item of discussion recalled was Mr. Peters' recollection that Weisman claimed that he had contacts with then Attorney General Edwin Meese and that he might be helpful in obtaining an audience with the Attorney General should that become necessary. Def. Exh. I ¶8. Peters also said that Weisman accompanied Lapides on other occasions to his offices, but Peters had no recollection of what was discussed or what "would have" been discussed. Id. at ¶¶9,11.

planned for in any event) and that the corporation would plead not guilty (a fact already known to the government because the company had been arraigned and entered a not guilty plea). See CN Order 10 n.12, 18-29.

b. What Information Did Weisman Actually Convey?

The district court correctly found that there was nothing to substantiate the allegations that Lawrence Weisman ever communicated even this limited "defense strategy" directly or indirectly to the government prosecutors.

1. The Lawrence Weisman Affidavit

As a preliminary matter, the district court concluded that the affidavit of Lawrence Weisman was inadmissible hearsay, executed as a "self-serving" act to settle a multi-million dollar claim by Lapides against him and to obtain the release of a constructive trust placed on several millions of dollars worth of Alleco bonds that Weisman held. CN Order 11-18, 15 (noting that Weisman had provided contradictory sworn testimony in his deposition only months before executing the affidavit and that Weisman "has been revealed over the long tortuous course of this and related litigation to be wholly unreliable"). See, e.g., United States v. Moore, 27 F.3d 969, 975 (4th Cir.), cert. denied, 115 S. Ct. 459 (1994).[14] Lapides does not seriously challenge this legal conclusion on appeal. See Inf. Br. 29 & n.21.[15] In any event, while finding the

[14] Joy Weisman repeatedly stated that her husband was a liar. Govt. Exh. 12 at 27, 122; Govt. Exh. 13 at 51. And Lapides' own attorney has stated that "Mr. Weisman appears willing to make any allegation, no matter how outrageous, to advance his cause." Govt. Exh. ll at 271. Throughout his deposition testimony, moreover, Weisman referred to his history of serious mental and physical problems, and to his diminished powers of recollection. Govt. Exh. ll at 351-352, 370, 387-394.

[15] Lapides has conceded (Reply to US Opposition to Motion to Vacate Sentence at 16) that admission of the affidavit under Rule 804(b)(3), Fed. R. Evid., was "committed to the sound discretion of the trial court."

affidavit unreliable, the court nonetheless "carefully considered" and "thoroughly discussed" it in its opinion "out of an abundance of caution." CN Order 18.

In his affidavit, the only direct contact Lawrence Weisman claimed to have with Justice Department prosecutors prior to trial were two telephone calls: one from prosecutor Terrence McDonald in November 1987, and another a month later from a Justice Department attorney "who may have been David Jordan" to "confirm information" that Weisman had previously relayed to William Morse of the SEC and Neil Walsh, a friend of Weisman's (see pages 26-28, infra). Weisman said that on both occasions his wife answered the call and handed it over to him. Weisman claimed he told McDonald and "Jordan" about "Mr. Lapides' plan to testify, the plan to have separate counsel for the bottling company, and the not-guilty plea to be entered by the bottling company." Def. Exh. B ¶¶4,5. He said he also spoke of threats Lapides had made against a government witness. Def. Exh. B ¶3.

The district court properly concluded that these allegations were not credible on their face. CN Order 18-23. By all accounts, the information about Lapides' trial that was allegedly conveyed was not discussed in front of Weisman until February 24, 1988, two months after these telephone calls were said to have occurred.[16] Moreover, if the allegations were true, then the prosecutors knew about threats against a government witness in the winter of 1987, yet waited until the bond revocation hearing in August 1988 to bring these allegations to the court's

[16] There is no allegation anywhere in Lapides' submissions that Weisman could have learned of these defense plans through any other privileged source. As the district court noted, if Weisman learned anything more, Lapides was also at these meetings and would certainly have submitted an affidavit to that effect. Discovery Tr. 60, also 52, 86.

attention.[17] This, the district court concluded, was incredible. CN Order 20-23. Indeed, the allegations in Lawrence Weisman's affidavit were directly contradicted by his deposition testimony given just four months prior, in which he repeatedly and emphatically stated that he had had absolutely no contact with any law enforcement officers about Lapides or Allegheny Pepsi prior to Lapides' trial. CN Order 22; Govt. Ex. ll at 30-31, 45-46, 54, 117, 121, 126, 137. Joy Weisman also repeatedly had stated that she and her husband never heard of Terrence McDonald or David Jordan until they came to the Weisman home in July 1988, two months after Lapides' conviction. CN Order 20 & n.18, Govt. Exh. 13 at 31-32,37 & exh. l; Govt. Exh. 12 at 113, 115-116, 161. Finally, while contacts with Weisman after July 1988 are documented by phone records and memoranda in government files, an exhaustive review of relevant government files shows they contain no mention of Weisman until July 1988 (Govt. Exh. 4, 4C); nor do any telephone records reveal calls between the Weismans and the Justice Department until the summer of 1988, well after Lapides' conviction. See CN Order at 21-22. All of this evidence, therefore, supported the statements of government prosecutors that they never heard of Lawrence Weisman until July 1988. Govt. Exhs. 1-3; see note 18, infra.

With respect to communications that might have been indirectly relayed to government prosecutors, Weisman claims in his affidavit (Def. Exh. B ¶2) that he met with SEC attorney

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[17] In fact, government prosecutors first learned of Lawrence Weisman on July 7, 1988, when the probation officer preparing the presentence report on Lapides called to inform them of allegations from Weisman that Lapides had threatened to assassinate James Sheridan, the government's chief witness at Lapides' trial, and that Lapides had obtained a Haitian passport and was planning to flee the country. The government prosecutors promptly acted on the information by arranging to interview Weisman in July, and then moving in August to revoke Lapides's bail. See CN Order 20-21; note 20, infra.

William Morse on July 16, 1987 (shortly after Lapides received the antitrust target letter) concerning SEC matters. The affidavit also alleges that he told Morse that "Mr. Lapides was guilty of antitrust price-fixing violations." Ibid. Weisman did not claim to have conveyed any privileged information about Lapides' antitrust case and, as discussed above, Weisman could not have learned of any "defense strategy" at that time. In fact, Weisman testified at his deposition that he never contacted any law enforcement agency regarding Lapides prior to Lapides' antitrust trial (Govt. Exh. 11 at 121); that, more specifically, he never discussed Lapides or his company with Morse or the SEC prior to trial, except with respect to insider trading (id. at 117); and that he never told anyone to communicate with the Department of Justice about Lapides prior to trial. Id. at 139-140. Nor is there any evidence to suggest that Morse ever turned over any information of any kind to the antitrust prosecutors prior to Lapides' trial.[18] In fact, at his deposition Lawrence Weisman testified quite emphatically that the first time he ever called Morse to discuss any matter related to Lapides' antitrust trial was on or after June 26, 1988,[19] a month after Lapides' conviction, when he called Morse about Lapides' plans to flee the country using a Haitian passport. Govt. Exh. 11 at 24-27, 53-54, 277-278.[20] Thus, the trial court correctly rejected allegations that William Morse could have conveyed privileged defense strategy to the Justice Department. CN Order 23-25.

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[18] Morse and government prosecutors denied any pretrial communications. Govt. Exh. 9 ¶¶3,6; Govt. Exh. 3 ¶¶4,5,7,12.

[19] Weisman was quite clear on the date because a newspaper article on that day prompted him to make the call. Govt. Exh. ll at 24-27, 53-54, 277-278.

[20] The SEC communicated this information to the probation officer preparing Lapides' presentencing report, and he conveyed the information to government prosecutors who then investigated the allegations. Govt. Exh. l ¶2.

Weisman's affidavit also refers to periodic contacts in 1987 and 1988 about Alleco and Lapides with Neil Walsh, whom Weisman "believed . . . had close connections with the FBI." Def. Exh. B ¶3. Although the affidavit stated that Weisman "made comments about the substance of [Lapides'] defense strategy" to Walsh, Weisman could not "recall specifics at this time." Ibid. In fact, at his deposition Weisman expressly had stated that the only information he conveyed to Neil Walsh about Lapides prior to trial concerned an alleged affair between one of Lapides' ex-wives and an FBI agent, and Lapides' plans to blackmail the FBI with this information. CN Order 25-26; Govt. Exh. 11 at 19, 22, 140, 258-260. Prior to Lapides' conviction, Weisman did not ask Neil Walsh to convey anything about Lapides to the FBI or any other law enforcement agency. Govt. Exh. 11 at 113-115.[21] The Weisman affidavit also stated that Weisman told Walsh "some time in 1988" about Lapides' plans to flee the country, and asked that this information be conveyed to the FBI. Def. Exh. B ¶ 3. Lapides does not claim that this information was privileged, however. See In re Grand Jury Proceedings, 33 F.3d 342, 349 n. 13 (4th Cir. 1994) (communications about a client's existing or future scheme to commit a crime or fraud is not privileged). In any event, it could not conceivably have been conveyed to the Department of Justice prior to Lapides' trial in April 1988, since the government did not move until August 1988 to revoke Lapides' bail based on this very information. CN Order 20-22, 28; Govt. Exh. l; 2 ¶5; 3 ¶9; note 17, supra.

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[21] While a Neil Walsh memorandum written after Lapides' conviction makes a vague reference to having provided some information to Tom Walsh (unrelated) at the FBI a year before, neither Neil Walsh nor Tom Walsh remembered any such information actually being conveyed; and a subsequent investigation revealed that the information referred to was unrelated to Lapides' antitrust case. Govt. Ex. 5 ¶¶ 2,5-8,10 & Attach. B; Def. Exh. L at 145-146; CN Order 26; compare Inf. Br. 30-31.

The Weisman affidavit further claims (Def. Exh. B ¶6) that Weisman spoke "with an FBI agent (whose name I do not recall) shortly before Mr. Lapides' trial or shortly after it commenced, and that the agent reviewed with me the subjects I had previously discussed with Mr. Morse of the SEC and Ms. McDonald." Since, as discussed above, Weisman did not discuss with Morse or McDonald any privileged communications relating to Lapides' antitrust offense, this paragraph adds nothing to Weisman's allegations. Moreover, at his deposition Weisman testified that the only time he talked to the FBI directly was to ask "for protection against murder" after Lapides had threatened Weisman's family following a falling-out. Govt. Exh. 11 at 23-25, 262-266, 285, 289. Weisman said that he did nothing about these threats until June 26, 1988, however, a month after Lapides' conviction. Govt. Exh. 11 at 24-25; see note 19, supra, and accompanying discussion. Other than disclosing these threats, Weisman had no discussion with the FBI about Lapides or his company "at any time." Govt. Exh. ll at 18, 99, 121. Documentary evidence, moreover, shows that while the name of an FBI agent, Carroll Deane, and an incomplete phone number appear on an undated page from the front or back of Weisman's 1988 calendar, there is no indication of any specific day or time that Weisman might have called Deane. And the only telephone records produced show that Carroll Deane called Weisman (no indication that they actually spoke) in 1989, a year after Lapides' trial and conviction. Finally, a search of FBI files revealed no contact with Weisman and any FBI agent prior to July 1988, which is consistent with Weisman's deposition testimony. Govt. Exh. 8 ¶¶5-7; Govt. Exh. 16 at 174-176; Govt. Exh. 4 ¶9. Since there is documentation for contacts with Weisman after Lapides' conviction, the lack of documentation before conviction confirms the fact that no such

contacts existed. CN Order 27-28.[22] Thus, the district court correctly concluded that these alleged FBI contacts did not support Lapides' claims. CN Order 26-29.

2. The Joy Weisman Affidavit

Apparently recognizing that the district court's thorough discrediting of Lawrence Weisman's affidavit is unassailable, Lapides now principally relies on Joy Weisman's affidavit and claims it supports Lawrence's allegations. But Joy's affidavit does not advance Lapides' claims.

Lapides secured the affidavit of Joy Weisman (Def. Exh. M) on November 7, 1990, shortly after her separation from husband Lawrence. Govt. Exh. 12 at 22-27. Lapides then used the affidavit to persuade the Office of Professional Responsibility of the Department of Justice ("OPR") to investigate the charges of prosecutorial misconduct that he has raised in this proceeding. Id. at 6. OPR interviewed Joy Weisman to allow her to explain and amplify the allegations in her affidavit. Lapides' attorney was present at the OPR interview. Govt. Exh. 13 at 3. Joy Weisman also testified at a deposition in Lapides v. Weisman about issues in this case.

While Lapides claims that some of the allegations in Joy Weisman's affidavit "standing alone" entitled him to an evidentiary hearing (Inf. Br. 29), the court was not required to look at the affidavit "standing alone." Since Joy Weisman was later interviewed and deposed concerning the allegations in her affidavit, the district court correctly examined that subsequent testimony to gain a better understanding of the vague allegations in the affidavit. Particularly

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[22] Thus, Weisman's claim in paragraph 6 of his affidavit that he communicated with a "Mr. Deane" and an "Agent Donahue" of the FBI "at some point, possibly in or around April 1988" is refuted by the documentary evidence. It also would not support Lapides' claim in the absence of any specific indication of the nature of the communication and a more precise recollection of whether those contacts in fact occurred before Lapides' trial.

when viewed in light of her subsequent explanations, the district court correctly concluded that the affidavit did not support Lapides' contentions. CN Order 19-20; 29; 35-37 & n.20.

For example, in paragraph 5 of her affidavit (Def. Exh. M), Joy Weisman states that "[b]eginning at least several months prior to Mr. Lapides' antitrust trial in April 1988, Larry had telephone conversations from our home in Sparks, Maryland with attorneys from the U.S. Department of Justice . . . Larry discussed Mr. Lapides' defense strategy for his upcoming antitrust trial."[23] See Inf. Br. 29-30. But, as discussed above, Weisman could not have conveyed any "defense strategy" to anyone "several months" before the April trial, since he did not attend any strategy meeting whatever until six weeks before the trial. Moreover, Joy does not specify in her affidavit what so-called "defense strategy" was discussed. In fact that term was put in the affidavit by Lapides' lawyer and Weisman had no idea what it meant. Govt. Exh. 12 at 29-31, 86-89. When asked to explain, Weisman said that the "strategies" she was referring to in this paragraph were "threats against the various government witnesses" and various matters in the Gould complaint (a case in which Weisman sued Lapides for violations of securities law and other matters unrelated to antitrust). Id. at 87.

Thus, there is no reason to believe, based on Joy Weisman's statements, that any privileged information was conveyed to the government prior to the Lapides trial. Indeed, Joy does not name the DOJ attorneys involved in these alleged communications, and she previously

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[23] In this same paragraph Joy Weisman said that Larry also conveyed Lapides' "threats against a government witness." Lapides does not, and could not, claim that such information was privileged. In re Grand Jury Proceedings, 33 F.3d at 349 n.13. Indeed, Morton Lapides talked with Lawrence Weisman about what would happen if government witness James Sheridan were "deceased" in front of Joy Weisman, who is not a lawyer and with whom Lapides does not claim to have had any privileged relationship. Govt. Exh. 13 at 11-15; Govt. Exh. 12 at 50-52.

had disavowed any contact with government antitrust prosecutors before July 1988. Moreover, when asked by OPR to explain this reference to "U.S. Department of Justice attorneys" in paragraph 5, Weisman did not even know whether it referred to "main justice" attorneys or "U.S. attorneys." (Lapides' attorneys had prepared the affidavit. Govt. Exh. 13 at 29-30.) Finally, at her deposition Joy indicated that contacts with the Department of Justice prior to July 1988 had nothing to do with the antitrust case at all. Rather, they concerned Lawrence Weisman's efforts to get the Department to prosecute his nephew, his ex-wife, and Joy's nephew. Govt. Exh. 12 at 161.[24]

Similarly, Lapides' reliance on paragraph 4 of Joy's affidavit (Inf. Br. 29) is misplaced. In that paragraph, Joy states that "at least several months before Mr. Lapides' antitrust trial . . . Larry received telephone calls from FBI agents at our Sparks home. The calls related to the government's antitrust case against Mr. Lapides . . . I listened in to these calls." Again, the affidavit does not give any details of the calls, or who at the FBI was involved. Joy's subsequent statements, however, indicate that these communications concerned Lapides' threat to kill a government witness in the antitrust case (not a privileged matter), and Lapides' "movement of money" and bribery of a bank official (allegations wholly unrelated to antitrust). Govt. Exh. 12 at 78-79. Thus, paragraph 4 does not support Lapides' contention that privileged information was leaked to the government prior to his trial.

Finally, Lapides relies on paragraph 6 of Joy's affidavit (Inf. Br. 30) which states that "prior to Mr. Lapides' antitrust trial, Larry conveyed information about Mr. Lapides and Alleco

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[24] As Lapides himself points out (Inf. Br. 31), Joy Weisman indicated that her husband "used Government agencies all through his life to get back with people that he gets mad at." Def. Exh. T at 16, 20.

to the FBI through Neil Walsh" (a friend with alleged FBI "contacts"). Joy Weisman admitted that she did not know whether in fact Walsh ever conveyed any information to the FBI. And she certainly did not know what, if anything, the FBI may have conveyed to antitrust prosecutors. Govt. Exh. 12 at 95; Govt. Exh. 13 at 23-25. Indeed, Joy's affidavit does not reveal what information was communicated to Neil Walsh, but Joy subsequently explained that the only information conveyed was the plan to kill James Sheridan, the bribery of bank officials, and the "cooking" of corporate books. Govt. Exh. 13 at 26-27. Finally, while Neil Walsh confirmed that he had received information from Lawrence Weisman, none of that information contained any antitrust defense strategy, and none of it was relayed to the Department of Justice prior to Lapides' trial. Govt. Exh. 5; Def. Exh. L; CN Order 26; note 21, supra. Thus, Walsh did not "corroborate" Joy Weisman's affidavit in any material respect (compare Inf. Br. 30-31).

Therefore, the district court properly concluded that Lapides' submissions were insufficient to require an evidentiary hearing. "With all of the information available to Lapides' attorneys, petitioner has still only been able to construct the vaguest of conspiracy theories out of the essentially purchased allegations of Weisman, who Lapides' own attorneys have accused of being "`willing to make any allegation, no matter how outrageous, to advance his cause.'" CN Order 39 (citing Govt. Ex. 11 at 271).

3. DID THE DISTRICT COURT APPLY THE WRONG LAW?

a. Denial Of An Evidentiary Hearing

Lapides' first claim of legal error is the failure to hold an evidentiary hearing in the face of "conflicting affidavits." Inf. Br. 28. What Lapides fails to acknowledge is that it was his own submissions that were "conflicting." Lawrence and Joy Weisman contradicted themselves and

each other at every turn. Since the record before the court contained ample evidence to resolve those conflicts, however, and nothing could be gained by an evidentiary hearing at which Lapides' chief witness would be unavailable,[25] an evidentiary hearing was properly denied.

The denial of an evidentiary hearing is reviewed for abuse of discretion.[26] Raines v. United States, 423 F.2d 526, 528-529 & n.l (4th Cir. 1970) (expressing view and hope that most §2255 and coram nobis petitions could be resolved without a hearing). A hearing is not required where allegations presented in an affidavit are unsupported or insufficient. Sanders v. United States, 373 U.S. 1, 20-21 (1963); United States v. Castor, 937 F.2d 293, 297-298 (7th Cir. 1991); Newfield v. United States, 565 F.2d 203, 207 (2d Cir. 1977); Smith v. United States, 356 F.2d 868, 873 (8th Cir. 1966), cert. denied, 385 U.S. 820 (1966); United States v. Hill, 319 F.2d 653, 654 (6th Cir. 1963); see also United States v. Marcum, 16 F.3d 599, 602 (4th Cir.), cert. denied, 115 S. Ct. 137 (1994). Nor is a hearing required where allegations are vague, conclusory, or palpably incredible. Machibroda v. United States, 368 U.S. 487, 495 (1962); Townsend v. Sain, 372 U.S. 293, 317 (1963); Oliver v. United States, 961 F.2d 1339, 1343 n.5 (7th Cir.), cert. denied, 113 S.Ct. 469 (1992); United States v. Orlando, 327 F.2d 185, 188 (6th Cir.), cert. denied, 379 U.S. 825 (1964).

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[25] Lawrence Weisman died a month after executing his affidavit of "[c]ombined drug and ethanol intoxication." Govt. Exh. 14 at 5. High levels of illegal drugs, alcohol, and prescription medications were found in his system (id. at 1, 5), thus raising questions about Weisman's competency and state of mind at the time he executed the affidavit. We understand that Neil Walsh is also now dead.

[26] Rule 8(a) of Rules Governing §2255 Proceedings provides that the judge, "after the answer is filed and any transcripts or records of prior court actions in the matter are in his possession, shall, upon a review of those proceedings and of the expanded record, if any, determine whether an evidentiary hearing is required. If it appears that an evidentiary hearing is not required, the judge shall make such disposition of the motion as justice dictates."

Moreover, the court is not required to limit its examination to the affidavits alone in determining whether to hold a hearing. The court can consider all circumstances presented in the record, and can rely on its own knowledge gleaned from the case to conclude, without a hearing, that a facially valid claim in fact manifestly lacks merit. Machibroda v. United States, 368 U.S. at 495; Oullette v. United States, 862 F.2d 371, 377 (lst Cir. 1988); Shraiar v. United States, 736 F.2d 817 n.1 (1st Cir. 1984); Owens v. United States, 551 F.2d 1053, 1054 (5th Cir.), cert. denied, 434 U.S. 848 (1977); Day v. United States, 357 F.2d 907, 910 (7th Cir. 1966).

In this case, the court was not only familiar with the parties and issues, but previously had found "at the request of attorneys for Lapides" that other allegations by Weisman were "untrustworthy." See CN Order 14-15 & n.14 (noting several court decisions finding Weisman to be untrustworthy and unreliable).[27]

In Taylor v. Alabama, 335 U.S. 252, 263-265 (1948), the Supreme Court held that a court is required to determine the reasonableness of allegations in a coram nobis petition and the probability or improbability of their truth, and that the court may, consonant with due process, evaluate the credibility of affiants based on its knowledge of the case as a whole, without an evidentiary hearing. In Rohrbough v. Wyeth Laboratories, Inc., 916 F.2d 970, 976 (4th Cir. 1990), this Court held that where an affidavit and a deposition of a person are in conflict, the court can disregard the affidavit if it finds that it was not the considered opinion of the affiant but an effort on the part of the plaintiff to create an issue of fact. And in United States v. Barsanti, 943 F.2d 428, 440 (4th Cir. 1991), the Court held that a district court can choose what to accept

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[27] Where, as here, the court determines that a supporting affidavit would not be admissible proof at a hearing, no hearing is required. Dalli v. United States, 491 F.2d 758 (2d Cir. 1974).

among conflicting affidavits without a hearing if a hearing would add little or nothing to the proceedings. Accord, United States v. Wilson, 901 F.2d 378, 381 (4th Cir. 1990).

In this case, the district court had before it extensive evidence in the form of telephone records, government files, affidavits, and sworn statements of the chief proponents of the petition. On this record, the court was able confidently to conclude that Lawrence Weisman could not conceivably have conveyed any privileged defense strategy to government prosecutors prior to Lapides' trial. CN Order 30-39. Moreover, since the court could not "imagine a single new fact that could be brought forth in the course of" an evidentiary hearing (CN Order 39) -- particularly since the chief accuser and only non-governmental party to these alleged communications, Lawrence Weisman, was now dead (CN Order 33-34)[28] -- an evidentiary hearing would be a needless waste of time and expense. CN Order 39. Machibroda v. United States, 368 U.S. at 495 (requirement of hearing in §2255 "does not strip the district courts of all discretion to exercise their common sense"); Barrett v. United States, 965 F.2d 1184, 1195 (lst Cir. 1992); Politte v. United States, 852 F.2d 924, 931 (7th Cir. 1988) (court is not required unnecessarily to expend resources to conduct an evidentiary hearing).

b. Failure of Defendant To Show Prejudice

Lapides' second claim of error is that the trial court improperly required him to show

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[28] Lapides claims that "numerous contradictions, inconsistencies and incredible statements on behalf of the government witnesses" show that these government agents may not be credible. Inf. Br. 32, 35. None of these alleged contradictions and inconsistencies relate to the issue whether the government obtained privileged defense strategy prior to trial. And because Lapides never made out a prima facie case in the first instance, the court's holding did not rest on the credibility of any of the government's witnesses, but on the fact that the Weismans' statements, taken in their entirety, and the documentary evidence belied Lapides' allegations.

"what confidential information was conveyed to the government by Weisman and demonstrate how the Petitioner's defense was prejudiced." Inf. Br. 35. This claim misstates the law and misapprehends the extraordinary nature of coram nobis relief.

A writ of error coram nobis is an "extraordinary remedy" and "should be allowed . . . only under circumstances compelling such action to achieve justice." United States v. Morgan, 346 U.S. 502, 511 (1954). Coram nobis must involve errors of constitutional dimension that affect the fundamental fairness and validity of the trial. United States v. Mandel, 862 F.2d 1067, 1075 (4th Cir. 1988), cert. denied, 491 U.S. 906 (1984); Hall v. United States, 410 F.2d 653, 657 (4th Cir.), cert. denied, 396 U.S. 970 (1969); United States v. Doe, 867 F.2d 986, 988 (7th Cir. 1989). The burden is on the petitioner to show error "of the most fundamental character" that "has resulted in a complete miscarriage of justice." United States v. Bruno, 903 F.2d 393, 396 (5th Cir. 1990); see also Miller v. United States, 261 F.2d 546 (4th Cir. 1958).

Even if this were not a coram nobis proceeding, moreover, Lapides seriously understates his burden in establishing a Sixth Amendment violation. An intrusion into the attorney-client relationship is not a violation of the Sixth Amendment's right to counsel per se. Rather "the constitutionality of the conviction depends on whether the overheard conversations have produced, directly or indirectly, any of the evidence offered at trial." Weatherford v. Bursey, 429 U.S. 545, 552 (1977). The burden of proof is on the movant to show that there was an attorney-client relationship that was breached by the disclosure of privileged matter to the government. United States v. Fortna, 796 F.2d 724, 730 (5th Cir.), cert. denied, 479 U.S. 950 (1986); United States v. Popoola, 881 F.2d 811, 812 (9th Cir. 1989).

To determine whether a Sixth Amendment violation has occurred, the court must decide

(l) whether an intrusion into the attorney-client relationship was purposely caused by the government to garner confidential information; (2) whether the government actually obtained privileged information, directly or indirectly, that was used in evidence at trial; (3) whether the privileged information was otherwise used in any manner to the substantial detriment of the defendant; and (4) whether details of trial preparation were learned by the government. Weatherford v. Bursey, 429 U.S. at 554 & n.l, 557; United States v. Brugman, 655 F.2d 540, 546 (4th Cir. 1981).

While it is unnecessary to establish all four of the Weatherford factors, there is no Sixth Amendment violation unless privileged information was actually conveyed to government prosecutors.[29] United States v. Castor, 937 F.2d 293, 297-298 (7th Cir. 1991); United States v. Mastroianni, 749 F.2d 900, 907-908 (lst Cir. 1984); United States v. Ginsberg, 758 F.3d 823, 833 (2d Cir. 1985). And even assuming that privileged information is conveyed, reversal is not required unless the information is "pertinent" or "beneficial" to the government's case. United States v. Ofshe, 817 F.2d 1508, 1515 (11th Cir. 1987), cert. denied, 484 U.S. 963 (1987) (no Sixth Amendment violation when government placed a "body bug" on defense attorney and monitored conversation because no pertinent information concerning the case was conveyed to the prosecutor); Mastrian v. McManus, 554 F.2d 813, 821 (8th Cir.), cert. denied, 433 U.S. 913 (1977) (no Sixth Amendment violation when defendant's conversations with another inmate were monitored because no showing that the substance of the overheard conversation was of some

[29] In the absence of a Sixth Amendment claim, there can be no violation of the Fifth Amendment either on the same facts. Brugman, 655 F.2d at 546. Although Lapides claimed Fifth as well as Sixth Amendment violations in his coram nobis petition, he has not pursued them in the district court or here.

benefit to enforcement officials); United States v. Humphreys, 982 F.2d 254, 259 (8th Cir. 1992), cert. denied, 114 S. Ct. 61 (1993) (defendant must show how prosecution used the information).[30] Thus, contrary to petitioner's assertions, a movant must show that he was prejudiced by the communication of privileged information. United States v. Cronic, 466 U.S. 648, 658 (1984) (there is no Sixth Amendment violation in the absence of a showing that the information actually tainted the trial); United States v. Chavez, 902 F.2d 259, 266-267 (4th Cir. 1990) ("it is well settled that some showing of prejudice is a necessary element of a Sixth Amendment claim based on an invasion of the attorney-client relationship"); Brugman, 655 F.2d at 546 (no violation in absence of "substantial detriment" to defendant).

Thus, Lapides is plainly wrong in asserting that he was not required to demonstrate prejudice in order to prevail on his Sixth Amendment claim, particularly where the remedy he is seeking is vacating his conviction. United States v. Rogers, 751 F.2d 1074, 1077-1079 (9th Cir. 1985); United States v. Fortna, 796 F.2d at 731 & n.5, 732, citing United States v. Morrison, 449 U.S. 361 (1981); United States v. Isgro, 974 F.2d 1091, 1098-1099 (9th Cir. 1992). The cases on which Lapides relies to claim that he was not required to prove prejudice (Inf. Br. 36-37) are plainly inapposite. Cuyler v. Sullivan, 446 U.S. 335 (1980), and its progeny, concern conflicts

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[30] Thus, even where the government has intentionally placed an informant at privileged attorney meetings and later debriefed him (circumstances that are not present in this case), a defendant must show that there is a "realistic possibility of injury" to defendant or "benefit to the State." United States v. Mastroianni, 749 F.2d 900, 907-908 (lst Cir. 1984); United States v. Green, 962 F.2d 938, 941 (1992); United States v. Cross, 928 F.2d 1030, 1053 (11th Cir. 1991), cert. denied, 112 S. Ct. 594, 941 (1992); United States v. Singer, 785 F.2d 228, 234 (8th Cir.), cert. denied, 479 U.S. 883 (1986); United States v. Irwin, 612 F.2d 1182, 1186-1187 (9th Cir. 1980); but see United States v. Levy, 577 F.2d 200, 208-209 (3d Cir. 1978) (where there has been a "knowing invasion of an attorney-client relationship" [through a planted government informant] and where actual disclosure of defense strategy occurs, defendant need not show additional prejudice).

of interest that arise when an attorney representing the defendant is simultaneously representing a co-defendant with conflicting interests, or has his own conflicting private interests that affect the attorney's representation of the defendant at trial. Ibid.; Glasser v. United States, 315 U.S. 60, 76 (1942); United States v. Magini, 973 F.2d 261 (4th Cir. 1992); United States v. Foster, 469 F.2d 1, 4 (lst Cir. 1972). To establish an actionable conflict of interest claim, the defendant must show (l) that his lawyer actually represented conflicting interests and (2) that the conflict "actually affected the adequacy of [the lawyer's] representation." Cuyler, 446 U.S. at 349; United States v. Tatum, 943 F.2d 370, 375 (4th Cir. 1991) (defendant must show "`that, but for counsel's unprofessional errors, the result of the proceeding would have been different'"); United States v. Rodriguez Rodriguez, 929 F.2d 747, 751 (lst Cir. 1991)(defendant must show that a claimed alternative defense was not undertaken due to attorney's other loyalties).

Neither prong of Cuyler is established here. Even assuming that Lawrence Weisman and Lapides had an attorney-client relationship at some point, Weisman did not represent Lapides or any other defendant in the antitrust criminal case. Weisman's name does not appear on any document or pleading in this case. Motion of Morton Lapides to Vacate Sentence at 7-8 (listing all "Movants' attorneys throughout the stages of the proceedings that led to the judgment attacked herein"). Nor has Lapides ever alleged that the attorneys representing him relied in any way on Weisman for their defense strategy. And Weisman certainly did not "represent" the government. See Inf. Br. 36. In addition, there was no showing that the defense of this case was actually affected by an attorney's conflict of interest. Indeed, Lapides has eschewed any obligation to show that the alleged Weisman communications affected his defense or had any actual effect on the outcome of the trial. Inf. Br. 35-37, 38.

The coram nobis petition was thus properly denied.[31]

4. DO YOU FEEL THAT THERE ARE ANY OTHER REASONS WHY THE DISTRICT COURT'S JUDGMENT WAS WRONG?

Lapides claims (Inf. Br. 37-40) that the court was wrong to examine the strong evidence of guilt adduced at his trial. By relying on this "irrelevant" (Inf. Br. 38) factor, Lapides claims the court ignored the factors relevant to his Sixth Amendment claim. As we have outlined above, however, the court examined all relevant factors and applied the law correctly. Where Lapides was seeking to vacate his conviction, the court correctly considered whether Lapides' trial was "fundamentally" unfair. See page 39, supra.

5. WHAT ACTION DO YOU WANT THE COURT TO TAKE IN THIS CASE?

The orders of the district court should be affirmed.

6. IF YOU THINK THE COURT SHOULD HEAR ORAL ARGUMENT IN THIS CASE, WHY DO YOU THINK SO?

Oral argument is not required. The district court issued three thorough and well-reasoned opinions extensively citing the factual record and the legal precedent supporting its conclusions. We believe the court can affirm on the basis of those opinions, the record, and the briefs.

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[31] Although the district court did not make findings on the issue, a coram nobis petition is deficient if it fails to show that a conviction produces lingering civil disabilities or adverse collateral consequences. Howard v. United States, 962 F.2d 651, 653-654 (7th Cir. 1992); United States v. Hay, 702 F.2d 572, 574 (5th Cir. 1983); Courtney v. United States, 518 F.2d 514-515 (4th Cir. 1975) (per curiam); Byrnes v. United States, 408 F.2d 599, 602 (9th Cir. 1969), cert. denied, 395 U.S. 986 (1969). Lapides made no attempt to show continuing collateral consequences here.

Respectfully submitted.

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Certificate of Service

I hereby certify that on this 9th day of March, 1995, I caused two copies of the accompanying INFORMAL BRIEF FOR THE UNITED STATES to be served by United States first class mail, postage prepaid, on:

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