No. 12-15479-E

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JOHN F. TRIPLETT,
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
(JUDGE CHARLES A. PANNELL, JR.)

BRIEF FOR APPELLEE UNITED STATES OF AMERICA

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CERTIFICATE OF INTERESTED PERSONS

Appellee, the United States of America, believes that the following persons and entities have an interest in the outcome of this appeal:

1. Baer, William J.
2. Baverman, Honorable Alan J.
3. Chandler, Adam D.
4. Hammond, Scott D.
5. Henry Pratt Company
6. Mueller Water Products, Inc. (MWA)
7. Pannell, Honorable Charles A., Jr.
8. Powers, John J., III
9. Triplett, John F.
10. United States of America

May 13, 2013

s/ Adam D. Chandler
Attorney

STATEMENT REGARDING ORAL ARGUMENT

The United States does not believe that the Court would benefit from oral argument in this appeal.

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STATEMENT OF JURISDICTION

The district court's jurisdiction rested on 28 U.S.C. §§ 1361, 1651(a), 2241(a), 2255(a). This Court's jurisdiction rests on 28 U.S.C. §§ 1291, 1651(a), 2241(a).

STATEMENT OF ISSUE PRESENTED

Whether a former federal prisoner who long ago paid his monetary penalties is entitled to reimbursement of those penalties under 28 U.S.C. §§ 1361 (mandamus), 1651 (All Writs Act), 2241 (writ of habeas corpus), or Federal Rules of Criminal Procedure 33 or 34, in light of *Skilling v. United States*, 130 S. Ct. 2896 (2010).

STATEMENT OF THE CASE

A. Course of Proceedings

On April 18, 2003, a jury convicted petitioner John F. Triplett on a single count of conspiracy to commit mail fraud, wire fraud, and honest services fraud, in violation of 18 U.S.C. § 371. The jury rendered a special verdict, in addition to a general one, specifically finding Triplett guilty on all three objects of the conspiracy.

On July 31, 2003, Triplett was sentenced to 51 months of imprisonment, to be followed by 36 months of supervised release (ECF

No. 107).[1] He was also fined $10,000 and ordered to pay $86,512.02 in restitution (*id.*).

Triplett appealed his conviction and sentence, arguing that the indictment had been constructively amended and that his sentence and restitution amount had been erroneously computed. This Court summarily affirmed the conviction and sentence. *United States v. Triplett*, 99 F. App'x 882 (11th Cir. 2004) (unpublished table decision). The U.S. Supreme Court vacated that decision and remanded for further consideration in light of *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738 (2005). *Triplett v. United States*, 543 U.S. 1097, 125 S. Ct. 994 (2005) (granting, vacating, and remanding). On remand, this Court found *Booker* inapplicable to the issues Triplett raised on appeal and reinstated his conviction and sentence. *United States v. Triplett*, 128 F. App'x 105 (11th Cir. 2005) (unpublished) (per curiam). The Supreme Court denied certiorari. *Triplett v. United States*, 546 U.S. 1002, 126 S. Ct. 623 (2005).

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[1] Unless otherwise indicated, docket citations are to the district court docket for Triplett's criminal trial, *United States v. Triplett*, No. 1:02-CR-718 (N.D. Ga.).

On March 28, 2006, Triplett filed a motion, pursuant to 28 U.S.C. § 2255, to vacate his sentence under *Booker*. *Triplett v. United States*, No. 1:06-CV-736 (N.D. Ga.). The district court denied that motion on December 21, 2006, and on March 27, 2007, this Court denied Triplett's application for a certificate of appealability. Order, *Triplett v. United States*, No. 07-10151 (11th Cir. Mar. 27, 2007).

On March 14, 2007, Triplett filed a habeas petition pursuant to 28 U.S.C. § 2241, challenging the sentencing court's discretion to impose a fine without considering Triplett's ability to pay it. *Triplett v. United States*, No. 1:07-CV-608 (N.D. Ga.). The district court denied the petition on February 20, 2008.

Nearly four years later, after serving his full sentence and paying off his obligations, Triplett filed another habeas petition that forms the basis of this appeal. Citing 28 U.S.C. §§ 2255, 2241, 1651 (All Writs Act), 1361 (mandamus), as well as Fed. R. Crim. P. 33 and 34, Triplett moved to vacate, set aside, or correct his sentence in light of *Skilling v. United States*, 130 S. Ct. 2896 (2010). The district court denied the Section 2255 motion for lack of jurisdiction because Triplett is no longer in federal custody, and it denied him a certificate of appealability on

that issue. *Triplett v. United States*, No. 1:11-CV-4459, 2012 WL 4344609 (N.D. Ga. Sept. 21, 2012) (adopting Mag.'s Report and Recommendation, 2012 WL 4362774 (Aug. 29, 2012)). It also denied relief on all of the alternative grounds that Triplett proposed. *Id.*

After Triplett filed a notice of appeal, the district court denied his motion for leave to appeal in forma pauperis, finding that "the appeal is clearly baseless[,] . . . frivolous[,] and not filed in good faith." Order at 3, *Triplett v. United States*, No. 1:11-CV-4459 (N.D. Ga. Nov. 21, 2012) (ECF No. 179). Triplett proceeded with the appeal. This Court denied him a certificate of appealability with respect to the denial of his Section 2255 motion. Order, *Triplett v. United States*, No. 12-15479-E (11th Cir. Mar. 6, 2013). Because a certificate is unnecessary for the other remedies that Triplett invoked, the availability of the relief Triplett seeks using those alternative remedies is the only issue properly before this Court.[2]

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[2] Because of the number of remedies invoked, the standard of review for each is contained in the Argument section below.

B. Statement of Facts

Triplett worked for the Henry Pratt Company (Pratt) for thirty years, retiring in 1997 as senior project manager.[3] Pratt manufactures valves for nuclear power plants and wastewater treatment plants, and it also refurbishes used Pratt valves. When a plant needs to replace a valve, it often prefers a refurbished one because it takes Pratt much less time to refurbish a used valve than to manufacture a new one. Because demand for replacements is limited, Pratt does not maintain an inventory of used valves. When plants requested them, Triplett was responsible for locating surplus valves to refurbish.

Rather than purchasing surplus valves at the lowest cost for Pratt, Triplett directed Jimmy Scruggs of Pumps, Valves & Equipment, Inc., d/b/a The Scruggs Company (PVE), to purchase surplus valves at low prices, then to sell them to Pratt at far higher prices through a front company named Eurotech Industries, Inc. (Eurotech). PVE and Triplett

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[3] This subsection summarizes the government's proof at trial. Transcript support is provided in the Statement of Facts in the government's brief on direct appeal, *United States v. Triplett*, No. 03-14099-DD (11th Cir. Nov. 25, 2003).

split the profits and paid Eurotech a small fee for hiding the nature of the transactions from Triplett's superiors.

The indictment charged a classic "pay to play" kickback scheme, wherein a vendor pays a purchasing agent to do business with the purchasing agent's employer. It was a "speaking" indictment, containing a detailed description of the conspiracy and the means by which it was executed. It used the term "kickback" ten times.

Triplett has now been released from prison, has paid his financial obligations (ECF No. 159), and has obtained early release from supervision (ECF No. 162).

SUMMARY OF ARGUMENT

Triplett sought relief principally under 28 U.S.C. § 2255, but that avenue is not available to him on appeal. Only a scattershot collection of dubious theories of relief remains. Each theory is either time-barred, procedurally barred, substantively barred, or some combination thereof.

Regardless, Triplett's underlying argument—that the Supreme Court's decision in *Skilling v. United States*, 130 S. Ct. 2896 (2010), entitles him to reimbursement of his fine and restitution—ignores the circumstances of his case. In a special verdict, the jury made clear that

it found Triplett guilty of conspiring to commit *each* of three kinds of fraud: mail, wire, and honest services. *Skilling* has no bearing on mail or wire fraud, and therefore casts no doubt on Triplett's conspiracy conviction. In any event, *Skilling* approved honest services fraud prosecutions based on kickbacks like the ones Triplett received in this case. Triplett has failed to demonstrate that he is entitled to any relief from a sentence he discharged many years ago.

ARGUMENT

Relief Under 28 U.S.C. § 2241. Triplett seeks a writ of habeas corpus under 28 U.S.C. § 2241. This Court reviews *de novo* the district court's denial of such relief, although it reviews any factual findings for clear error. *Bowers v. Keller*, 651 F.3d 1277, 1291 (11th Cir. 2011).

Like Section 2255, Section 2241 has an "in-custody" requirement. *See* 28 U.S.C. § 2241(c). Triplett is not in custody: he is no longer in prison, is not serving any supervised release, and has discharged his financial responsibilities. Thus, Section 2241 cannot provide him relief.

In addition, Triplett failed to raise the current motion's claims during trial, on direct appeal, in petitions for Supreme Court review,

and in prior collateral attacks. He therefore procedurally defaulted the *Skilling* claims he now hopes to raise.

Moreover, even if Triplett were somehow in custody and had properly preserved his claims, Section 2241 cannot be used to challenge just the restitution part of a sentence. *See Arnaiz v. Warden, Federal Satellite Low*, 594 F.3d 1326 (11th Cir. 2010) (per curiam). That is because "habeas corpus has traditionally required a relationship between a petitioner's custody and the relief sought." *Id.* at 1329. Accordingly, the district court did not err in rejecting Triplett's attempt at Section 2241 relief.

Relief Under Fed. R. Crim P. 33, 34. Triplett also maintains that Rules 33 and 34 afford him relief. The district court's denial of a new trial under Rule 33 is reviewed for abuse of discretion. *United States v. Sweat*, 555 F.3d 1364, 1367 (11th Cir. 2009) (per curiam). The denial of a Rule 34 motion implicating the district court's subject-matter jurisdiction is reviewed *de novo*. *See United States v. Searcy*, 278 F. App'x 979, 980 (11th Cir. 2008) (unpublished) (per curiam).

The time for seeking relief under Rules 33 and 34 of the Federal Rules of Criminal Procedure expired long ago. Rule 33(b) provides two

alternative time limits. Motions for a new trial based on newly discovered evidence (which Triplett's is not) must be filed within three years of the guilty verdict. That window closed on April 18, 2006, more than five years before Triplett filed this motion. All other new-trial motions under Rule 33 must be filed within fourteen days of the verdict, which this motion obviously was not. Rule 34 also has a fourteen-day time limit that has long since passed, and Triplett has not attempted to demonstrate excusable neglect. *See Searcy*, 278 F. App'x at 982. Accordingly, the district court did not err in denying Triplett relief under Rules 33 or 34.

Coram Nobis Relief. Triplett alternatively seeks *coram nobis* relief under the All Writs Act, 28 U.S.C. § 1651. This Court reviews a district court's denial of a petition for a writ of error *coram nobis* for abuse of discretion. *United States v. Peter*, 310 F.3d 709, 711 (11th Cir. 2002).

The All Writs Act, 28 U.S.C. § 1651(a), gives federal courts limited authority to issue a writ of error *coram nobis*, which is a remedy to vacate a conviction after a petitioner is out of custody. *Id.* at 712. It "is an extraordinary remedy of last resort available only in compelling circumstances where necessary to achieve justice." *United States v.*

Mills, 221 F.3d 1201, 1203 (11th Cir. 2000). The bar for relief is high. A petitioner may only obtain it when (1) no other avenue of relief is or was available and (2) "the error involves a matter of fact of the most fundamental character which has not been put in issue or passed upon and which renders the proceedings itself irregular and invalid." *Alikhani v. United States*, 200 F.3d 732, 734 (11th Cir. 2000). The Supreme Court considers it "difficult to conceive of a situation in a federal criminal case today where [a writ of *coram nobis*] would be necessary or appropriate." *Carlisle v. United States*, 517 U.S. 416, 429, 116 S. Ct. 1460, 1468 (1996); *see also United States v. Spellissy*, 438 F. App'x 780, 783 n.1 (11th Cir. 2011) (finding only one prior published opinion in which *coram nobis* relief had been granted).

Triplett believes that *Skilling*, which confined the scope of the honest services fraud statute (18 U.S.C. § 1346) to schemes involving bribes and kickbacks, somehow invalidated his conviction so that he is entitled to a refund of his fine and restitution payments. But based on its review of the criminal trial record, including the special verdict, the district court found that the jury convicted Triplett of conspiracy to commit both mail fraud and wire fraud, rendering superfluous any

conspiracy to commit honest services fraud. "Movant was charged with only one crime, conspiracy to defraud, which the jury could have found he accomplished in one or more of three different ways," and thus "the outcome of his trial and sentencing would not have changed" had he not been charged with honest services fraud at all. Mag.'s Report and Recommendation, 2012 WL 4362774, at *6; *see United States v. Katopodis*, 428 F. App'x 902, 903-04 (11th Cir. 2011) (refusing to find plain error on direct appeal because the defendant "has not shown a reasonable probability that . . . he would not have been found guilty of traditional money or property fraud" had the court given a *Skilling*-oriented instruction on honest services fraud).

Moreover, citing the indictment and the jury verdict, the court found that Triplett conspired specifically to perpetrate a kickback scheme, precisely the type of crime for which *Skilling* approved the use of the honest services fraud statute. It concluded that "there is no rational possibility that the outcome of Movant's trial would have been different" if the court had instructed the jury that the use of kickbacks or bribes was a necessary element of a conviction for conspiracy to commit honest services fraud. *Id.*; *see Spellissy*, 438 F. App'x at 782-84

(affirming the denial of *coram nobis* relief when the record indicated that the activity charged remained illegal "even after *Skilling* narrowed 'honest-services fraud' to include only bribe or kickback schemes").

Triplett makes no serious attempt to rebut the district court's record-based conclusions or argue that the court abused its discretion in reaching them. He invokes *United States v. Blitch*, No. 5:08-CR-40, 2011 U.S. Dist. LEXIS 153218 (M.D. Ga. Nov. 10, 2011), *adopted by* 2012 U.S. Dist. LEXIS 18855 (M.D. Ga. Feb. 15, 2012), but in that case, the defendant was convicted of committing only honest services fraud. The record revealed, and the government conceded, that Blitch's sole crime of conviction did not involve bribery or kickbacks. Here, in contrast, there are multiple independent bases for Triplett's conviction, only one of which *Skilling* touches, and regardless, *Skilling* approved the application of the honest services fraud statute to Triplett's conduct.

Triplett has shown no error, much less a fundamental and grievous one, that might warrant *coram nobis* relief . In addition, he makes no attempt to explain, as he must, why he failed to pursue these arguments during his numerous prior proceedings. The district court

was correct, and within its sound discretion, to deny Triplett *coram nobis* relief.

Mandamus Relief. Lastly, Triplett seeks mandamus relief under 28 U.S.C. § 1361. This Court reviews a district court's refusal to issue a writ of mandamus for an abuse of discretion. *Carpenter v. Mohawk Indus., Inc.*, 541 F.3d 1048, 1055 (11th Cir. 2008).

Mandamus is an extraordinary remedy, appropriate only when (1) the petitioner has a clear right to the relief requested, (2) the respondent has a clear duty to act, and (3) no other adequate remedy is available. *Cash v. Barnhart*, 327 F.3d 1252, 1258 (11th Cir. 2003). Section 1361 requires the petitioner to bring action against a specific federal "officer or employee." 28 U.S.C. § 1361; *see United States v. Pena*, 84 F. App'x 118 (2d Cir. 2003).

Triplett has not only failed to show a fundamental error entitling him to extraordinary relief, as discussed *supra*, but he has also failed to identify any federal officer or employee who has a clear duty to act on his behalf. Triplett's restitution has been disbursed to the victim, and his fine, pursuant to federal statute, went into the federally mandated crime victim's fund and was disbursed long ago. Accordingly, the

district court did not abuse its discretion in denying Triplett mandamus relief.

CONCLUSION

This Court should affirm the denial of petitioner's motion.

Respectfully submitted.

s/ Adam D. Chandler

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May 13, 2013

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 2637 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 with 14-point New Century Schoolbook font.

May 13, 2013

s/ Adam D. Chandler
Attorney

CERTIFICATE OF SERVICE

I, Adam D. Chandler, hereby certify that on May 13, 2013, I electronically filed the foregoing Brief For Appellee United States Of America with the Clerk of the Court of the United States Court of Appeals for the Eleventh Circuit by using the CM/ECF System. I also sent 7 copies to the Clerk of the Court by FedEx Priority Overnight.

I certify that service to the petitioner-appellant John F. Triplett will be accomplished by first-class mail.

May 13, 2013

s/ Adam D. Chandler
Attorney