

I. BACKGROUND

This is Defendant's second attempt to have his conviction overturned. The first was a motion pursuant to 28 U.S.C.A. § 2255 (West 1994 & Supp. 1997), which was denied by this Court, and the denial was affirmed by the United States Court of Appeals for the Third Circuit. By way of background, this Court's Opinion on that Motion stated:

Between November, 1990 and January, 1995, Zinner operated a Multiple Employer Welfare Arrangement ("MEWA") through a complex web of companies that he controlled. Each MEWA was a plan that purportedly provided medical, accident, disability, and/or death benefits to plan participants and their beneficiaries. Zinner and his co-Defendants, acting as fiduciaries, solicited and administered employee health benefit plans across the United States, fraudulently representing that the plans were insured with sufficient reserves to pay claims, while embezzling the plans' assets. Defendants failed to pay their subscribers' legitimate medical claims. Zinner was the kingpin of this operation.

As a result of this racketeering, more than 1,500 individuals and their dependents were left without medical and other types of insurance that Defendants contracted to supply. This scheme produced catastrophic effects, causing severe victim impact, . . .

On March 10, 1995, Zinner pled guilty to 2 Counts of a 15 Count Indictment. Specifically, Zinner pled guilty to Count 1, charging him with violating 18 U.S.C.A. § 19672(c) ("Prohibited Activities") of the Racketeer Influenced and Corrupt Organization Act ("RICO"), . . . and Count 13, asserting Zinner violated § 1963 ("Criminal Penalties").

United States v. Zinner, 1996 WL 628585 at *1 (E.D. Pa. Oct. 25, 1996.) Defendant was sentenced on November 14, 1995 to 68 months in prison.

Court will refer to both, collectively, as Defendant's hearing.

Some of the issues that Defendant raised in his Section 2255 Motion were ones he had raised before, e.g., the Court's denial of a reduction in offense level for acceptance of responsibility, ineffective assistance of his counsel at sentencing, and prosecutorial misconduct in misrepresenting Defendant's income and assets. In denying Defendant relief, this Court stated: "Zinner's § 2255 Motion does nothing more than regurgitate the same unsuccessful arguments presented during sentencing, injecting nothing new into the equation that would compel the Court to vacate his sentence." Id. at *5.

Defendant now raises some of the same issues again, on the basis of alleged newly discovered evidence that he found in the files of his trial attorney, Albert Mezzaroba, which Defendant recently received, and in government files obtained by his wife during discovery in a related matter. Defendant has contended all along that the government falsely asserted that he did not provide accurate and complete financial information and misrepresented information on his assets. He believes that these allegedly false statements by the government resulted in his loss of a three level reduction for acceptance of responsibility. Defendant now claims to have new documentation that the government did have Defendant's accurate and complete financial disclosure.

In addition, Defendant raises two new claims. First, he argues that his guilty plea was not valid because it was coerced by the prosecutors' threats to indict other family

members if he did not plead guilty. Second, Defendant contends that newly discovered evidence reveals a secret and corrupt agreement between Mezzaroba and government prosecutors, Seth Weber and Pamela Foa. Defendant states that he only recently learned that the prosecutors were aware that Mezzaroba was paid legal fees from the trust fund account of the American Plan, one of the fraudulent benefits plans. He contends that the prosecutors threatened to seek an indictment against Mezzaroba for illegally receiving legal fees from the trust fund account unless Mezzaroba would deliver the guilty pleas of Defendant and co-defendant Mark Waldron, Jr. (Mot. at 1-2.) Defendant alleges that Mezzaroba, as a result of his conflict of interests, misled him into pleading guilty, and the plea was therefore involuntary.

II. LEGAL STANDARD

Rule 60(b) of the Federal Rules of Civil Procedure, entitled "Relief from Judgment or Order", provides in pertinent part:

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On Motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: . . . (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; . . . (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and

for reasons (1), (2), and(3) not more than one year after the judgment, order, or proceeding was entered or taken. . . . This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, . . . or to set aside a judgment for fraud upon the court.

Fed. R. Civ. P. 60(b).

Insofar as Defendant is basing his Motion on 60(b)(2), newly discovered evidence, or 60(b)(3), fraud, misrepresentation or misconduct, his Motion is not timely. The most recent events on which he bases his claims occurred at his sentencing, which was on November 14, 1995; the instant Motion was filed on May 12, 1997, more than a year later. However, insofar as Defendant claims to have evidence of fraud on the Court, his Motion may not be time-barred. The question is whether his alleged newly discovered evidence rises to the level of fraud upon the Court. As another judge of this court has stated:

Fraud upon the court does not encompass every type of fraud which may arise in connection with a case but rather is limited to "that species of fraud which does or attempts to, subvert the integrity of the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication." . . .

Courts have found fraud upon the court only where there has been the most egregious conduct involving a corruption of the judicial process itself. Examples of such conduct are bribery of judges, employment of counsel to "influence" the court, bribery of the jury, and involvement of an attorney (an officer of the court) in the perpetration of fraud.

Cavalier Clothes, Inc. v. Major Coat Co., No. CIV.A.89-3325, 1995

WL 314511 at *7 (E.D. Pa. May 18, 1995) (quoting 7 James W.

Moore, Moore's Federal Practice ¶ 60.33 at 60-360); see also Great Coastal Express, Inc. v. Internat'l Brotherhood of Teamsters, 675 F.2d 1349, 1356 (4th Cir. 1982) (federal courts generally agree that the concept "fraud on the court" should be construed very narrowly).

Insofar as Defendant alleges that officers of the court, namely prosecuting attorneys, improperly influenced defense counsel to persuade an innocent defendant to plead guilty by threatening counsel with prosecution, the Court concludes that Defendant has sufficiently alleged a claim of fraud upon the court under Rule 60(b) to warrant review of his evidence. Defendant will therefore be allowed to bring what would otherwise be an untimely motion for relief from judgment on the basis of his alleged newly discovered evidence.

In determining this Motion, the Court will consider only evidence that in the exercise of due diligence Defendant could not have discovered until after his 2255 Motion. To do otherwise would be to subvert the purposes of the recent amendments to 28 U.S.C.A. § 2255 contained in the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (April 24, 1996), by allowing Defendant to raise piecemeal issues which he could have raised in one motion. See 28 U.S.C.A. §§ 2244, 2255 (West 1994 & Supp. 1997).

In a motion for relief from judgment on the basis of newly discovered evidence, whether under Rule 33 of the Federal Rules of Criminal Procedure or Rule 60(b) of the Federal Rules of

Civil Procedure, the movant bears the burden of establishing: (1) that the evidence is newly discovered; (2) that the movant's failure to discover it earlier was not due to any lack of diligence on his part; (3) that the newly discovered evidence is not merely cumulative or impeaching; (4) that it is material to the issues involved; and (5) that it is of such a nature that, in a new trial, the newly discovered evidence would probably produce a different result. See United States v. Iannelli, 528 F.2d 1290, 1292 (3d Cir. 1976) (discussing Fed. R. Crim. P. 30); Compass Technology, Inc. v. Tseng Laboratories, Inc., 71 F.3d 1125, 1130 (3d Cir. 1995) (discussing Fed. R. Civ. P. 60(b)).

III. DISCUSSION

The Court will now review Defendant's claims and his alleged newly discovered evidence in support of them presented at the hearing on his Motion and contained in his submissions to the court.

A. Acceptance of Responsibility

It is possible to dispose of this claim without even examining what Defendant claims to be newly discovered evidence because Defendant admitted at the hearing on this Motion that he did not and had never accepted responsibility. Therefore, the failure to have granted him a three point reduction in offense level for accepting responsibility cannot have been an error. Throughout the hearings on the instant Motion, Defendant argued

that he should have gotten a three level reduction in offense level under the Sentencing Guidelines for acceptance of responsibility, while at the time maintaining that he was and is innocent of all charges to which he pleaded guilty! It did not seem to occur to Defendant that these positions are incompatible. He considered that his pleading guilty, without more, merited a quid pro quo reduction of offense level. (Tr. of Nov. 12 at 5.)

At Defendant's hearing, the following dialogue occurred:

THE COURT: It is perfectly obvious, Mr. Zinner, to any objective eye that you still have not accepted responsibility for this crime, you say in your pleadings that you're not responsible for criminal conduct.

MR. ZINNER: I don't believe I'm guilty, and that position is consistent.

THE COURT: And, therefore, you lack acceptance of responsibility, you did then and you do now.

MR. ZINNER: If I might, just for the record, my argument isn't that I accepted responsibility for the crime, that's what I've been trying to say and I can't seem to get anyone to hear it. The argument is --

THE COURT: What is your argument?

MR. ZINNER: -- that they used the three points as an inducement to plead guilty --

. . . -- that's the argument. The argument isn't whether or not I accepted -- I never said I accepted responsibility, I never agreed I was guilty of the crime, I admit that, I admit it now, I admitted it then.

THE COURT: So, then there couldn't have been anything wrong with the sentencing with respect to the acceptance of responsibility which you did not get?

MR. ZINNER: My argument is that they gave the three points as an inducement to plead guilty and when

the court accepted the plea that they were bound by -- should be bound by that. And when the Government --

THE COURT: I told you during the plea colloquy, Mr. Zinner, that it was up to the Court to determine what sentence would be imposed upon you in all respects and that I couldn't do that until after there was a presentence report, I told you that at the guilty plea.

MR. ZINNER: Right

(Tr. of 12/30/97 at 69-70.)

The Guilty Plea Agreement Defendant signed on January 20, 1995, stated: "As of the date of the agreement, the defendant has demonstrated a recognition and affirmative acceptance of responsibility for the offenses to which he is pleading guilty, and therefore qualifies for the 3 level reduction from the base offense under § 3E1.1 of the Sentencing Guidelines." (Plea Agreement at 11.) By the time of the sentencing on November 14, 1995, the government had concluded that Defendant's conduct subsequent to his guilty plea showed that he had tried to evade responsibility in the payment of restitution and therefore did not merit the three level reduction.

As this Court stated in its Section 2255 Memorandum Opinion, it's decision not to allow the reduction "rested on a finding that Zinner violated this Court's Orders on three separate occasions." 1996 WL 628585 at *6.

The Court also declined the reduction request because Zinner failed to demonstrate sincere conduct with respect to restitution. The court found fault with Zinner's reinvestment of income in himself and his band rather than in an effort to compensate the victims he injured. For example, Zinner's claim that the Government never required him to use the \$10,000 in the Florida bank account for restitution does not help his

position; a defendant clearly demonstrating a strong acceptance of responsibility would have voluntarily provided those monies.

Zinner's behavior subsequent to the Guilty Plea Agreement illustrates nothing more than irresponsibility with respect to restitution. Zinner never paid more than \$1,000 into that fund. The Government provided Zinner with assets in order to allow him to create a greater pool of restitution funds. Instead, Zinner foolishly dissipated those assets in a manner inconsistent with a clear demonstration of acceptance of responsibility.

Id.

Given Defendant's assertion at the hearing on the instant Motion that he does not and has never accepted responsibility for his crimes, it is not surprising that his conduct failed to demonstrate acceptance of responsibility between the time of his guilty plea and his sentencing hearing. Any evidence which government prosecutors may or may not have had bearing on Defendant's financial disclosures and any change in the prosecutors' position between Defendant's plea and his sentencing did not affect the correctness of this Court's determination that Defendant was not entitled to a reduction in offense level for acceptance of responsibility. If this Court had granted the three level reduction at Defendant's sentencing, that would have been an error because, by Defendant's own admission, he never accepted responsibility at all.

Zinner is also making another argument: he is saying that the government did not honor the plea agreement when it argued against a reduction in offense level at sentencing, and because it did not honor the agreement, his plea should be

declared invalid. There is substantial authority requiring the government to honor promises it makes in plea agreements, whether recorded or not. See Santobello v. New York, 404 U.S. 257, 262, 92 S. Ct. 495, 499 (1971)("[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such a promise must be fulfilled;") see also United States v. Moscahlaidis, 868 F.2d 1357, 1361 (3d Cir. 1989) ("In this circuit, the government must adhere strictly to the terms of the bargain it strikes with defendants." (internal quotations and citations omitted)).

In this case, the government did not violate the terms of the plea bargain. The plea agreement tied the recognition of acceptance of responsibility to Defendant's conduct subsequent to the date of the agreement. As quoted above, the government recognized Defendant's acceptance of responsibility as of the date of the agreement. (Plea Agreement at 11.) The very next paragraph stated:

These agreements in no way restrict either party's right to raise additional adjustments to the Court which may have an effect on the final adjusted offense level. In particular, the parties acknowledge that the government reserves its right to raise to the Court an adjustment pursuant to Section 2F1.1(b)(33)(B), for violation of an administrative or judicial order.

(Plea Agreement at 11.) At the sentencing, the Court found that Defendant had violated its Orders on three separate occasions. 1996 WL 628585 at *6. The government was therefore quite within its rights in arguing at sentencing that Defendant did not

deserve a three-level reduction for acceptance of responsibility, and it did not violate the plea agreement in so doing.

The bargain the government made with Defendant required that he truly accept responsibility, not merely go through the motions of pleading guilty. See U.S.S.G. §3E1.1, Application Note 1. (in determining whether a defendant qualifies for decrease in offense level for acceptance of responsibility, appropriate considerations include "truthfully admitting the conduct comprising the offense(s) of conviction." (emphasis added)).³ At sentencing, the Court found that Defendant's post-plea conduct demonstrated what he has now admitted: that he never accepted responsibility and does not now accept it.

Finally, even if Defendant's evidence were relevant to this issue, it does not qualify as newly discovered. Defendant argues his evidence shows that the government, while claiming that Defendant had failed to provide complete, timely, and truthful financial disclosure statements, had such statements in its files, statements which would have supported Defendant's

³ At his sentencing, Defendant stated under oath that the factual basis for his guilty plea, as set out in the Presentence Investigation Report ("PSI"), was true, with certain minor corrections. At the hearing on the instant Motion, however, he maintained that the PSI was false, while at the same time refusing to acknowledge that he had lied under oath when he told this Court at sentencing that the factual basis for his plea was true. Defendant appeared to be claiming that he merely said what his attorney told him to say, although he did not want to, and therefore the statements, while untrue, were not lies on his part -- an imaginative but unconvincing argument. Defendant again takes incompatible positions: the facts presented in the PSI were false, but Defendant did not lie under oath when he stated at sentencing that they were true. (Tr. of 11/12/97 at 33-35.)

claim for acceptance of responsibility. The statements, however, were ones that Defendant himself had provided to the government and were therefore known to him. When this was pointed out to Defendant, he responded, "[I]t is physically impossible for me to have remembered everything that I gave the Government. . . . This is a huge, enormous case." (Tr. of 11/12/97 at 54.) Defendant evidently forgot he had given the government the documents and recently re-discovered them in the government's files in the course of discovery on another matter. Documents in government files that Defendant himself provided do not represent evidence that Defendant, in the exercise of due diligence, could not have discovered. Defendant clearly could have kept copies of the documents he gave to the government and could have kept track of the copies. The evidence therefore is not newly discovered.

B. Prosecutorial Misconduct in the Guilty Plea

1. Secret Condition of the Plea Agreement .

Defendant claims there was a secret and illegal deal between himself and the government to the effect that the government would not indict his wife, mother, or brother if he pleaded guilty. He evidently wishes to argue that the agreement was illegal under United States v. Brady, 397 U.S. 742, 90 S. Ct. 1463 (1970), on the ground that the government allegedly threatened to indict his family members if he did not plead guilty. The following evidence was presented on the issue.

Prior to his hearing, Defendant called his former attorney, Albert Mezzaroba, from prison. His notes of the tape of the telephone conversation state the following: "Question proposed from Zinner; Do you recall the prosecutor agreeing not to indict my mother if I would plead guilty? Mezzaroba Response; YES, why their [sic] not going after your Mother, are they?" (Deft.'s Mem. in Supp. of Sanctions, Ex. 16.)

At the hearing, Defendant asked Mezzaroba about this conversation, and Mezzaroba elaborated as follows:

[T]here was an agreement by the government, although not made part of the plea, there was an agreement that after Ed [Zinner] pled guilty that the case basically stopped there.

He was basically the boss behind everything, and they wouldn't indict his wife, his mother and his brother, who were also minor players in the company.

(Tr. of 11/12/97 at 79.) Later in Mezzaroba's testimony, Defendant raised the issue again:

Q Was the agreement [not to indict Defendant's mother] inducement is . . . what I'm trying to say?

A The way I recall it was that there were many aspects of the plea and the negotiation to get to that plea. One of the benefits that was given to you by pleading was the fact that the investigation stopped with you. Once they had you, they had no interest in your mom, your brother or your wife.

. . .
Had you gone to trial, I still think they may have or may not have indicted.

Q So you -- there in fact was an agreement not to indict my mother if I pled guilty.

A Sure.

(Id. at 91). Still later in his testimony, Mezzaroba explained that the government's agreement not to indict Defendant's family

members was "a byproduct" of the plea negotiations. (Id. at 96.)

He further stated:

It wasn't put to you that either if you don't plead guilty we're going to indict your mother, but part of the negotiation that you and I had discussed and it was discussed with the Government, that it ends with you. . . . And that they . . . wouldn't be looking for the minor players later on down the road. . . . Well, it was never discussed whether it would appear or not in the plea agreement, . . .

(Id. at 129.)

Assistant United States Attorney Pamela Foa testified that an agreement not to indict Defendant's family members was not a condition of his guilty plea. When Defendant asked her if she accepted his statement that the government had agreed, as an inducement to obtain his guilty plea, that it would not seek indictments against his mother or wife, she replied, "No, I do not. I certainly agree that the question was raised whether or not down the road there were going to be further indictments." (Tr. of 11/12/97 at 156.)

At the hearing, the Court accepted Defendant's representation that "the Government wasn't going to indict, or that you believed that if you pleaded guilty the Government would not indict your mother or your wife, and that you certainly gave that favorable consideration in determining whether or not to enter a guilty plea." (Id. at 96.) But there was no convincing evidence that the prosecutors made threats or explicit promises not to indict Defendant's family members. The evidence showed they let it be known that their primary interest was in Defendant

and that they did not intend to pursue minor players if he pled guilty; and they did not pursue minor players.

When asked what was newly discovered about this agreement or understanding, which he obviously know about at the time of his plea, Defendant answered that he had only recently discovered that it was illegal. Such a discovery would not qualify as newly discovered evidence under Rule 30. It is not evidence at all. In any case, Defendant's evidence does not show that what occurred was illegal.

Defendant argues that his plea was induced by of threats of indictment of his family members and was therefore involuntary under Brady, which he quotes. In Brady, the Supreme Court stated:

[A] plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g. bribes).

397 U.S. at 755, 90 S. Ct. at 1472 (quotations, citation, and footnote omitted). In this case, however, Defendant has presented no evidence bringing this case within the rule of Brady, no evidence of a secret or improper agreement not to indict Defendant's family members based on "threats (or promises to discontinue improper harassment)." Nor was there anything improper in the Government's letting Defendant know that it was

not interested in pursuing minor players in the fraud once the kingpin pleaded guilty.

There is an important line to be drawn between an implicit understanding, as evidently occurred in this case, and a bargain based on a threat. While the word "agreement" can be applied to either, Mezzaroba's testimony makes clear that there was no threat when he states, "It wasn't put to you that . . . if you don't plead guilty we're gong to indict your mother, but part of the negotiation that you and I had discussed and it was discussed with the Government, that it ends with you. . . . And that they . . . wouldn't be looking for the minor players later on down the road." (Tr. of 11/12/97 at 129.) On the basis of the evidence presented in this case, the Court finds the government did not threaten Defendant or his family or mislead him. His plea was therefore not made involuntary by an understanding concerning his family that was not recorded in the plea agreement.

2. Secret "Deal" between Defense Counsel and Prosecutors

Defendant introduced at his hearing affidavits and other written submissions, transcripts of tape recorded conversations, and testimony to support his allegation of a secret deal between government prosecutors and his attorney. Defendant not only tried to prove that there was a secret deal between defense counsel and the prosecutors, he offered a

reinterpretation of much evidence that was not newly discovered in light of this alleged deal. He wanted to show that all of his attorney's conduct was circumstantial evidence of the deal and was intended to implement it. For example, Defendant argued that Mezzaroba's advice that he not object to many of the facts in the Presentence Investigation Report was part of the deal. However, Mezzaroba testified that he thought such objection would compromise Defendant's reduction for acceptance of responsibility, and this Court found in its Memorandum Opinion on Defendant's Section 2255 Motion that Mezzaroba's assistance at sentencing was not ineffective. Unless newly discovered evidence established that there was, in fact, a corrupt deal, there is no reason to revisit issues already decided. The Court will now review what Defendant claims is newly discovered evidence of the alleged deal.

a. Affidavit of William Turpin

Defendant included as an exhibit to his Rule 60(b) Motion a single page of what purported to be an affidavit from government agent William Turpin. The document states in part:

20. Subjects ZINNER and WALDRON and through the American Trust, NICE, the American Association and Equity Development Corporation are aware that they are involved in an operation to defraud employee welfare benefit plans participants of money through the use of the businesses and trust identified above.

21. Cooperating witnesses report that ZINNER intends to and will shortly close the American Plan. They report that Zinner has caused to be prepared the cancellation letter to policyholders to notify them of

the closing of the American Plan within 30 days. In addition, he has caused envelopes for these notices to be addressed on January 7 and 8, 1995.

22. The investigation has disclosed, as well, that within the last six months the Subjects have transferred Trust funds for personal expenses, including over \$50,000 to pay attorneys representing the Subjects in this criminal investigation.

(Deft.'s Mot. at Ex. 60-C.)⁴ Accepting this page as part of Turpin's affidavit, it is evidence only that the government was aware that Defendant and Waldron had used some of the trust fund money to pay their attorneys, not that their attorneys had done anything illegal for which they might be indicted.

b. Letter of Sidney Friedler

On April 18, 1997, attorney Sidney Friedler, who represented co-defendant Mark Waldron, Jr. in this case, wrote a letter to Defendant, the entire body of which reads as follows:

Reference is made to our conversation this date, wherein you made inquiry as to the conversation with Al Mezzaroba regarding legal fees paid to him out of the trust. Mr. Mezzaroba indicated to me that various discussions were held between him and the U.S. Attorney regarding these fees. He relayed to me in conversation that there was an issue raised with him by the U.S. Attorney regarding the payment of fees directly from the trust. He relayed this information to me prior to your sentencing.

(Deft.'s Mot. at Ex. 60-D.) This letter and the conversation to which it refers evidently came about after Defendant found

⁴The page from the affidavit, which came from Mezzaroba's files, has various handwritten notations to which Defendant seemed to attach importance. He asked Mezzaroba about them, but Mezzaroba testified he did not know who had written them. (Tr. of 11/12/97 at 82-84.)

Turpin's affidavit in Mezzaroba's files. Defendant then wanted to get more information about possible negotiations between Mezzaroba and the government over the payment of Mezzaroba's legal fees from the trust. The letter goes to show that, before Defendant's sentencing, the government and Mezzaroba were in communication about the payment of his fees directly from the trust fund.

c. Tapes of Defendant's Conversations with Friedler⁵

Defendant requested, and the Court Ordered, the preservation of tapes of telephone conversations Defendant had from prison with two attorneys. Those from March, 1997, with Albert Mezzaroba, were not transcribed, but Defendant listened to them, took notes, and his notes were admitted into evidence. Those from April 8, 1997, with Sidney Friedler, were transcribed, and the transcripts were admitted into evidence.

Defendant indicated that some of the most important evidence he had of a secret deal came from three telephone conversations held on April 8, 1997, between himself and Sidney Friedler. The three conversations were really one conversation which was interrupted because Defendant could use the prison telephone for only a short period at a time. The following passages from the transcript contain representative examples of

⁵Sidney Friedler was subpoenaed to appear at the hearing on December 30, 1997, but was unable to appear for medical reasons.

Friedler's statements regarding Defendant's allegations of a deal between the government and Mezzaroba:

MR. ZINNER: Well, Mr. Waldron, Senior, has told my wife that you had a conversation with him that Al [Mezzaroba] made a deal with my prosecutor to not be charged for taking fees out of the trust, and part of that deal included him withdrawing from the race for City Council in Philadelphia. Is that true?

MR. FRIEDLER: No.

. . .
The only question she ever raised, [prosecutor] Pam Foa, was that there were fees paid out of the trust to defend the trust.

. . .
The only thing I remember is that Pam or Seth Weber, when they reviewed all the accounting records; correct?

. . .
Raised the issue that legal fees had in fact been paid out of the trust.

. . .
[Al] never told me he was threatened with indictment. I'm telling you, I was never told he was threatened with an indictment.

. . .
The only question was would that money have to be restored back to -- by Al to the trust.

MR. ZINNER: . . . I would appreciate it if you could send me a letter . . . that you are aware that there was at least discussion between you and Al with respect to those fees and the prosecutors.

(Tr. of 4/8/96 at 2, 3, 7, 9, 11, 26.) Then, while still on the telephone with Defendant, Friedler proceeded to dictate the letter, which is reproduced in section (b), supra. Both the letter and the transcript show that Friedler was aware that prosecutors had raised with Mezzaroba the issue of payment of legal fees from the trust fund and the tapes show that there was a question whether Mezzaroba would have to repay the fees. They do not show or suggest that there was a deal between Mezzaroba

and Foa whereby Foa agreed not to indict Mezzaroba in exchange for Mezzaroba's delivering Defendant's guilty plea.⁶

Another section of Friedler's tape relates to a conversation he had with Mark Waldron, Sr., about which Waldron testified at the hearing. The portions of the transcript relating to that conversation will be discussed below, along with Waldron's testimony.

d. Testimony of Mark Waldron, Sr.

Mark Waldron, Sr., the father of co-defendant Mark Waldron, Jr., signed an affidavit and then testified at the hearing as to conversations that occurred before his son pleaded guilty. Mezzaroba had agreed to drive Friedler and Waldron, Sr. to the naval station. Waldron testified that Mezzaroba spent the whole journey of about fifteen or twenty minutes trying to convince him that his son should plead guilty. (Id. at 11.) He stated that Mezzaroba "indicated that at this time the prosecutors had dropped some charges and that Mark might get a lesser penalty if he pleaded guilty right now, that was the sort of logic he was giving to me. And I in turn couldn't think of

⁶Part of the conversation with Friedler suggests that Defendant may previously have known that the government was aware that Zinner paid Mezzaroba's fees from the trust, and that the evidence is therefore not newly discovered, but the conversation is not conclusive. (Tr. of 4/8/97 at 4-5.)

any reason why my son should plead guilty to something that he hadn't done."⁷ (Tr. of 12/30/97 at 13.) He went on to state:

[W]hen we arrived at the place where Mr. Friedler was staying, he and Mr. Mezzaroba spoke together for a half an hour or so and I was waiting in the other room. And when Mr. Mezzaroba left Mr. Friedler came up to me and said to me, he said -- I'll answer as exactly as I can -- "he really worked on you, didn't he?" I said, yeah, I don't understand that, he's supposed to be one of our guys. He said, well, the prosecutors found out that he had taken \$80,000 from the trust and that was illegal, that's what I think he said, that was illegal or that was not legal. And he said now he's got to do everything they tell him or he's going to be in big-time trouble. And then he said they've really got him by the -- well, where the hair is short, that's the way he said it. And that was the first time that I had heard or knew of an arrangement.

(Id.)

Friedler's account of what he told Waldron in his telephone conversation with Zinner about Mezzaroba's payment from trust funds differs from Waldron's account. He stated:

Waldo's father was concerned that his son would take a plea and go to jail.

I said to him, "Look. You know, it looks like if we get this thing done, he will not go to jail at this point, . . ." He had manifested some concern about whether he should plead guilty, and I have some recollection of Al saying to him he should plead guilty. He should do this, and the old man was all pissed off.

Al mentioned to me that they had questioned him or something in regard to legal fees, and he was talking, and I said [to Waldron] "Gee, he's all concerned about that," but I never

⁷ Defendant contended that Mezzaroba was trying to persuade Mark Waldron, Sr. that his son should plead guilty as part of the corrupt deal he had with the prosecutors, but Mezzaroba explained that he considered a guilty plea in Waldron's best interests. He stated he was advising Waldron as well as Defendant because, at that time, it was not determined exactly which attorney would represent which client. (Tr. of 12/30/97 at 53-55.)

said he was going to be indicted. I never said that he was dropping out of the race, because I don't think at that time I knew.

MR. ZINNER: What he said was that you told him that Al had made a deal with the prosecutors to drop out of the race in return for not being indicted.

MR. FRIEDLER: No. I'm telling you, I don't remember that.

(Tr. of 4/8/97 at 33-34.)

There may be an inconsistency between what Waldron testified that Friedler told him about Mezzaroba and Friedler's statements on tape as to what he knew about Mezzaroba. While the Court sees no reason to find either testimony less than credible, it must give greater credence to Friedler's own statements regarding his knowledge. There is no convincing evidence that Friedler had knowledge of a secret deal between Mezzaroba and the prosecutors, and his statements on tape, combined with the other evidence, compels the Court to reach the conclusion that no secret deal has been proved.

e. Testimony of Albert Mezzaroba

Defendant questioned Mezzaroba extensively about the payment of his legal fees from the trust fund and other matters, but failed to adduce any evidence that a secret deal existed between the prosecutors and Mezzaroba. An example of their exchange appears below:

Q Mr. Mezzaroba, did you ever have any discussions with Mr. Weber or Ms. Foa with respect to the legal fees being paid to you from the trust fund as to whether or not you would be allowed to keep them?

A No, never had a discussion. Like I said the last time I was here, there were discussions where the prosecutors let us know that they were aware that legal fees came out of the trust fund, which was no big secret, they were checks. But there was never discussions that they were going to come after at least myself for the attorneys' fees at any time. [p. 36-37.]

. . .
[M]y understanding of this fee, as well as any other fee I take in a criminal case, it's possibly subject to forfeiture at the very worst-case scenario. And that was the question of the illegality and the possibility that I was under a criminal investigation.

. . .
Q . . . When you learned on January 13th, '95 that the prosecutors were interested in the fees did you have any discussions with any representative of the government about any possible criminal liability to you?

A No.

Q But you did have discussions with respect to criminal liability to me?

A It wasn't -- from what I recall in discussing the entire case, not just the attorneys' fees, the attorneys' fees were a very small portion of the case. What the Government was alleging, that you had -- one of the things you were doing with the trust money was paying your own bills, including attorneys' fees.

(Tr. of 12/30/97 at 36-37, 39.)

Mezzaroba stated that he and Friedler were doing both civil work for the trust and criminal work for the defendants, and that it was proper that they get some of their fees from the trust. He further testified that the government had never asked for any of the fees back and that he had never returned any.

f. Testimony of Pamela Foa

Assistant United States Attorney Seth Weber proffered the testimony of Assistant United States Attorney Pamela Foa that

"she did not at any time make any secret deals or agreements with Mr. Mezzaroba, nor did she ever discuss with Mr. Mezzaroba withdrawing from any political race with which he was involved or that would be any condition of any guilty plea." He further proffered that "there were no other agreements other than what is in writing and certainly no threats of prosecution, suggestions of any prosecution or investigation of Mr. Mezzaroba by Ms. Foa or myself." (Tr. of 11/12/97 at 154.) Pamela Foa accepted the proffer as her testimony, but Defendant insisted that she take the witness stand and she testified to what was represented in the proffer. (Id. at 155-56.) When Foa testified, she was asked neither whether Mezzaroba had done anything illegal in accepting fees from the trust fund, nor why, if he had done something illegal, the government had not pursued the matter. But she denied emphatically that there had ever been any secret deal with him.

g. Summary

The amount of newly discovered evidence of a secret deal between prosecutors and Mezzaroba is small indeed. Turpin's affidavit shows that the government was aware that Defendant had paid some of Mezzaroba's legal fees from one of the trust fund plans. On the basis of that affidavit, Defendant extracted evidence from Sidney Friedler and Mark Waldron, Sr. that the government had raised the question of the fees with Mezzaroba. Waldron was under the impression that Friedler had told him

Mezzaroba was under the control of the prosecutors. Friedler had a much less sinister account of his conversation with Waldron. He remembered that he said Mezzaroba was concerned about his conversation with the prosecutors over legal fees. Both Friedler and Mezzaroba stated that the worst that could have happened was that Mezzaroba would have had to return the fees, but Friedler testified that he had heard nothing about a possibility of indictment.

Defendant offers a few other bits of newly discovered evidence: for example, two versions of the government's sentencing memorandum in Mezzaroba's files, one which accepted for a reduction for acceptance of responsibility and a later one which challenged it. Defendant asked Pamela Foa if, after the first sentencing memorandum was submitted to the Court, she had any discussions with Mezzaroba about submitting a second memorandum. She stated that she did not recall, but that her practice would have been to call him before filing the second one to alert him so he could prepare to respond to the government's allegations. (Tr. of 11/12/97 at 170.) For Defendant, the only possible explanation for Mezzaroba's possession of the two documents is that he had a secret deal with the prosecutors, but one would draw that conclusion only if one were already convinced. Defendant's convictions, however, cannot substitute for evidence, and there is no newly discovered evidence that Mezzaroba delivered Defendant's guilty plea in exchange for the government's agreement not to indict him. The evidence

Defendant has presented falls far short of sustaining his accusation of a secret and corrupt deal between his attorney and the prosecutors.

IV. CONCLUSION

Once again, Defendant has prevailed upon this Court to re-examine his case, this time on a promise of newly discovered evidence that would require the Court to grant him relief from judgment. Most of the evidence is not newly discovered, and the small amount that can qualify as newly discovered does not begin to prove Defendant's case.

Defendant's argument is based primarily on conjecture, speculation, and reinterpretation of old evidence in an effort to convince the Court that his explanation is the only one that makes sense. His argument rests in part on premises contrary to this Court's decisions: for example, that Mezzaroba inadequately represented Defendant at his sentencing, whereas this Court concluded in its response to Defendant's Motion pursuant to 28 U.S.C.A. § 2255 that the representation was not inadequate. Defense counsel vigorously defended against the government's attempt to increase Defendant's offense level for obstruction of justice and won.

Defendant feels he did not get the benefit of his bargain with the government. He believes that the sentence he got was double the one he should have gotten because he was denied a reduction for acceptance of responsibility. (Tr. of

11/12/97 at 41-42.) In fact, his attorney had estimated that, with a reduction for acceptance of responsibility, he would be sentenced to 2½ to 3 years in prison, whereas he was given over 5½ years. Defendant is understandably upset and disappointed with this outcome and wants it changed. However, the evidence to support his claims is simply not there. Defendant's plea was not coerced. He got a sentence longer than he or his attorney expected because he demonstrated that he had not truly accepted responsibility for his crimes and he still has not. His Motion for Relief from Judgment will be denied.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA, : CRIMINAL ACTION
 : :
 : :
 : :
EDWARD M. ZINNER : NO. 95-0048

O R D E R

AND NOW, this day of February, 1997, upon
consideration of Defendant's Pro Se Motion for Relief from
Judgment and Request for Hearing Pursuant to Rule 60(b)(1)(3)
Fed. R. Civ. Pr. (Doc. No. 159), the government's responses (Doc.
Nos. 166, 178) and other supplemental submissions of the parties
pertaining to said Motion, **IT IS HEREBY ORDERED** that the Motion
is **DENIED**.

BY THE COURT:

John R. Padova, J.