

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION
LEXINGTON

DOUGLAS WILLIAM VANCE,)	
)	
Petitioner,)	Criminal Action No.
)	5:20-cr-63-DCR
V.)	
)	Civil Action No.
UNITED STATES OF AMERICA,)	5:26-cv-57-DCR
)	
Respondent,.)	
)	

**PETITIONER’S REPLY TO GOVERNMENT’S
RESPONSE IN OPPOSITION TO § 2255 MOTION**

I. INTRODUCTION

Petitioner Douglas Vance, appearing pro se, respectfully submits this Reply to the Government’s Response [R. 290].

The Government’s opposition relies on a manufactured narrative that can only exist by ignoring its own investigative records and the structural failures of the trial process. Throughout its Response, the Government characterizes the trial as a fair weighing of "overwhelming evidence," yet it fails to acknowledge that this "mountain of evidence" was built upon a foundation of suppressed truths.

While the Government asserts that many of these claims are procedurally defaulted, Petitioner maintains that the failure to preserve these "dead-bang winner" issues was the result of Ineffective Assistance of Counsel (IAC) that permeated every stage of the proceedings. Counsel’s failure to

effectively challenge the exclusion of a third-party written confession—while the Government was permitted to use a "False Exculpatory" instruction to frame Petitioner's truthful statements as lies—resulted in a total breakdown of the adversarial process. This Reply will demonstrate that when the record is viewed in its entirety, including the 2018 Hubbuch Recording and the McKinnon Exoneration Letter, the Petitioner is factually innocent of the specific intent required for wire fraud.

II. ARGUMENT

REBUTTAL TO GOVERNMENT - ARGUMENT 1: THE SUPPRESSION OF THE MCKINNON EXONERATION LETTER

The Government's Response [R. 290] attempts to dismiss the November 14, 2018, McKinnon Exoneration Letter as "hearsay" and "unreliable," while arguing that trial counsel was not ineffective for failing to secure its admission. This argument is a legal fallacy that ignores the Rule of Completeness, the Statement Against Interest exception, and the Government's own recorded acknowledgement of the evidence.

I. Admissibility Under FRE 804(b)(3) via Constructive Unavailability

The Government argues the letter was hearsay. However, the procedural reality of the trial triggered the exception for Statements Against Interest under Federal Rule of Evidence 804(b)(3):

The "Structural Trap" of Testimony: When the Court restricted Molly McKinnon's testimony to a failed "Duress" theory—effectively barring her from testifying that her actual boss at NGEP "forced," "insisted," and "required" her to perform fraudulent acts—she became legally unavailable to provide the most critical exculpatory facts.

Legal Unavailability: Under FRE 804(a), a witness is unavailable if a court ruling limits their testimony. Because she was barred from explaining the true nature of her "boss's" control, her written confession became the only admissible vehicle for that truth.

The Admission: In the letter, McKinnon admits she acted "of [her] own free will" to implicate herself because she could not "with good conscience let Vance take responsibility for what [she] did at Chamblee's request and insistence." This is a direct admission of criminal liability that directly rebuts the Specific Intent element of 18 U.S.C. § 1343.

II. The Hubbuch Recording: Notice and the Rule of Completeness

The Government's claim that the letter is "unreliable" or a "recent fabrication" is refuted by the Government's own investigative file.

The Evidence: The December 19, 2018, Hubbuch Transcription captures Special Agent Hubbuch explicitly stating: "I will ask the prosecutor, the A.U.S.A. to reach out to your attorney for this letter." Rule of Completeness (FRE 106): At trial, the Government introduced Petitioner's statements from the Hubbuch call to frame him as deceptive. However, under FRE 106, the Petitioner was entitled to introduce the "other part" of that interaction—the letter he was pointing the agents toward. The Government cannot introduce a "guilty sounding" fragment of a conversation while suppressing the evidence the defendant offered during that same conversation to prove his innocence.

The Breach: By promising to investigate the letter in 2018 and then failing to do so, the Government committed a Due Process violation under *Townsend v. Burke*, 334 U.S. 736 (1948).

III. The False Exculpatory Evidence Instruction as a Structural Trap

The "false exculpatory evidence" jury instruction compounded the prejudice. The Court instructed the jury that they could infer consciousness of guilt if they found Petitioner's statements false, while simultaneously preventing him from introducing the McKinnon Letter that would have proven those statements true. This created a classic "structural trap": the jury heard Petitioner

reference the letter in the Hubbuch recording, but—because the physical evidence was suppressed—they were left with the judicially endorsed inference that his references were lies.

This sequence violated Due Process under *Chambers v. Mississippi*, 410 U.S. 284 (1973), which prohibits the mechanistic application of evidentiary rules that exclude critical exculpatory evidence and defeat the defendant's right to present a defense. It also improperly shifted the burden of proof, contrary to *In re Winship*, 397 U.S. 358 (1970). The instruction did not merely "backfire," as warned against in *United States v. Robinson*, 602 F.2d 760 (6th Cir. 1979); it guaranteed that the jury would view Petitioner's entire defense through the lens of fabricated exculpatory statements—statements the Government's own agent had once agreed to verify.

Counsel's failure to object to the instruction in light of the suppressed letter and Hubbuch's agreement constitutes ineffective assistance under *Strickland*.

Conclusion to Argument 1

Under *Chambers v. Mississippi*, 410 U.S. 284 (1973), hearsay rules cannot be applied "mechanistically to defeat the ends of justice." The letter was the only evidence capable of rebutting the Government's theory of "Specific Intent." Its exclusion resulted in a trial based on a "sanitized" record that attributed the actions of an NGEF administrator to a Nex-Gen Industries builder. Petitioner is factually innocent, and the conviction must be vacated.

REBUTTAL TO GOVERNMENT - ARGUMENT 2: CONSTITUTIONALLY UNRELIABLE SENTENCING ENHANCEMENTS

The Government's Response [R. 290] maintains that the 174-month sentence and the associated enhancements were properly determined. However, the record demonstrates that the sentencing phase was a "procedural and substantive vacuum" where the Court relied on materially false information while ignoring mandatory offsets and narrowed legal standards.

I. The "Loss" Error and Mandatory Offsets

The Government's loss calculation is a figure that is legally prohibited in this Circuit. Under U.S.S.G. § 2B1.1, Application Note 3(E)(i) and *United States v. Kozerski*, 969 F.3d 310 (6th Cir. 2020), the court must credit the fair market value of the property returned and the services rendered by the defendant to the victim before the offense was detected.

Benefit of the Bargain: Under the principle recognized in *United States v. Watkins*, 994 F.2d 1192 (6th Cir. 1993), the Court was required to credit the value of the equipment and services the victims actually received against any claimed loss.

Pre-Investigation Assets: The Bills of Sale issued to Allan Deware and the Shumard Group for approximately \$490k were executed well before any investigation began (Gov Ex# 611, 704). These were legitimate business instruments reflecting the transfer of industrial value, not post-hoc restitution.

Admitted Machinery Value: Agent Hubbuch admitted at the Evidentiary Hearing that "multiple machines were made" (Page ID# 2181-2182). By disregarding these physical assets and services, the Court arrived at an inflated loss figure that directly and incorrectly increased the offense level. Trial counsel's failure to introduce the Bills of Sale or effectively cross-examine on the physical value created constitutes Ineffective Assistance of Counsel (IAC).

II. Misapplication of the "Abuse of Trust" Enhancement (§ 3B1.3)

The Government's narrative hinges on the claim that Petitioner "abused a position of trust" by directing fraudulent activities. This is factually and legally infirm:

Lack of Supervisory Authority: The "Abuse of Trust" enhancement requires a position of trust that facilitated the offense. The record proves that Molly McKinnon was an employee of the investors (Deware and Shumard), not the Petitioner.

The NGEP Buffer: Petitioner held no signing authority or digital access at NGEP, where the funds were routed and the administrative work was performed. One cannot "abuse a trust" or exercise supervisory authority over an individual who is effectively the "financial watchdog" for the alleged victims. Because McKinnon was the investors' representative, Petitioner had no administrative control over her actions. Counsel was ineffective for failing to challenge the legal bridge between Petitioner and an investor-appointed administrator.

The Corporate "Wall" (Counts 2, 3, and 4): The testimony of Ken Shumard and Gary Chamblee (Page ID# 1053-1054) confirms that these specific wires along with almost 400k were routed to NGEP—an investment entity where Petitioner had no signing authority and no "say so." While presented by the Government to show a broad "scheme," actually corroborated the Petitioner's operational isolation:

The Communication Gap: Hogan testified (Page ID# 1151) that Petitioner was not made aware of the specific loan arrangements or the technical details of the financial instruments McKinnon was coordinating with the lenders. On (Page ID# 1147) Hogan states loans were signed by Gary Chamblee not Petitioner.

The Failure: Counsel allowed the Government to present NGEP and Nex-Gen Industries as one "sham" business. Counsel failed to elicit from Hogan the specific fact that Petitioner was legally excluded from NGEP's decision-making process. Under *Strickland v. Washington*, 466 U.S. 668 (1984), Trial Counsel was ineffective for failing to use Hogan's testimony to clearly define the "wall" between Nex-Gen Industries and NGEP for the jury.

III. The "Sophisticated Means" Enhancement and Amendment 792

The application of the "Sophisticated Means" enhancement relies on a misrepresentation of individual conduct:

Individual Conduct Requirement: Under the current Guidelines and Amendment 792, the "Sophisticated Means" enhancement must be based on the individual conduct of the defendant.

The Rebuttal: The intricate digital forgeries and administrative maneuvers cited by the Government were executed by a third-party administrator (McKinnon) at the "request and insistence" of her actual boss at NGEF (Gary Chamblee). Petitioner's individual conduct—the physical construction of industrial machinery at the Hazard site—does not meet the legal threshold for "sophisticated" fraudulent means.

IV. Obstruction Enhancement – Alleged False Testimony

The obstruction enhancement under U.S.S.G. § 3C1.1 was based on Petitioner's trial testimony. To support such an enhancement, the Court must find that the defendant willfully provided materially false testimony — not merely testimony that was disputed or disbelieved. *United States v. Dunnigan*, 507 U.S. 87, 94 (1993).

The Government asserts Petitioner specifically denied sending the falsified bank statements identified in Exhibit 153. He did not issue a blanket denial of all emails. He provided a specific, good-faith denial, explaining that certain emails lacked his customary signature line ("Best, Doug Vance") and that he did not knowingly transmit falsified documents.

However, the Government conflates "sending documents" with knowingly providing false information.

Court Exhibit 1 (McKinnon Letter), although excluded from the jury, was part of the record and directly corroborates Petitioner's testimony. In that letter, Molly McKinnon admits:

- She produced altered bank statements.
- She accessed Petitioner's email account

- She sent emails from his account and opened them “to make it appear he had already read them.”
- Petitioner “had no knowledge” of her actions and “had no involvement whatsoever.”

This admission directly supports the absence of willful falsity. At minimum, it establishes a factual dispute as to knowledge — which precludes a finding of perjury under Dunnigan. A defendant’s good-faith denial of knowledge cannot constitute obstruction.

Perjury and the "Advice of Counsel" Defense: The Government argues the Obstruction enhancement was justified by Petitioner’s "lies".

Prior Conviction: Petitioner’s prior plea for a statement under oath was entered upon the specific advice of his then-attorney to resolve the matter. Petitioner is certain the Government is well-acquainted with this concept-where a plea of convenience or strategy is entered upon the advice of counsel-and it is a bad-faith distortion to use that past legal strategy as a bridge to label his current, factually supported testimony as 'perjury.'

Petitioner's transparency about following legal advice in the past only highlights his commitment to the truth in the present case, where the stakes involve a structural suppression of his actual innocence.

Physical Corroboration: The "Nucor Lie" is refuted by the testimony of the Government's witness Mr. Horrex, he corroborates Petitioner’s testimony that the document’s format was consistent with industrial sample labeling standards (Page ID# 1417-1418). And Ms. Francis also corroborates Petitioner’s testimony about shipping a five-gallon bucket of product (Page ID# 750). This was a good-faith dispute over industrial terminology, not willful obstruction. Petitioner was testifying to industrial reality, not attempting to obstruct justice.

The Ownership Reality: Petitioner testified to his status as the sole owner of the operational entity, Nex-Gen Industries. Joan Faybik was a stockholder, not a partner with management authority.

Prejudice: By labeling Petitioner's description of his own corporate structure and his stockholder's intent as "lies," the Government used the sentencing phase to punish Petitioner for accurately describing his business relationships.

Ineffective Assistance of Counsel:

Trial counsel failed to properly object to the obstruction enhancement and failed to insist upon the specific, individualized perjury findings required by Dunnigan. Counsel also failed to meaningfully argue that (Court Exhibit 1, McKinnons letter) directly undermined any finding that Petitioner willfully provided false testimony. Had counsel objected and required the Court to make explicit findings as to which statements were knowingly false, material, and willful — in light of record evidence corroborating Petitioner's lack of knowledge — there is a reasonable probability the enhancement would not have been applied. The two-level increase materially increased Petitioner's advisory guideline range, resulting in prejudice.

V. Inclusion of Non-Victims (Joan Faybik and Shannon Wells)

The Government utilized Joan Faybik to justify a sentencing enhancement for financial hardship, yet suppressed her actual stance. Faybik's notarized declaration proves she did not believe she was defrauded and did not rely on the alleged false statements. The Government conceded at the evidentiary hearing (Page ID# 2196) that if they relied strictly on their own financial spreadsheet (Gov. Exhibit 1), they "would not be arguing that substantial financial hardship resulted as to her." Agent Hubbach could trace only \$42,500 coming from Faybik to Petitioner on her bank records...but what they conveniently left out was the fact that their own financial spreadsheet (Gov.

Exhibit 1) shows \$42,500 coming in and \$59,600 going back to Faybik, which would be a \$17,100 return to her (Page ID# 2167). And with respect to the alleged \$500k, Faybik further states in her notarized declaration that she felt pressured and bullied by Agent Hubbuch to adopt the government's narrative, which did not reflect her actual statements or her view of her voluntary investment relationship with Petitioner. To enhance a sentence based on a hardship the Government admits its own data does not support is a violation of Due Process. By including a non-victim in the loss and hardship calculation, the Court utilized materially inaccurate information to increase the advisory range.

Shannon Wells (\$50k): Investigative 302 reports prove Wells explicitly told the Government he did not consider himself a victim, blaming the deal's failure on his own infrastructure limitations.

VI. Mathematical Impact: When the \$490k (Bills of Sale), \$500k (Faybik), \$50k (Wells) and \$500k to (NGEP) are properly offset, the loss falls well below the critical \$1.5 million threshold, requiring a significant reduction in the offense level.

Conclusion to Argument 2

The 174-month sentence is the product of cumulative constitutional and procedural error. The record contains evidence corroborating Petitioner's lack of knowledge with respect to the alleged falsified documents, yet the Court imposed enhancements without the requisite legal findings or factual basis. Additionally, the loss calculation was fundamentally flawed by disregarding governing offset principles. Had trial counsel presented the pre-investigation Bills of Sale and the Hubbuch admissions, the loss would have been reduced by over \$1 million, materially lowering the advisory range.

Individually and collectively, these errors resulted in a sentence based on materially inaccurate findings and ineffective assistance of counsel. This Court must vacate the sentence to correct these constitutional and procedural failures.

REBUTTAL TO GOVERNMENT - ARGUMENT 3: ACTUAL INNOCENCE, DUE PROCESS, AND THE FALLACY OF "OVERWHELMING EVIDENCE"

The Government's Response [R. 290] rests entirely on the premise that the evidence of guilt was "overwhelming," thereby rendering any procedural or constitutional errors "harmless." This argument is a legal circularity. Evidence can only be characterized as "overwhelming" when it has survived the adversarial process; here, the Government successfully extinguished that process by suppressing the McKinnon Exoneration Letter and breaching the investigative promise captured in the 12/9/18 Hubbuch Transcription.

I. Actual Innocence and the Schlup Gateway

Under *Schlup v. Delo*, 513 U.S. 298 (1995), a petitioner may overcome procedural bars by presenting "new reliable evidence" that shows "it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence."

The New Evidence: The November 14, 2018, McKinnon Letter—now corroborated by McKinnon's most recent notarized statement—is the definition of "reliable evidence." It is a contemporaneous confession stating that McKinnon, at the "request and insistence" of her actual boss at NGEP (Gary Chamblee), performed the digital and financial acts for which Petitioner was convicted.

Factual vs. Legal Innocence: Actual innocence means "factual innocence." *Bousley v. United States*, 523 U.S. 614 (1998). The Letter proves Petitioner's factual innocence regarding Specific Intent. Because Petitioner was legally isolated from NGEP (where the funds were routed and

managed), and because the person with digital access (McKinnon) was not his employee, Petitioner lacked the mens rea to defraud. A jury presented with a third-party confession from an investor-appointed administrator would not have found Petitioner guilty beyond a reasonable doubt.

II. Due Process and the "Sanitized" Trial Record

The Fifth Amendment guarantees a trial based on the truth, not a "sanitized" version of the facts.

The Government violated Due Process in two distinct ways:

1. The Investigative Breach (Townsend v. Burke): In the 12/19/18 Hubbuch Recording, the lead agent promised to "reach out to [Petitioner's] attorney for this letter." By failing to do so, and then arguing at trial that Petitioner's defense was a "recent fabrication," the Government relied on "materially false" information to secure a conviction. *Townsend v. Burke*, 334 U.S. 736 (1948).

2. The Right to a Complete Defense: Under *Crane v. Kentucky*, 476 U.S. 683 (1986), the Constitution guarantees a "meaningful opportunity to present a complete defense." When the Court restricted McKinnon's testimony to a failed "Duress" theory—preventing her from testifying about the control exerted by her NGEF boss—and simultaneously excluded her written confession, Petitioner was left with a "hollow" defense that could not rebut the Government's digital evidence.

III. The Fallacy of "Overwhelming Evidence"

The Government's reliance on the "mountain of evidence" [R. 290] is misplaced under *United States v. Cronin*, 466 U.S. 648 (1984).

Structural Error: When the Government hides a co-defendant's written confession and ignores its own recorded investigative admissions, the "adversarial process" itself breaks down. In such

cases, a conviction cannot be rescued by claims of "overwhelming evidence" because the quality of that evidence was never tested against the truth.

The "False Exculpatory" Trap: The Government used the False Exculpatory Statement jury instruction to tell the jury that Petitioner's claims were "lies." This was only possible because the Government had suppressed the McKinnon Letter.

Case Law: As held in *Chambers v. Mississippi*, 410 U.S. 284 (1973), the hearsay rules "may not be applied mechanistically to defeat the ends of justice." The "mountain" of digital evidence cited by the Government consists entirely of the very records McKinnon admitted to managing. By hiding the confession, the Government didn't prove Petitioner's guilt; they merely hid his innocence.

III. CONCLUSION

The 174-month sentence imposed on the Petitioner is the product of a "structural trap" rather than a search for the truth. The Government's "overwhelming evidence" is merely a reflection of a trial record that was strategically sanitized of its most exculpatory facts. By suppressing Molly McKinnon's admission, ignoring the legal separation between Nex-Gen Industries and NGEF, and misapplying sentencing enhancements to a defendant with no administrative authority, the Government secured a conviction through a vacuum of information. Petitioner has demonstrated factual innocence and constitutional error under the standards of *Schlup v. Delo* and *Strickland v. Washington*.

The combination of newly available evidence (the McKinnon declaration), corporate records proving a lack of authority at NGEF, and the Government's own recorded investigative admissions in

the Hubbuch Recording proves that no reasonable juror, fully informed of these facts, could have found the Petitioner guilty beyond a reasonable doubt.

Agent Hubbuch admitted (Page ID# 1576) that while he “could have done a lot of things and [pulled] strings to get a more complete financial picture,” he believed he had “sufficient information.” He further conceded (Page ID# 1573) that he could not confirm all the incriminating emails were sent from the same computer and agreed that anyone with access to Petitioner’s password could have sent them from any device. These admissions directly undermine the Government’s core theory of the case. In the Government’s reply (Page ID# 15) they quoted the 6th Circuit saying, The FBI agent investigating Faybik's losses testified that the \$42,500 mark was “wildly inaccurate” while simultaneously arguing so at best, we are left reviewing the district court's choice between “two different plausible interpretations of the facts.” When viewed together, these statements reveal a prosecution built not on solid evidence, but on selective investigation and convenient interpretations. The conviction in this case was obtained through a manifest injustice and a breakdown of the adversarial process. By suppressing the McKinnon confession the Government presented a factually hollow narrative to the jury. This was not a fair weighing of evidence, but a misrepresentation of the investigative record that deprived the Petitioner of a fair trial." While the Government attempts to undermine Petitioner’s claims by suggesting that Ms. Faybik is merely protecting a friend, it fails to address similarly situated individuals, including Shannon Wells. In fact, other alleged victims declined the Government’s characterization of them as “victims” through interviews, FBI 302 reports, and letters to the Court, and were ultimately not treated as victims. Several of these individuals maintained collateral positions comparable to those of the Government’s primary witnesses, Deware and the Shumards. It is not difficult to see that this was a malicious prosecution. Any

failure to raise these specific constitutional and factual issues previously is excused by the clear Ineffective Assistance of Counsel, as no reasonable legal strategy could justify leaving a written confession of innocence on the table. Petitioner has demonstrated that his Sixth Amendment rights were violated and that he remains factually innocent. Consequently, this Court should grant the Petitioner's § 2255 Motion, vacate the conviction and sentence, and grant such further relief as justice requires.

Respectfully submitted,

/s/ Douglas William Vance

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Petitioner declares under penalty of perjury pursuant to 28 U.S.C. § 1746 that the facts stated herein are true and correct to the best of his knowledge and belief, and that this motion is filed in good faith, not for delay or harassment

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of April, 2026, a true and correct copy of the foregoing Reply to Government's Response in Opposition to § 2255 Motion was placed in the United States mail, first-class postage prepaid, addressed to the Clerk of the Court and the United States Attorney for the Eastern District of Kentucky.

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/s/ Douglas William Vance
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