

Adelman Travel Group (Adelman) and Omega World Travel (Omega) were the two leading bidders in 2005 for a contract to book \$30 million in travel by Wisconsin State employees. A three-part bid evaluation process resulted in a statistical tie between Adelman and Omega – each with 1027 out of a possible 1200 points. ¹ Of the three criteria, Adelman had the lowest bid and was rated higher for service, while Omega was considered to have given a better oral presentation of its proposal.

Georgia Thompson, a section chief in the state Bureau of Procurement presided over the bidding process, and she was on the six-member committee responsible for awarding the contract. Some members were in favor of deciding the tie in favor of Omega, while Thompson argued in favor of granting the contract to Adelman. She told the other members that her boss Pat Farley, a political appointee, would favor Adelman since it was a Wisconsin based company, whereas Omega was based in Fairfax, Virginia. To break the impasse, a committee member other than Thompson “suggested that the contract be rebid on a best-and-final basis, as state law permitted.” ² Adelman then further reduced its bid to \$27,000 under Omega, and based on the “tie-breaking procedure specified by state law” the committee awarded the contract worth about \$750,000 to Adelman. ³

Three months after Adelman won the contract Thompson was granted a \$1,000 merit increase in her annual salary to \$77,300, after a job performance review showed she was typically working 10 to 12 hours per day because of short-staffing in her department.

Thompson investigated and indicted

Thompson subsequently became a party of interest in the investigation by Republican Steven Biskupic, U.S. Attorney for the Eastern District of Wisconsin, of campaign contributions to Wisconsin Governor Jim Doyle, a Democrat. Biskupic’s investigation sought to find a link between two \$10,000 campaign contributions to Doyle’s re-election campaign by different Adelman corporate officers, and award of the travel contract to Adelman.

Although Biskupic didn’t any connection between the contributions and the travel contract, Thompson was indicted by a federal grand jury in early 2006 on two counts related to how the contract was awarded. One charge was an alleged violation of 18 U.S.C. §666, “Theft or bribery concerning

Federal Appeals Court Tosses Fraud Conviction And Orders Georgia Thompson’s Release

By Hans Sherrer

programs receiving Federal funds.” The other charge was 18 U.S.C. §1341, “Frauds and swindles,” that includes a “scheme or artifice to deprive another of the intangible right of honest services.”

Doyle reacted to Thompson’s indictment by promptly canceling the State’s contract with Adelman. The governor’s cancellation of the contract was widely reported throughout Wisconsin, and it may have had the effect of sending the message to Thompson’s prospective jurors that there was something fishy about the way the contract was awarded.

U.S. District Judge Rudolph Randa denied Thompson’s motion to dismiss the indictment, and her trial began in Milwaukee’s federal courthouse on June 4, 2006.

The prosecution’s theory was that Thompson violated §666 by misappropriating state money when she argued that Adelman should be awarded the travel contract, when Omega could have been awarded the contract because it had tied in the evaluation process. The prosecution also theorized that she violated §1341 by depriving Wisconsin of her “honest services” when she agreed with implementation of the tie-breaking process that resulted in awarding of the contract to Adelman.

The prosecution alleged that Thompson’s intent in aiding Adelman was to improve her job security by benefiting her bosses politically, and that she was rewarded with the \$1,000 merit pay raise. Although the prosecution didn’t allege that Thompson had favored awarding the contract to Adelman as a *quid pro quo* for its contributions to Governor Doyle, Judge Randa allowed testimony about the contributions and the close ties between the travel agency’s executives, and Doyle and his aides. Thus Randa enabled the prosecution to cast the shadow over the trial that Thompson favored Adelman as part of a “pay to play” political corruption scheme involving the governor.

Thompson’s defense was that she had never met Governor Doyle, at the time the travel contract was awarded she knew nothing about any contributions by Adelman to Doyle, she had been hired in 2001 when Wisconsin had a Republican governor, she was a civil servant protected from being fired



for political reasons, and as a purchasing supervisor she was required by state law to purchase a qualified product at the lowest possible price. Thus by favoring award of the contract to the low bidder Thompson was just doing her job by looking out for the State’s interest.

Thompson convicted

After a six-day trial Thompson was convicted by a jury of both counts. She was then fired, as a convicted felon, from her state job.

Republicans politicized Thompson’s conviction by blanketing the state with ads that her conviction was an example of corruption in Doyle’s Democratic administration of state government.

At Thompson’s September 2006 sentencing hearing, the prosecution argued her sentence should be enhanced above the guideline recommendation because she refused to accept responsibility for her convicted crimes. She was sentenced to 18 months in federal prison by Judge Randa.

Randa denied Thompson’s motion to remain free on bond pending her appeal, based on his assessment that it was unlikely her convictions would be reversed on appeal. Thompson began serving her sentence in November 2006. She was scheduled for release in March 2008, under what would be much different personal circumstances than before her indictment. The 57-year-old Thompson was financially devastated after selling her condominium that she owned free and clear, and cashing in her state retirement, to pay her legal bills that were estimated to total between \$250,000 and \$400,000.

Thompson’s wins her appeal and release

A three-judge panel of the federal Seventh Circuit Court of Appeals heard the oral arguments in Thompson’s appeal on the morning of April 5, 2007. During the hearing Thompson’s lawyer, Steve Hurley, argued that her convictions were entirely based on the government’s speculation – unsupported by any facts – that she favored awarding Adelman the contract as part of a political pay-off scheme. He argued, “The bottom line is there is nothing in the indictment that charges that she even knew about the political contributions and certainly nothing in the evidence.” ⁴

The three judges asked the government sharp questions about the case. The tone of the

Thompson cont. on page 13

Thompson cont. from page 12

questioning by all three judges was reflected by Judge Diane Wood in her comment to the assistant U.S. attorney, "It strikes me that your evidence is beyond thin."⁵

Several hours after the hearing the judges announced they had decided to vacate Thompson's convictions and acquitted her of the charges. Since Thompson was acquitted, they instructed Judge Randa to order her immediate release from custody. The panel said they would later issue a written decision.

Complying with the appeals court's instructions, Judge Randa entered a judgement of acquittal and issued an order to the federal Bureau of Prisons to immediately release Thompson. Within hours of the appeals court's ruling, Thompson was released from federal prison. She had been wrongly imprisoned for 4-1/2 months.

The print and broadcast media immediately began reporting that Thompson had been wronged by her prosecution that caused her personal suffering and financial harm. Somewhat ironically, that was the same media that after her conviction castigated her as a criminal and embarrassment to honest government workers.

Legal experts expressed astonishment that within hours of Thompson's oral argument the three judges took the extraordinary actions of unanimously vacating her convictions, acquitting her, and ordering her immediate release from custody. Former Assistant U.S. Attorney Chris Van Wagner said of their decision, "It's a statement to the government that you never had enough evidence to get out of the starting gate."⁶ Frank Tuerkheimer, a UW-Madison law professor and a former U.S. Attorney, said the appellate panel's decision was all the more remarkable because, "This is not recognizably a pro-defendant panel. If anything, it's pro-prosecution."⁷

Governor Doyle lamented in a statement "It's obvious an innocent woman was used as a political football for political reasons."⁸ He said in an interview, "Millions and millions of dollars were spent by my political opponents trying to make this woman appear to be a terrible criminal."⁹ He further said, "This is a woman who I've never met who has never been part of any political process at all. Can you imagine the horror of this? She's doing her job and then she get caught up in all of this."¹⁰ The Republicans considerable efforts to make political hay out of Thompson's convictions were for

naught when Doyle was re-elected as governor in November 2006.

Thompson's attorney Hurley expressed his disgust with her prosecution in a statement:

"The government charged Georgia Thompson with conduct that did not constitute a crime. It cost Georgia her job, her life savings, her home and her liberty; and it cost Georgia her good name. At sentencing, the government urged a longer period of incarceration because Georgia did not accept responsibility. Today, the government ought to accept responsibility for the consequences of its acts."¹¹

Written decision issued on April 20, 2007

The appeals panel's written decision was issued on April 20. (*United States v. Thompson*, 484 F.3d 877 (7th Cir. 04/05/2007).

The decision stated that "a narrow reading ... limits §666 to theft, extortion, bribery, and similarly corrupt acts ..." ¹² Yet, "Neither Thompson nor anyone else in state government was accused of taking a bribe or receiving a kickback."¹³ The panel also noted that even if Thompson had presided over an erroneous implementation of the bid tie-breaking regulations, that was not a violation of §666, because "the sin is civil (if it is any wrong at all) when a public employee manipulates the rules ... to save the state money or favor a home-state producer that supports elected officials. ... As long as the state gets what it contracts for, at the market price, no funds have been misapplied ..." ¹⁴ Thompson consequently could not have violated §666.

The Court next analyzed Thompson's conviction of violating §1341:

"§1341 forbids "any scheme or artifice to defraud" that predictably employs the United States mails. What "fraud" did Thompson commit, and who was the victim? Thompson did not bilk the state out of any money or pocket any of the funds that were supposed to be used to buy travel. ...

For the purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

The prosecutor's theory, which the jury accepted, is that Thompson deprived Wisconsin of her "honest services" ...

According to the prosecutor, Thompson "misused" her office when she lent it to

political ends (even if the "political" end was just a lower price, about which incumbents could crow) and obtained a "private gain" when she got a raise. The prosecutor adds that, by currying favor with Farley, Thompson improved her job security. This is implausible; Thompson already had security as a civil servant."¹⁵

Although there was no proof Thompson favored Adelman for political reasons, the Court took pains to explain that even if she had, that wouldn't in and of itself have violated §1341. "The idea that it is a federal crime for any official in state or local government to take account of political considerations when deciding how to spend public money is preposterous."¹⁶

In regards to the prosecution's claim that Thompson's 1.3% (\$1,000) raise three months after Adelman was awarded the contract constituted an illegal "private gain," the Court wrote:

"It would stretch the ordinary understanding of language, however, to call a public employee's regular compensation, approved through above-board channels, a kind of "private gain." The history of honest-services prosecutions is one in which the "private gain" comes from third parties who suborn the employee with side payments, often derived via kickbacks skimmed from a public contract. ... getting a raise through normal personnel practices does not sound like an aspect of a "scheme or artifice."

The United States has not cited, and we have not found, any appellate decision holding that an increase in official salary, or a psychic benefit such as basking in a superior's approbation (and thinking one's job more secure), is the sort of "private gain" that makes an act criminal under §1341 and §1346. ..."¹⁷

The Court then established a new precedent for the Seventh Circuit, "We now hold that neither an increase in salary for doing what one's superiors deem a good job, nor an addition to one's peace of mind, is a "private benefit" for the purpose of §1346."¹⁸

Consequently the Court declared that Thomson's role in the travel contract being awarded to the low bidder wasn't a crime: "This prosecution, ... led to the conviction and imprisonment of a civil servant for conduct that ... was designed to pursue the public interest as the employee understood it ..."¹⁹

Thompson cont. on page 17

majority does not make this argument) is that the rule announced is not materially worse than the applicable rule in the administrative context. If you rely to your detriment on a government official's characterization of the law—an IRS agent's informal prediction of the tax consequences of some investment, say—but it turns out that the official was mistaken, you will not ordinarily be excused from complying with the law as written. Put another way, the government is not bound—in legal terms, estopped—by the erroneous representations of its low-level functionaries.

Likewise here, it could be argued, Bowles and his lawyer should not have taken Judge Nugent's statement of the deadline as authoritative. They should have consulted the rules and calculated the deadline themselves.

But three important caveats make the administrative example a questionable analogy. First, although the Supreme Court has rejected every claim of so-called "estoppel against the government" in the administrative context, it has never ruled out the possibility that a sufficiently extreme case would warrant estoppel, and the lower courts have occasionally deemed particular cases sufficiently extreme. Thus, the rules in this area are reasonably close to the "unique circumstances" doctrine that the *Bowles* Court overrules.

Second, even if there were a per se bar on estoppel against the government in the administrative context, that would not justify such a bar where the relevant official is a federal district judge, rather than a relatively low-level bureaucrat. Estoppel against the government can be a dangerous doctrine if it effectively gives thousands upon thousands of low-level agency employees the power to overturn decisions made by Congress. However, the professionalism, relatively small number, and constant review of the work of federal judges together place them in a wholly separate category.

Third, the particular facts of *Bowles* are indeed extreme. There is no claim of any prejudice to anybody as a result of the two-day delay. Moreover, as Justice Souter explained in dissent, there was nothing on the face of the order to indicate that it stated the wrong deadline (because the clock runs from the date an order is "entered," which does not appear on the order itself). Thus, Bowles and his attorney had no reason to check Judge Nugent's math.

It turns out, then, that the best that can be said for the majority opinion is not very much at all.

The facts and circumstances of the *Bowles* case are strikingly similar to a chilling allegory in the penultimate chapter of Franz Kafka's dark novel of the bureaucratic state run amok, *The Trial*. The protagonist, K, stands accused of an unnamed crime in a court system with enigmatic procedures. When K stumbles upon the prison chaplain, the latter explains to K that his approach to the law has been naïve.

The chaplain tells a story of a man from the countryside who comes to the door of the law, only to be told by the doorkeeper that he can't be let in at the moment but it's possible that he could be permitted entry later. The man waits before the door for years, until as he is dying, he asks the doorkeeper why, given that everyone wants access to the law, no one but he has come to the door during his many years of waiting. The doorkeeper answers: "Nobody else could have got in this way, as this entrance was meant only for you. Now I'll go and close it."

Like the man from the countryside, Keith Bowles was told by a doorkeeper to the law—a federal judge—just what he needed to do to gain access. For following those instructions, he was repaid only by having the door to the law shut in his face by the Supreme Court.

The Court split 5-4 in *Bowles* along what are conventionally described as conservative-liberal lines, but in this case "conservative" seems a poor description for the majority view. Opposition to arbitrary exercises of power by the bureaucratic state has been one of the hallmarks of the conservative tradition in Anglo-American thought for over two centuries.

The majority opinion in *Bowles* would be better described as statist than conservative. As Justice Souter wrote in dissent: "It is intolerable for the judicial system to treat people this way, and there is not even a technical justification for condoning this bait and switch."

Reprinted with permission of the author. Originally published on, writ.findlaw.com, June 20, 2007.

About the author: Michael C. Dorf is the Isidor & Seville Sulzbacher Professor of Law at Columbia University. He blogs at www.michaeldorf.org

Read or print *Bowles v. Russell* on JD's website, www.justicedenied.org/bowles_russell.pdf Or order a copy for \$3 (stamps OK) from, Justice Denied, PO Box 68911; Seattle, WA 98168

Aftermath

Biskupic responded defensively to the firestorm of publicity that followed in the aftermath of Thompson's exoneration. His spokesperson, Michelle Jacobs, defended the government's prosecution of Thompson's, saying, "They acted on the evidence as they found it, convinced a jury of 12 that there was criminal conduct, convinced a judge who has been sitting on a state and federal bench for 33 years that the verdict was sound. But we just did not convince the court of appeals ..." ²⁰

One of the jurors, Marvin Bizzelle, was irritated by the appeals court's declaration that Thomson was "innocent" of committing a crime by doing her job and acting to save the state government money. He said, "As far as I'm concerned – and I'm sure any other juror you talk to will tell you the same thing – she was guilty of manipulating the contract." ²¹ Bizzelle comment was prior to the appeals court's written decision, and as they made clear, what he characterized as "manipulation" was nothing more than Thompson's support for awarding the travel contract to the low bidder, and she only had one vote out of six in the committee that awarded the contract.

It so happened that at the time Thompson was exonerated there was a furor in Washington D.C. over possible improprieties in the firing of at least eight U.S. Attorneys. There were suggestions that some of the U.S. Attorneys who weren't fired, such as Biskupic, showed their loyalty to the Bush administration's pro-Republican political agenda by engaging in questionable partisan activities, such as the prosecution of Thompson who was bluntly described by the appeals court as "innocent." ²²

Thompson was rehired by the state of Wisconsin, and on April 23, 2007 she returned to her old job at her previous pay of \$77,300 annually. She was also paid back pay of \$67,161. On June 14 Thompson filed a claim with the state Claims Board for reimbursement of \$359,048, which included more than \$340,000 related to legal expenses ²³ She may also qualify for about \$18,000 under the federal compensation statute that provides for \$50,000 per year of wrongful imprisonment.

Endnotes:

1 The evaluation was tied when the scores were rounded to the nearest whole number. Omega had a score of 1027.3 while Adelman's was 1026.6, so the actual difference between the two bidders score was about 6/1000ths of a percent.

2 *United States v. Thompson*, 484 F.3d 877 (7th Cir. 04/05/2007); 2007.C07.0000350 ¶15 <www.versuslaw.com>

3 *Id.*, at ¶15.

4 *Id.*, Oral Arguments before the Seventh Circuit Court of Appeals on April 5, 2007.

5 *Id.*

6 Experts say ruling hits prosecutor's credibility, By Jason Stein, *Wisconsin State Journal*, April 7, 2007.



Thompson Endnotes cont.on p. 19

TN Theft Conviction Tossed

By JD Staff

In late 1999 Linda Maples and her husband took their 1982 Chevrolet Silverado to McMahan's Garage in Pigeon Forge, Tennessee for refurbishing. The Maples' also delivered a new engine for installation in the truck. McMahan's didn't finish the refurbishing before the death of Mr. Maples in April 2001. When she inquired about her Silverado, Ray McMahan told her it had disappeared from his storage lot. She then reported it stolen.

About two years later, when her vehicle still hadn't been found, Maples began investigating on her own. In November 2003 she found that the serial number of an engine in a truck owned by Rod Mills, a former employee of McMahan's Garage, matched the engine she had delivered to McMahan's almost four years earlier. Mills' truck was inoperable at the time Maples matched the engine serial number.

Maples provided the information to the Pigeon Forge Police Department, which conducted an investigation. In January 2004 Mills and McMahan were each indicted on "one count of theft over \$10,000."

McMahan died in November 2004, prior to his trial. Mills elected to have a bench trial, which was held in May 2006. He was found guilty and sentenced to five years imprisonment. Mills appealed to Tennessee's Court of Criminal Appeals.

Mills' trial strategy had been that the prosecution didn't have sufficient evidence to prove he committed a crime. That is why, after the prosecution presented its case, Mills' lawyer rested without Mills testifying or presenting any witnesses in his defense. Mills' appeal was based on the same strategy by relying solely on the insufficiency of the evidence.

The appeals court issued its ruling on June 5, 2007. (*State v. Rod Mills*, No. E2006-02207-

Thompson Endnotes cont. from p. 17

- 7 *Id.*
- 8 *Id.*
- 9 Federal appeals court orders Thompson released from prison, By Ryan J. Foley, *The Janesville Gazette* (Janesville, WI), April 6, 2007.
- 10 Court orders ex-state employee freed from prison, *WISN Channel 12* (Milwaukee, WI), April 6, 2007.
- 11 *Id.*
- 12 *United States v. Thompson*, 484 F.3d 877 (7th Cir. 04/05/2007); 2007.C07.0000350 ¶28 <www.versuslaw.com>
- 13 *Id.* at ¶ 27.
- 14 *Id.* at ¶ 29-30.
- 15 *Id.* at ¶ 31-33, 35.
- 16 *Id.* at ¶ 37.
- 17 *Id.* at ¶ 40-41.
- 18 *Id.* at ¶ 41.
- 19 *Id.* at ¶ 42.
- 20 Conviction may cost Thompson \$300,000, By Steven Walters and Patrick Marley, *Milwaukee Journal-Sentinel*, April 6, 2007.
- 21 *Id.*
- 22 Georgia Thompson case warrants congressional probe, Editorial, *The Tomah Journal*, April 16, 2007.
- 23 State worker files claim, By Patrick Marley, *Milwaukee Journal-Sentinel*, June 15, 2007.

CCA-R3-CD (Tenn.Crim.App. 06/05/2007))

The Court recounted the basic facts of the case, including that Mills told the police investigator that McMahan gave him the vehicle in June 2001 as payment for money he was owed by McMahan for mechanic work, and that McMahan didn't tell him he didn't own the truck. Mills said he didn't make any attempt to transfer the title because he parted out the Silverado, and he only put the engine in his own truck. McMahan told the investigator the same thing: he gave the truck to Mills for back wages and he never told him the truck belonged to Maples.

The Court explained that the theft statute (Tenn. Code Ann. * 39-14-106(20) (2003)) requires that a "... person knowingly obtains or exercises control over the property without the owner's effective consent." The Court stated that in regards to the theft statute's *mens rea* requirement, to have acted "knowingly" Mills would need to have had "actual or constructive knowledge that the truck was stolen."

Since it was undisputed that Mills had control over McMahan's Silverado without her consent, the question was if the prosecution had presented proof beyond a reasonable doubt that he had done so "knowingly."

The Court recited that the serial number hadn't been altered or removed from the engine; that Mills fully cooperated during the police investigation; that McMahan confirmed Mills' explanation that he was given the truck for back wages; that McMahan confirmed he never told Mills that the vehicle belonged to someone other McMahan; and that McMahan had been truthful in confidential information he had provided the Pigeon Forge PD about automobile thefts throughout Sevier County.

The Court concluded by deciding: "The entirety of the evidence is not consistent with the defendant's guilt and does not exclude every other reasonable hypothesis except the guilt of the defendant. The evidence produced at trial did not prove, beyond a reasonable doubt, that the defendant had actual or constructive notice that the truck was stolen at the time he was found with the truck in his possession. As such, the defendant's conviction must be reversed.

Since Mills' conviction was reversed for insufficient evidence he committed a crime, the indictment was dismissed and he was released from custody after 13 months of wrongful imprisonment.

Fingerprint Doesn't Stop Quashing Of Conviction

Three masked men stole more than \$50,000 (£30,000) after overpowering 60-year-old Neil Bateman outside his Bodenham, England home in April 2004.

In February 2006 two brothers, Khalid and Mohammed Khan, pled guilty to the robbery.

A third man charged with the robbery was auto mechanic Sirfraz Ahmed. The Khan brothers didn't implicate Ahmed in the robbery, but his fingerprint was found on a black plastic bag left at the crime scene after it had been worn as a mask by one of the robbers.

At his October 2006 trial, Ahmed testified that at the time of the robbery he was almost 50 miles away in Birmingham, where he lived, attending a birthday party at this mother's house. Several witnesses corroborated Ahmed's alibi. He also testified that he knew the Khan brothers, and that he had helped Khalid fix cars at the house the brothers shared.

Ahmed said that they would put plastic bags on the seat of a car to prevent oil stains, and that he could have touched the bags, so that is how his fingerprint could have gotten on the bag found at the crime scene.

The jury rejected Ahmed's alibi and convicted him. He was sentenced to four years imprisonment.

In June 2007 the Court of Appeal heard arguments in Ahmed's appeal. Afterwards the three-judge panel unanimously quashed his conviction on three grounds: The judge failed to properly instruct the jury about the sufficiency of evidence necessary to convict Ahmed; there was insufficient evidence to sustain Ahmed's conviction; and the jury may have been overly influenced to infer Ahmed's guilt from the guilty pleas of his friends and co-defendants, the Khan brothers.

The Court stated in regards to the fingerprint evidence: "The jury could not properly be sure that the fingerprint found on such a common item as a plastic bag was sufficient evidence on which to conclude that this appellant was involved in the robbery."

Since Ahmed's conviction was quashed due to the insufficiency of the evidence, the Court didn't order a retrial. He was immediately released from custody after eight months of wrongful imprisonment.

Source: Conviction quashed, *Hereford Times* (Hereford, England), June 29, 2007.

