

FILED

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PETITION UNDER 28 USC § 2255 TO VACATE, SET ASIDE, OR CORRECT
SENTENCE BY A PERSON IN FEDERAL CUSTODY

UNITED STATES DISTRICT COURT		Dist. CLERK ERON B. MEDILSKY CLERK ED-WI
Name of Movant Gary R. George	Prisoner No. 07163-084	Case No. 03-CR-259
Place of Confinement YANKTON FPC		
UNITED STATES OF AMERICA		V. (name under which convicted)
MOTION		
1. Name and location of court which entered the judgment of conviction under attack ED-WI, J. Randa		
2. Date of judgment of conviction August, 2004		
3. Length of sentence 48 months		
4. Nature of offenses involved (all counts) 18 U.S.C. § 371		
5. What was your plea? (Check one)		
(a) Not guilty <input type="checkbox"/>		
(b) Guilty <input checked="" type="checkbox"/>		
(c) Nolo contendere <input type="checkbox"/>		
If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:		
6. If you pleaded not guilty, what kind of trial did you have? (Check one)		
(a) Jury <input type="checkbox"/>		
(b) Judge only <input type="checkbox"/>		
7. Did you testify at the trial? Yes <input type="checkbox"/> No <input type="checkbox"/>		
8. Did you appeal from the judgment of conviction? Yes <input checked="" type="checkbox"/> No <input type="checkbox"/>		

9. If you did appeal, answer the following:

(a) Name of court Seventh Circuit

(b) Result pending

(c) Date of result _____

10. Other than a direct appeal from the judgement of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgement in any federal court?

Yes

No

11. If your answer to 10 was "yes", give the following information:

(a) (1) Name of court _____

(2) Nature of proceeding _____

(3) Grounds raised _____

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes

No

(5) Result _____

(6) Date of result _____

(b) As to any second petition, application or motion give the same information:

(1) Name of court _____

(2) Nature of proceeding _____

(3) Grounds raised _____

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes No

(5) Result _____

(6) Date of result _____

(c) Did you appeal, to an appellate federal court having jurisdiction, the result of action taken on any petition, application or motion?

(1) First petition, etc. Yes No

(2) Second petition, etc. Yes No

(d) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

12. State *concisely* every ground on which you claim that you are being held in violation of the constitution, laws or treaties of the United States. Summarize *briefly* the *facts* supporting each ground. If necessary, you may attach pages stating additional grounds and *facts* supporting the same.

Caution: If you fail to set forth all grounds in this motion, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in these proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed. However, you should raise in this motion all available grounds (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The motion will be returned to you if you merely check (a) through (j) or any one of the grounds.

- (a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily or with understanding of the nature of the charge and the consequences of the plea.

- (b) Conviction obtained by use of coerced confession.
- (c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
- (d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.
- (e) Conviction obtained by a violation of the privilege against self-incrimination.
- (f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
- (g) Conviction obtained by a violation of the protection against double jeopardy.
- (h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.
- (i) Denial of effective assistance of counsel.
- (j) Denial of right of appeal.

A. Ground one: SEE ATTACHED, SIX
PAGES

Supporting FACTS (state *briefly* without citing cases or law) _____

B. Ground two: _____

Supporting FACTS (state *briefly* without citing cases or law) _____

C. Ground three: _____

Supporting FACTS (state *briefly* without citing cases or law) _____

D. Ground four: _____

Supporting FACTS (state briefly without citing cases or law) _____

13. If any of the grounds listed in 12A, B, C, and D were not previously presented, state briefly what grounds were not so presented, and give your reasons for not presenting them:

Ineffective Assistance of Counsel

14. Do you have any petition or appeal now pending in any court as to the judgment under attack?

Yes No

15. Give the name and address, if known, of each attorney who represented you in the following stages of judgment attacked herein:

(a) At preliminary hearing Bruce Rosen, Madison, WI

(b) At arraignment and plea Alex Flynn, Milwaukee, WI

(c) At trial n/a

(d) At sentencing Alex Flynn, Milwaukee, WI

(e) On appeal David Geier, Madison, WI

(f) In any post-conviction proceeding n/a

(g) On appeal from any adverse ruling in a post-conviction proceeding n/a

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at approximately the same time?

Yes No

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes No

(a) If so, give name and location of court which imposed sentence to be served in the future:

(b) Give date and length of the above sentence: _____

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

Yes No

Wherefore, movant prays that the court grant petitioner relief to which he or she may be entitled in this proceeding.

Garyh Geary
Signature of Attorney (if any)

I declare under penalty of perjury that the foregoing is true and correct. Executed on

3 Nov 06
(Date)

Garyh Geary
Signature of Movant

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Question 12: Grounds for Claim

Ground One: The Grand Jury Clause of the U.S. Constitution was violated.

Facts: The 7th Circuit ruled in this case the §371, 18 U.S.C., charge in the Indictment was based on the "Defraud Clause" and not the "Offense Clause" of that statute. The two clauses are disjunctive. The 7th Circuit cited the misunderstanding. The U.S. Attorney, the District Court and the Defense, as well as the Grand Jury, proceeded on the basis that this was an "Offense Clause" case.

Count 1 of the Superseding Indictment does not identify a generic conspiracy to defraud the United States. As stated by Judge Easterbrook in U.S. v. Reynolds, 919 F.2d at 438, "There are no common law federal crimes" and the "Defraud" and "Offense" Clauses are distinct.

The Supreme Court in U.S. v. Dennis, 384 U.S. 855 (1966), held that §371 "Defraud Clause" cases address "defrauding the United States by impairing, obstructing or defeating the lawful function of any department of government." In this case, the Indictment does not track the statute. The language used in Count 1, ¶2 on Page 2, clearly identifies the basis for the Indictment as a scheme to defraud involving "honest services" and does not reference the United States. ¶1 on Page 1 references a conspiracy "to commit offenses involving federal program funds." The Plea Agreement only references the Indictment. See ¶7. No "interference with governmental function" is alleged.

An examination of the Judgement of Conviction further makes this point. On Page 1, under "Nature of Offense," the Court entered "Conspiracy to Commit Offenses Against Federal Program Funds." The Grand Jury, as well as the Defense, was put on notice that this was an "Offense Clause" case and not a "Defraud Clause" case. The language of the Indictment is defective and must be dismissed.

Further, the District Court was aware of the failure to reference "interference in governmental function," as was the U.S. Attorney, in that the District Court asked for briefs on the matter.

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The Defense responded. The government did not. Failure to identify the United States as a victim in a "Defraud Clause" case is a failure of the indictment to state an offense. See U.S. v. Brandon, 17 F.3d 409, 421, 422 (1st Cir. 1994) and Tanner v. U.S., 483 U.S. 107, 128-132 (1987).

In addition, the Indictment falsely claims the failure of an attorney subject to the Wisconsin Ethics Code reporting requirements, to disclose legal fees from clients annually constitutes fraud. This is false per DeBardleben v. Ethics Board, 112 Wis. 2d 324, 332 NW 2d 326 (1983), which clearly rules such omissions do not violate Wisconsin Law. Failure to accurately state Wisconsin Law to the Grand Jury and the Grand Jury's Indictment based on the inaccurate statement of Wisconsin Law renders the Indictment defective. This flaw is not subject to harmless error analysis. The court should not enter the minds of the grand jurors and speculate as to their actions if the law had been accurately stated. This is a jurisdictional defect. See U.S. v. Spinner, 180 F3d 514 (3rd Cir. 1999).

FRCrP 7(c) was violated because the Indictment does not track the statute and FRCrP 12(b) was violated by the failure to accurately state the law which is a failure to state an offense.

Ground Two: The Due Process Clause of the U.S. Constitution was violated.

Facts: The Judgement of Conviction is defective regarding sentencing. The District Court did not adopt the PSR on the record at sentencing nor did it check the appropriate box on either the original or the amended judgement of conviction indicating PSR adoption. Pages 2 and 3 of the "Statement of Reasons" are blank in relevant parts.

Despite the failure to adopt the PSR, the 7th Circuit in U.S. v. George, stated the lack of a guideline calculation was harmless.

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Yet, the 7th Circuit in citing George in U.S. v Cunningham, 429 F.3d 673 (7th Cir. 2005) and in U.S. v. Robinson, No. 05-2224 (7th Cir. 2005), stated that a correct application of the guidelines is a precondition to proper sentencing.

In U.S. v. Gokey, 437 F. 3d 622 (7th Cir. 2006), Judge Easterbrook held for the Court that it is necessary to engage in a calculation of the appropriate sentencing guideline range prior to the judge exercising discretion in sentencing. There must be a "high degree of certainty" in the calculation, the court said. See also U.S. v. Bokhari, 430 F. 3d 861 (7th Cir. 2005).

In the August 2004 sentencing, the District Court did not properly calculate the guideline sentence in that:

- (a) The PSR, which was not formally adopted by the District Court, calculated a Level 26, under Cat. I. See PSR ¶¶68, 69, 72. However, the District Court did not properly address Defense objections to the USSG § 3B1.1(c) 2-point "leader" enhancement. Included in ¶72 of the PSR, the enhancement was neither specifically adopted nor the objection resolved on the record. No reference is made to the "leader" enhancement in the sentencing transcript nor in the Judgement of Conviction. Therefore, this 2-point addition should be eliminated. The 7th Circuit stated in U.S. v. Sienkowski, 359 F. 3d 463 (7th Cir. 2004), remand for resentencing was necessary where role enhancement was disregarded.
- (b) Per the Plea Agreement, Gary R. George was entitled to a 3-point reduction for acceptance of responsibility. The PSR at ¶82 recommended denial of this for "frivolously denying relevant conduct." However, the Plea Agreement at ¶¶13 and 18 specifically allowed Gary R. George to dispute "relevant conduct." No other grounds are cited. The District Court did not formally adopt the PSR, as stated above, and the failure to deduct 3 points for acceptance of responsibility was a breach of the Plea Agreement. The Court is asked to grant the 3-point reduction.
- (c) Gary R. George is entitled to a 3-point USSG reduction for an "inchoate" crime. See USSG §2X1.1(a), (b)(2). Count 1 of the Superseding Indictment is based on conspiracy in §371, 18 U.S.C. and not a substantive crime, and therefore, the reduction of 3 points to the guideline level applies.
- (d) The 7th Circuit stated in George that no downward departure was sought. This is untrue. The Defense filed a motion for downward departure dated July 30, 2004. The Sentencing Hearing transcript covers the request for departure for family circumstances. Because the District Court referenced its inability at sentencing to so grant, an additional reduction may be justified. See U.S. v. Fish, 388 F. 3d 281 (7th Cir. 2004), for failure to consider downward departure under USSG §5K2.0.

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In summary, the proper guideline calculation would have been:

- 26 per the PSR
- 2 improperly adopted "leader" enhancement
- 3 acceptance of responsibility per Plea Agreement
- 3 "inchoate" crime
- 18 before any downward departure for family consideration, if any,
and before credit for cooperation, which the District Court has
established at 12 months for pre-sentence cooperation

Level 18 is a sentencing range of 27-33 months, before at least a 12 month reduction for cooperation, which would establish a maximum of 21 months, well below the approximately 26 months already served not counting good time. Even at a Level 20, 33-41 months, the time served would about meet the maximum. Failure to resolve "disputed matters" such as acceptance of responsibility, downward departure under §5K2.0 and the leadership enhancement, as well as challenges to "gain" and "loss" and dozens of other PSR challenges by Gary R. George was a violation of FRCrP 32.

The wrong guideline was computed in the PSR. U.S. v. Martenson, 178 F. 3d 457 (7th Cir. 1999), speaks to the use of the wrong guideline, which creates an illegal sentence. U.S. v. Cureton, 81 F. 3d 469 (7th Cir. 1996), addresses the need for specific finding of fact. Every other defendant in the 7th Circuit has been entitled to the constitutional benefit of the U.S. Supreme Court Booker jurisprudence except Gary R. George. See U.S. v. Dean, 415 F. 3d 725 (7th Cir. 2006) at 729, "After Booker, the District Court must consider the §3553(a) factors in determining what sentence to impose." In U.S. v. Robinson, No. 05-2224 (7th. Cir. 2005), the Court stated the correct application of the guidelines is a precondition.

Failure to grant this Booker-required application is a violation of the Due Process Clause of the U.S. Constitution, as well as the Sixth Amendment covered by Booker.

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Ground Three: Ineffectice Assistance of Counsel

Facts: Failure by counsel in district court and by appellate counsel to properly advocate on matters covered in Grounds One and Two above constituted ineffective assistance of counsel. Also, failure to include in the appellate record Gary R. George's Defense Version, Defendant's Reply and the Downward Departure/Sentencing Memorandum constitutes ineffective assistance.

Ground Four: Actual Innocence

Facts: Legal services were provided by Atty. Gary R. George for OIC and therefore, the exception to §666, 18 U.S.C, applies. See §666(c) regarding bona fide fees. Atty. Mark Sostarich swore under oath that legal services were provided by Gary R. George and there is no contradictory evidence. Since the object of the conspiracy was not illegal, the conviction should be vacated.

Ground Five: Unconstitutional Motive by U.S. Attorney in denying Gary R. George a downward departure motion for post-sentencing cooperation.

Facts: Post-sentencing cooperation was covered by the Plea Agreement and, if so performed, a downward departure was to be moved by the U.S. Attorney. Post-sentencing cooperation has been performed and documented. The failure to move and grant is bad faith and Gary R. George requests a hearing to present such evidence to show the failure is based on race, and therefore, covered by Wade v. U.S., 504 U.S. 181, 185-186 (). Only two legislators in modern Wisconsin times, out of hundreds, have been prosecuted by the ED- U.S. Attorney: the first two black men elected to the Wisconsin State Senate, after statewide campaigns, while similarly situated individuals of different races have not been prosecuted.

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Ground Six: The U.S. Attorney breached the Plea Agreement.

Facts: U.S. v. Gee, on appeal at 432 F. 3d 713 (7th Cir. 2005), was filed in the district court under the same docket number (03-CR-259) as that of U.S. v. George (on appeal 403 F. 3d 470 (7th Cir.2005)) after the Gary R. George Plea Agreement was executed. In the Gee case, the U.S. Attorney accused Gary R. George of additional criminal activity, despite the fact that the Plea Agreement at ¶21 promised not to allege additional criminal conduct on the part of Gary R. George. And by so doing, and because Gary R. George was not a party to defend himself, damage to his reputation occurred. For example, the 7th Circuit in the Gee case stated that Sen. George used his position as "Senate Majority Leader" to protect OIC's legislative interests. This was the centerpiece of the Easterbrook opinion. Yet, Sen. George never held that position and the allegation is clearly defamatory. This violation of the Plea Agreement justifies extinguishing the conviction.

In closing, Gary R. George moves the Court for immediate release or bond. Failure to so grant causes irreparable damage to Gary R. George, inasmuch as the time already served is greater than that to be served if Gary R. George prevails in this §2255 motion.

Also, Gary R. George asks leave to amend this §2255 motion on restitution if the current direct appeal on that issue becomes final and is resolved against my interests.

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U.S. DISTRICT COURT
EASTERN DISTRICT-WI
FILED

06 NOV 15 A9:38

OFRON B. NEDILSKY, CLERK
MAIL-REC'D
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

PLAINTIFF,

V.

GARY R. GEORGE,

DEFENDANT

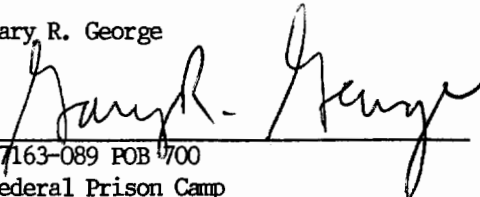
Certificate of Service

To: Clerk, United States District Court, and Steven M. Biskupic, United States Attorney,
517 E. Wisconsin Ave., Milwaukee, WI 53202

PLEASE TAKE NOTICE: that on November 3, 2006, the Petition under 28 U.S.C. §2255 was placed in the U.S. Mail in Yankton, S.D. FPC, postage prepaid, with an original and two copies to the Clerk at the address listed above and a copy to Mr. Biskupic mailed separately to the address listed above.

Dated this 3rd Day of November, 2006

Gary R. George



07163-089 FOB 1/00
Federal Prison Camp
Yankton, SD 57078