

FERNANDEZ & ROMANO, P.C.
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**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

_____	x	
USA,	:	
	:	
V.	:	3:01CR00216(AHN)-1
	:	
PHILIP A. GIORDANO,	:	FEBRUARY 19, 2008
Defendant.	:	
_____	x	

**MEMORANDUM OF LAW IN SUPPORT OF
MOTION UNDER 28 U.S.C. §2255 TO
VACATE, SET ASIDE, OR CORRECT SENTENCE**

Pursuant to 28 U.S.C. § 2255, et seq., and the Fifth, Sixth, and Eighth Amendments to the United States Constitution and with the direct consent of the Defendant, PHILIP A. GIORDANO, by and through his attorney Aaron J. Romano, the Defendant respectfully submits this Motion and Memorandum of Law under U.S.C. §2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody.

PROCEDURAL HISTORY

1. On July 26, 2001, the Defendant, Philip A. Giordano was arrested and indicted in case No. 3:01CR100216(AHN)-1 for the following offenses: 18 U.S.C. 242 Deprivation of Civil Rights (counts 1-2); 18 USC 371, Conspiracy to Defraud the United States (count 3); 18 U.S.C. 2425 Use

of Interstate Facilities to Transmit Information About a Minor (counts 4-18) with respect to two separate victims.

2. The Defendant pleaded not guilty and tried the case before a jury in the United States District Court of Connecticut (Bridgeport), with the Honorable Judge Alan H. Nevas presiding. At all times herein, the Defendant was represented by Attorney Andrew Bowman 1804 Post Road East, Westport, CT 06880.

3. Various pretrial motions were filed and denied including a motion to suppress where the Defendant testified.

4. The Defendant was found guilty on March 25, 2003 on counts 1-9 and 11-18. Before and subsequent to a verdict of guilty the Defendant filed Motions for Judgment for Acquittal which were denied by the trial court.

5. On June 13, 2003, the defendant was sentenced to serve a total effective sentence of 444 months. Defendant is presently in federal custody at FCI Herlong California and assigned Inmate No. 14302-014. The Defendant does not have a future sentence to serve after completing the sentence for this judgment.

6. A timely appeal to the Second Circuit Court of Appeals Case No. 03-1394 was filed raising the grounds of insufficient evidence, error in the trial court's failure to recuse, the constitutionality of 18 USC 2425, error in the court's permission to allow the victims to testify via closed circuit television, whether the court erred in its sentence enhancement of the civil rights counts, whether the court erred in denying the defendant's Motion to Suppress, and whether the court erred in various evidentiary rulings. The judgment of conviction was affirmed by mandate dated June 14, 2006. See United States v. Giordano, 172 Fed.Appx 340 (2nd Cir. 2006) and United States

v. Giordano, 442 F.3d 30 (2nd Cir. 2006).

7. A timely Petition for Certiorari to the United States Supreme Court, Case No. 06-7099 which raised insufficient evidence was denied on February 20, 2007. See Giordano v. United States, 127 S.Ct. 1253.

8. Further, the Second Circuit Court of Appeals by Mandate dated August 8, 2006 remanded the case for sentencing pursuant to U.S. v. Crosby, 397 F.3d 103 (2nd Cir. 2005).

9. On August 6, 2007 the trial court ruled on the Defendant's Motion for Resentencing pursuant to Crosby and did not alter its original sentence.

10. An appeal which raised error in the trial court's ruling on the Crosby hearing is currently pending before the Second Circuit Court of Appeals.

11. No other post-trial motions or collateral proceedings regarding this judgment of conviction have been filed.

GROUND FOR RELIEF

12. By his 28 U.S.C. §2255 Motion to Vacate, Set Aside, or Correct Sentence, the Defendant asserts that his convictions and sentences, violate the Fifth, Sixth, and Eighth Amendments to the United States Constitution, for each of the reasons set forth herein. Moreover, in this case the rulings and decisions of the federal courts, were contrary to, and/or involved an unreasonable application of clearly established federal law as determined by the United States Supreme Court and the Circuit Courts of Appeal; and/or were based on an unreasonable determination of the facts in light of the evidence presented before the trial court.

13. This Motion sets forth the claims requiring §2255 relief and provides the factual basis for only some of these claims. The Defendant submits this Motion for a §2255 relief in

compliance with D.Conn.L.Civ.R. 8(a) containing a “short and plain statement of the claim made and the relief sought,” and anticipates filing a memorandum of law describing the standard of review and legal argument to be applied to such claims for relief. Furthermore, **it is the Defendant’s position that a final judgment has not entered in the instant case since the issue of sentencing is currently before the Second Circuit Court of Appeals.**

STATEMENT ON RIPENESS

14. Defendant hereby submits this Introductory Statement on Ripeness.

15. The defendant’s judgment and conviction is on appeal before the Second Circuit Court of Appeals, as referenced above in Paragraph Ten of the instant motion.

16. It is the defendant’s position because there are issues on appeal before the Second Circuit, the statute of limitations has not yet been triggered. As a result, the defendant maintains that he has one year from the time the Second Circuit affirms the trial court’s decision within which to file the instant motion.

17. It is in the abundance of caution that the defendant submits the instant motion with the accompanied Sealed Motion for Stay and Permission to Amend to prevent any argument regarding statutory bar from being raised.

CLAIMS FOR RELIEF

I. INEFFECTIVE ASSISTANCE OF COUNSEL

18. Counsel for Defendant that counsel failed to adequately investigate the case, failed to interview witnesses, failed to consult with client, failed to make proper objections, failed to pursue proper legal theories, and otherwise failed to perform as counsel is so obligated under the Sixth Amendment and Strickland v. Washington, 466 U.S. 668 (1984).

19. Counsel for defendant waived speedy trial without fully informing his client of the legal ramifications.

20. Counsel for Defendant failed to adequately prepare, argue, and brief its Motion to Dismiss Indictment filed before the trial court. Further, counsel failed to effectively raise this issue before the Circuit Court of Appeals.

21. Counsel for Defendant failed to adequately prepare, argue, and brief its Motion to Suppress Tangible Objects filed before the trial court. Counsel failed to interview Defendant to obtain supporting evidence for the motion nor did counsel appropriately advise Defendant regarding his ability to testify. Counsel further failed to investigate and present witnesses whose testimony, if accepted by the trial court, would have had a material effect on the outcome of the motion. Further, counsel failed to effectively raise this issue before the Circuit Court of Appeals.

22. Counsel for Defendant failed to adequately prepare, argue, and brief its Motion to Suppress Wire and Oral Interceptions filed before the trial court. Counsel failed to interview Defendant to obtain supporting evidence for the motion nor did counsel appropriately advise Defendant regarding his ability to testify. Counsel further failed to investigate and present available witnesses whose testimony, if accepted by the trial court, would have had a material effect on the outcome of the motion. Further, counsel failed to effectively raise this issue before the Circuit Court of Appeals.

23. Counsel for Defendant failed to adequately prepare, argue, and brief its Motion to Disqualify Judge before the trial court. Further, counsel failed to effectively raise this issue before the Circuit Court of Appeals.

24. Counsel for Defendant failed to adequately prepare, argue, and brief its Motion for

Franks Hearing before the court on January 6, 2003. Counsel presented an oral motion at the bar of the court with only the Defendant's affidavit in support of the motion. In fact, the court remarked on counsel's lack of preparation and questioned its efficacy. Counsel failed to interview Defendant to obtain supporting evidence for the motion. Counsel further failed to investigate and present available witnesses whose testimony, if accepted by the trial court, would have had a material effect on the outcome of the motion. The following witnesses could have offered testimony: Mike Tieckczsa, Jim Paolino, Angela Guiliani, Danielle Rado, and Paul Barillo. These witnesses could have confirmed that the FBI informant who was the subject of the proposed Franks hearing had a motive to falsify his testimony. The FBI informant misappropriated funds from the Defendant's campaign fund which led to his termination. Counsel failed to investigate and present the above witnesses in support of the Franks hearing despite Defendant's request. The presentation of these witnesses would have challenged the credibility of the informant and provided a motive to fabricate. Further, counsel failed to effectively raise this issue before the Circuit Court of Appeals.

25. Counsel for Defendant failed to adequately prepare, argue, and brief its Objection to the Government's Motion for Order Allowing Child Witnesses to Testify by Closed Circuit Television. Further, counsel failed to effectively raise this issue before the Circuit Court of Appeals.

26. Counsel for Defendant failed to adequately prepare, argue, and brief its Motion to Prohibit Unmonitored Interviews of Alleged Child Victims in the Absence of a Court Monitor and in the absence of the Defendant's Counsel or Representative. Further, counsel failed to effectively raise this issue before the Circuit Court of Appeals.

27. Counsel for Defendant failed to adequately prepare its proposed voir dire questions for trial. Counsel failed to consult Defendant regarding the proposed questions. Had counsel

consulted with the Defendant, more effective voir dire questions could have been posed and the composition of the jury would have been different potentially resulting in an acquittal. Further, counsel failed to effectively raise this issue before the Circuit Court of Appeals.

28. Counsel for Defendant failed to adequately prepare, argue, and brief its Motion to Dismiss, Change Venue, and Postpone Jury Selection. Had the venue been changed, the composition of the jury would have been different resulting in the defendant's acquittal. Further, counsel failed to effectively raise this issue before the Circuit Court of Appeals.

29. Counsel for Defendant failed to adequately prepare, argue, brief, and object to the Government's Memorandum of Law on the Means and Methods of Presenting Testimony from a Child Witness. Further, counsel failed to effectively raise this issue before the Circuit Court of Appeals.

30. Counsel for Defendant failed to adequately prepare, argue, and brief, its Motion to Quash Subpoena Duces Tecum. Further, counsel failed to effectively raise this issue before the Circuit Court of Appeals.

31. Counsel for Defendant failed to adequately prepare proposed jury instructions and object to the court's erroneous jury instruction. Had counsel prepared appropriately he would have objected to the court's omission of the word "only" in its jury instruction regarding 18 U.S.C. §242 as is required by United States v. Classic, 313 U.S. 299 (1941) (holding that color of law overlays a deprivation of a constitutional right when the deprivation is achieved by a '[m]isuse of power, possessed by virtue of state law *and made possible only* because the wrongdoer is clothed with the authority of state law.'" United States v. Giordano, 442 F.3d 30, 48 quoting Classic supra. (2006). The "**but for**" clause is a critical element of the crime as charged and had the jury been given the

appropriate instruction it would have acquitted the Defendant. Counsel was ineffective where he failed to object to this jury instruction and request a correction and in his failure to raise this issue on appeal.

32. Counsel for Defendant failed to adequately prepare, argue, brief, and object to the Government's Memorandum of Law on Government's Notice of its Intention to Offer into Evidence Hearsay Statements of the Minor Victims. Further, counsel failed to effectively raise this issue before the Circuit Court of Appeals.

33. Counsel for Defendant failed to adequately prepare, argue, and brief its Motions for Judgment of Acquittal. Further, counsel failed to effectively raise this issue before the Circuit Court of Appeals.

34. Counsel for Defendant failed to adequately prepare its Sentencing Memorandum and adequately object to the PSR. Counsel failed to interview Defendant to obtain supporting evidence for sentencing. Counsel further failed to investigate and present the testimony of available witnesses whose testimony, if accepted by the trial court, would have had a material effect on the outcome of sentencing. Counsel failed to adequately advise the defendant of his right of allocution. Further, counsel failed to effectively raise this issue before the Circuit Court of Appeals.

35. Counsel failed to adequately prepare for trial and consult with the Defendant. Counsel failed to investigate and present witnesses that would have had a material outcome on the verdict.

36. Counsel failed to conduct an adequate investigation of the allegations or to otherwise develop inconsistencies in the Government's case-in-chief relating to the allegations made by the witnesses and victims. Counsel's failure to investigate was deficient and caused errors that

prejudiced the defense to the extent that Defendant was deprived of a fair trial. Counsel's errors consisted of those listed below, and others to be adduced during hearing and through its brief to the court:

- a. Counsel failed to contact and call witnesses that would have rebutted the basis for which the victims had contact with the mayor's office other than through the alleged instances of sexual misconduct;
- b. Counsel failed to present rebuttal evidence to the Government's contention that the defendant demonstrated acted under color of law by display of a badge that he possessed at all times. Yet, at the time of his arrest, the defendant was not in possession of his badge as the property receipt indicates.

37. Counsel failed to object to the admission of inadmissible evidence at crucial times during the trial and pre-trial motions. Said objections if timely made, would have been upheld and precluded the introduction of otherwise impermissible evidence which would have had an effect on the outcome of the case.

38. Each of the above described acts or omissions, individually and collectively, violated Defendant's rights under the Fifth, Sixth, and Eighth Amendments to the United States Constitution which constitutes a fundamental defect in the legal process that resulted in a complete miscarriage of justice. For each of the above described acts or omissions counsel's representation fell below objective standards of reasonableness and there is a reasonable probability that but for counsel's unprofessional errors the result of the proceedings would have been different. To the extent that counsel failed to properly raise and/or litigate these claims, it was ineffective.

Exhaustion

38. These claims were not fairly presented during the direct appeal and were the result of counsel's ineffective assistance. Defendant relies on Massaro v. U.S., 538 U.S. 500 (2003) for this court to review this claim.

II. NEWLY DISCOVERED EVIDENCE THAT THE DEFENDANT WAS NOT THE FATHER OF ONE OF THE VICTIMS WOULD HAVE LIKELY RESULTED IN AN ACQUITTAL:

39. All other allegations and facts contained in this motion and its attachments are incorporated as if fully set forth herein.

40. During trial, the Government permitted the co-defendant to testify that one of the victims was the Defendant's child despite the fact she was not. This had an effect of prejudicing and inflaming the jury towards wrongfully convicting the Defendant. Newly discovered evidence in the form of DNA testing was performed in the Waterbury Juvenile Court that confirmed that the Defendant was in fact not the father of the children in question.

41. The Government wrongfully offered this evidence and failed to correct it when it did or should have known it to be false.

42. Such evidence if revealed to the jury would have likely had an effect to produce and acquittal.

43. Each of the above described acts or omissions, individually and collectively, violated Defendant's rights under the Fifth, Sixth, and Eighth Amendments to the United States Constitution.

Exhaustion

44. These claims were not fairly presented during the direct and post conviction litigation because the evidence was not yet available.

III. THE DEFENDANT’S DUE PROCESS RIGHT TO A FAIR TRIAL UNDER THE FIFTH AND SIXTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WERE VIOLATED WHERE THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A CONVICTION THAT THE DEFENDANT ACTED UNDER COLOR OF LAW IN VIOLATION OF 18 USC §242.

45. All other allegations and facts contained in this Motion and its attachments are incorporated as if fully set forth herein.

46. The Second Circuit and trial court wrongfully upheld the convictions under 18 U.S.C. §242 where it found that the Defendant acted under color of law.

47. The Government failed to demonstrate under Classic that “**but for**” the Defendant’s position in municipal authority, the wrong committed was not possible. In fact the government failed to ask the victims if they submitted to the Defendant because of he asserted his official role as mayor.

48. No reasonable juror could find that the Defendant acted under color of law and that the trial and the appellate court’s affirmation of the conviction has resulted in a fundamental miscarriage of justice.

Exhaustion

49. These claims were fairly presented during direct appellate litigation and the appellate court’s affirmation of the conviction resulted in a fundamental miscarriage of justice.

IV. THE DEFENDANT’S DUE PROCESS RIGHT TO A FAIR TRIAL UNDER THE FIFTH AND SIXTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WERE VIOLATED WHERE THE COURT GAVE AN ERRONEOUS JURY INSTRUCTION AS TO THE ELEMENTS OF 18 USC §242.

50. All other allegations and facts contained in this motion and its attachments are incorporated as if fully set forth herein.

51. The court erroneously instructed the jury that they could convict the Defendant for a violation of 18 USC §242 without requiring that the jury find that the misuse of power was made possible **only** because the Defendant was acting with the authority of state law.

52. This erroneous jury instruction was plain error that denied the Defendant of due process and a fair trial and resulted in a fundamental miscarriage of justice because the jury would not have returned a guilty verdict had the correct instruction been given.

Exhaustion

53. This claim was not presented during the direct appellate litigation as a result of ineffective assistance of counsel.

V. THE DEFENDANT'S DUE PROCESS RIGHT TO APPEAL UNDER THE FIFTH AND SIXTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WERE VIOLATED WHERE THE SECOND CIRCUIT COURT OF APPEALS FAILED TO FAIRLY CONSIDER THE DEFENDANT'S ISSUES ON APPEAL

54. All other allegations and facts contained in this motion and its attachments are incorporated as if fully set forth herein.

55. The defendant appealed the judgment of conviction from the trial court. The Second Circuit Court of appeals failed to fairly address several of the claims, thereby denying the defendant of his right to appeal which resulted in a miscarriage of justice. If fairly reviewed, the Second Circuit would have found in his favor.

Exhaustion

56. This claim was not presented in any direct appellate litigation as the Second Circuit had not yet committed the miscarriage of justice.

PRAYER FOR RELIEF

WHEREFORE, based upon the foregoing, all prior proceedings and all submissions, Defendant respectfully prays that the Court grant him the following relief:

- A) That Defendant be granted such discovery that is necessary for full and fair resolution of the claims contained in this motion;
- B) That leave to amend this motion, if necessary, be granted;
- C) That Defendant be provided an opportunity to supplement this motion with additional briefing;
- D) That an evidentiary hearing be conducted on all claims involving disputed issues of fact;
- E) That the Government be ordered to respond to this motion; and
- F) That Defendant's convictions and sentences be vacated.

Respectfully submitted,

/s/

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Dated: February 19, 2008
Bloomfield, CT

**UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT**

**AMENDED
JUDGMENT IN A CRIMINAL CASE**

FILED

UNITED STATES OF AMERICA

v.

CASE NO. 3:01CR00161-UNA P 3: 28

Peter S. Jongbloed, Assistant U.S. Attorney

Andrew B. Bowman, Esq.
Defendant's Attorney

**PHILIP A. GIORDANO
157 Southwind Road
Waterbury, CT 06708
SSN: 041-64-9022**

DOB: 03/25/63

The defendant was found guilty to count(s) 1-9,11-18 after a plea of not guilty. Accordingly, the defendant is adjudged guilty of count(s) 1-9 & 11-18, which involve the following offenses:

Title & Section: 18:242, 18:371, 18:2425 & 2
Nature of Offense: Cts 1 & 2 Deprivation of Rights Under Color of Law; Ct 3 Conspiracy; Cts 4-9 & 11-18 Use of Interstate Facility to Transmit Information About a Minor
Date Offense Concluded: 7/01

Count: 1-9 & 11-18

The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant is hereby committed to the custody of the United States Attorney General or his duly authorized representative to be imprisoned for a term of: 444 months on Count 1, 444 months on Count 2 to be served concurrently to sentence imposed on Count 1; 60 months on Count 3 to run concurrently to sentence imposed on Count 1; 60 months each on counts 4,5,6,7,8,9, 11,12,13,14,15,16,17,18 to run concurrently to sentence imposed on Count 1. The defendant shall receive credit for time served from July 26, 2001. Upon release from custody, the defendant shall be on supervised release for a term of 5 years each on counts 1 and 2 and 3 years each as to Counts 3-9 & 11-18 to be served concurrently to Counts 1 and 2. The defendant is remanded to the custody of the U.S. Marshal. The Court adopts the findings and recommendations contained the in Presentence Report.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid.

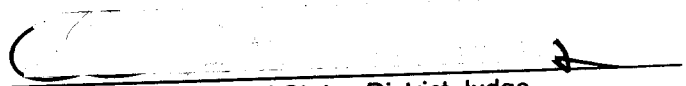
It is hereby ordered that the conditions of supervised release set out on the reverse side are imposed.

Count 10 is dismissed on the motion of the United States.

It is ordered that the defendant shall pay a Special Assessment of \$1,700, for count(s) 1-9 & 11-18 which shall be due immediately.

June 13, 2003

Date of Imposition of Sentence



Alan H. Nevas, United States District Judge

Date: June 26, 2003

**CERTIFIED AS A TRUE COPY
ON THIS DATE _____
Kevin F. Rowe, Clerk
BY: _____
Deputy Clerk**