

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JASON DANIEL GANDY,	)	
	)	
Movant,	)	USDC Case No. 4:21-cv-_____
	)	
v.	)	
	)	USDC Case No. 4:12-cr-503-1
UNITED STATES OF AMERICA,	)	
	)	Hon. Lee H. Rosenthal
Respondent.	)	Chief United States District Judge

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

[Return Date to be Fixed by the Court]

COMES NOW JASON DANIEL GANDY, through undersigned counsel, and respectfully submits this Memorandum of Law in support of the Motion to Vacate pursuant to 28 U.S.C. §2255, and would show the Court the following facts, circumstances, and points of law:

I. Concise Summary

Movant Jason Daniel Gandy, (“Mr. Gandy”), was deprived of the effective assistance of counsel by acts and omissions of his former trial

counsel, Sean Buckley. Specifically, Former Trial Counsel Buckley was constitutionally ineffective for: 1) failing to seek to suppress Mr. Gandy's July 20, 2012 statement, on grounds that such statement was coerced and involuntary. This failure deprived Mr. Gandy of his fundamental right to testify and deprived the jury of critical evidence, without which the verdict they returned cannot be trusted as the result of a fair adversarial proceeding; and 2) failing to move to dismiss Count 5 of the Superseding Indictment on grounds that no reasonable trier of fact could have found Mr. Gandy guilty of violating the statute based upon the undisputed facts set forth in that count.

Mr. Gandy seeks to vindicate his right to the effective assistance of counsel in this proceeding. He seeks vacation of his convictions and sentences and to be returned to the pre-trial phase of proceedings so he may pursue dismissal of Count 5 and suppression of his July 20, 2012 statement, and thereafter enjoy a fair trial in which he may testify without fear of impeachment with the involuntary July 20, 2012 statement.

II. Jurisdiction

Pursuant to 28 U.S.C. §2255, “[a] prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, . . . or is otherwise subject to collateral attack, may move the court which imposed sentence to vacate, set aside, or correct sentence.” Mr. Gandy so moves this Court on grounds that his sentence was imposed as a result of proceedings wherein he was denied the effective assistance of counsel.

III. Review Standards

A motion for relief under §2255 follows the procedures established by the “Rules Governing Section 2255 Cases in the United States District Courts” (“Rules”). The text of §2255 states that “[u]nless the motion and the files and records of the case **conclusively** show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served on the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of

fact and conclusions of law with respect thereto.”¹ Similarly, the Rules dictate that, upon initial consideration by the assigned District Judge, a §2255 motion should be dismissed only “if it **plainly** appears from the motion, any attached exhibits, and the record of prior proceedings that the moving party is not entitled to relief.”² In all other cases, “the judge must order the United States attorney to file an answer, motion, or other response within a fixed time, or to take action the judge may order.”³ The Rules authorize, where appropriate and by order of the Court, discovery proceedings, an expansion of the record, and an evidentiary hearing.

Subsequent to the “Preliminary Review” stage set out in Rule 4, the ultimate legal standard for motions brought pursuant to §2255 is prescribed by statute:

¹ 28 U.S.C. §2255 (emphasis added).

² *Rule 4(b)* (emphasis added).

³ *Id.*

If the court finds that . . . the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant him a new trial or correct the sentence as may appear appropriate.⁴

IV. Grounds for Relief

A. Ground One:

Mr. Gandy was Denied the Effective Assistance of Counsel in Connection with the Suppression of His July 20, 2012 Statement and His Fundamental Right to Testify

[1]. The Applicable Standard

Claims of ineffective assistance of counsel must satisfy the two-prong test set out by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d (1984). The performance prong requires a movant to establish that counsel performed outside the wide range of reasonable professional assistance and made errors so serious that he failed to function

⁴ 28 U.S.C. §2255.

as the kind of counsel guaranteed by the Sixth Amendment. *Id.* at 687-89. The prejudice prong requires a movant to demonstrate that seriously deficient performance of his counsel prejudiced the defense *Id.* at 687.

[2]. Deficient Performance

Former Trial Counsel Buckley was constitutionally deficient for failing to seek suppression of Mr. Gandy's July 20, 2012 statement on grounds it was coerced and involuntary. Once it became clear to Former Counsel Buckley that Mr. Gandy wished to testify in his own defense but could not safely do so under the parties' agreement mooted Mr. Gandy's earlier motion to suppress,⁵ Former Counsel Buckley was obligated to investigate the possibility of seeking to suppress that statement. This is true because it was the only means to protect Mr. Gandy's fundamental right to testify in his own defense.

⁵ See DE #91 and 04/03/2017 Docket Text Entry stating: "Terminate Deadlines and Hearings as to Jason Daniel Gandy: Suppression hearing scheduled for 4/6/17 is canceled based on the parties notification that the issue is moot."

As trial approached, the parties had agreed that:

1. The United States will not move to introduce the Defendant's statement, taken at George Bush Intercontinental Airport on July 20, 2012, during the presentation of its case-in-chief.
2. The United States will not introduce the Defendant's statement unless/until the Defendant testifies contrary to the statements he made to law enforcement thus opening the door to the use of his statement for purposes of impeachment.

DE #91.

On this basis, a suppression hearing on Mr. Gandy's July 20, 2012 statement, obtained in the following manner: "after almost three hours of interrogation, numerous invocations of his right to counsel, several denials of requests for an attorney, obstruction of access to his attorney, and increasing pressure, investigators finally coerced a statement from Gandy and placed him under arrest,"⁶ was cancelled.⁷

Former counsel Buckley should have recognized that the video of the

⁶ See *DE #34, p. 5.*

⁷ See *04/03/2017 Docket Text Entry.*

interrogation, or even the description of that video, set forth in Mr. Gandy's earlier motion to suppress,⁸ presented a meritorious basis to seek suppression of that statement on grounds that it was coerced and involuntary. Pursuing this approach to suppression would offer Mr. Gandy the opportunity to testify freely, without facing impeachment with his prior statement. *See New Jersey v. Portash*, 440 U.S. 450, 459, 99 S. Ct. 1292, 1297, 59 L. Ed. 2d 501 (1979).⁹ Moreover, further investigation of the facts surrounding Mr. Gandy's extended custodial interrogation and the degree of pressure used to coerce his confession, including refusal to allow him access to counsel indicate that seeking suppression on this ground was likely to be successful. *See e.g., Cole*

⁸ *See DE #34, pp. 2-5.*

⁹ ("The Fifth and the Fourteenth Amendments provide that no person 'shall be compelled in any criminal case to be a witness against himself.' As we reaffirmed last Term, a defendant's compelled statements, as opposed to statements taken in violation of *Miranda*, may not be put to any testimonial use whatever against him in a criminal trial. 'But any criminal trial use against a defendant of his involuntary statement is a denial of due process of law.'" (citing *Mincey v. Arizona*, 437 U.S. 385, 398, 98 S.Ct. 2408, 2416, 57 L.Ed.2d 290)).

v. State of Fla., 413 F.2d 1046, 1046 (5th Cir. 1969).¹⁰

No reasonable attorney whose client wishes to testify, but is unable to do so because of an involuntary, coerced confession would fail to seek to suppress that confession. In this case, counsel's failure to seek suppression falls below the minimal level of competence required of criminal defense counsel and constitutes deficient performance under *Strickland*.

[3]. Prejudice

Absent Former Trial Counsel Buckley's deficient performance in failing to seek suppression of Mr. Gandy's July 20, 2012 statement, on grounds it was involuntary, along the lines set forth in §IV.A.2, *supra*, there is a reasonable probability that: 1) the Court would have suppressed the statement; 2) Mr. Gandy would have testified in his own defense; and 3) the jury would not have convicted Mr. Gandy after hearing his testimony.

Had former counsel sought suppression on the grounds set forth in

¹⁰ ("In determining whether a confession was voluntary the failure to advise the accused of his privilege against self-incrimination or to allow him access to outside assistance is a factor to be taken into account.").

§IV.A.2, *supra*, this Court would have held the requisite hearing and there is a reasonable probability that Mr. Gandy's statement would have been suppressed. This is true because the Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. CONST. AMEND. V. The Due Process Clause prohibits the government from securing a criminal conviction through the use of an involuntary confession resulting from coercive police conduct. *See, e.g., Miller v. Fenton*, 474 U.S. 104, 109 (1985); *Brown v. Mississippi*, 297 U.S. 278 (1936). The test for determining voluntariness is well-established:

Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process.

Schneckloth v. Bustamonte, 412 U.S. 218, 225–26 (1973). A defendant who challenges the voluntariness of a confession sought to be used against him at trial has a due process right to "a fair hearing in which both the underlying factual issues and the voluntariness of his confession are actually and reliably

determined.” *Jackson v. Denno*, 378 U.S. 368, 380 (1964). At such a hearing, “the prosecution must prove at least by a preponderance of the evidence that the confession was voluntary.” *Lego v. Twomey*, 404 U.S. 477, 489 (1972). The record, including the video of Mr. Gandy’s custodial interrogation, simply would not permit the United States to establish that his statement was voluntary to a preponderance of the evidence.

Absent fear of impeachment with his statement, Mr. Gandy would have testified in his own defense at trial. This is clear from the record and his declaration, verified under penalty of perjury,¹¹ offered in support of this motion. At trial, despite the availability of his statement for impeachment purposes, Mr. Gandy still demonstrated a desire to testify which was rebuffed by Former Counsel Buckley.

MR. BUCKLEY: Yes, Your Honor. And it's my understanding as of yesterday that Mr. Gandy will

¹¹ See *Declaration of Jason Daniel Gandy in Support of Motion to Vacate*, ¶4 (“Had Mr. Buckley successfully sought to suppress my statement from the July 20, 2012 interrogation on grounds it was involuntary, such that no use of that statement was permitted, then I would have testified in my own defense.”).

not testify. Of course, I welcome the Court to inquire of the defendant.

THE COURT: Mr. Gandy, will you please rise. Mr. Gandy, raise your right hand.

Do you solemnly swear that the statements you will make in this case are the truth, the whole truth and nothing but the truth so help you God, or you may affirm?

THE DEFENDANT: Yes.

THE COURT: All right.

Mr. Gandy, have you and your lawyers had a thorough discussion about whether you will testify in this case?

THE DEFENDANT: It was some days ago. I just don't recall what the problem would be again if I were to testify, what would be --

THE COURT: All right. I am going to give you 15 minutes to talk right now.

MR. BUCKLEY: Thank you, Your Honor.

THE COURT: I want everybody else to clear the courtroom and leave it to Mr. Gandy and the lawyers to have a discussion. Thank you.

(Brief recess taken)

THE COURT: Please be seated. Go ahead.

MR. BUCKLEY: We have resolved the issue, Your Honor. And I'd be pleased to let Mr. Gandy answer for himself, but he has decided not to testify.

THE COURT: All right. Mr. Gandy, you have now had a additional opportunity specifically to discuss the issue with your attorneys outside the presence of other counsel, the Judge and jury. What is your decision, sir?

THE DEFENDANT: I decided not to testify.

THE COURT: Say that louder.

THE DEFENDANT: I decided not to testify.

DE #192, pp. 66-67.

Testimony from Mr. Gandy would have been a game changer for the jury. Mr. Gandy would have credibly explained that he understood each of the offenses alleged in the Superseding Indictment and had not committed any of the offenses alleged in the Superseding Indictment.¹² This testimony,

¹² See *Declaration of Jason Daniel Gandy in Support of Motion to Vacate*, ¶5 (“Included in the matters I would have testified to are the following; 1)

if credited by the jury, calls the jury's verdict into serious doubt. *See, Smith v. Dretke*, 417 F.3d 438, 444 (5th Cir. 2005). This court should vacate the convictions and sentences and reset the matter for trial. In the alternative, this Court may order an evidentiary hearing to hear the live testimony of Mr. Gandy and make the necessary assessment of whether the jury would have found his testimony sufficiently credible to undermine confidence in the verdict they returned in the absence of this critical evidence.

B. Ground Two:

Mr. Gandy was Denied the Effective Assistance of Counsel by Former Counsel Buckley's Failure to Move to Dismiss Count 5 on Grounds That No Trier of Fact Could Find Him Guilty of Violating the Statute Based upon the Undisputed Facts Set Forth in That Count

[1]. The Applicable Standard

Claims of ineffective assistance of counsel regarding motion practice must satisfy the same two-prong test set out by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d (1984). The

that I understood the offenses alleged in Counts 1 through 7 of the Superseding Indictment; and 2) that I did not commit any of the offenses alleged in Counts 1 through 7 of the Superseding Indictment.”).

performance prong requires a movant to establish that counsel performed outside the wide range of reasonable professional assistance and made errors so serious that he failed to function as the kind of counsel guaranteed by the Sixth Amendment. *Id.* at 687-89. The prejudice prong requires a movant to demonstrate that seriously deficient performance of his counsel prejudiced the defense *Id.* at 687.

[2]. Deficient Performance

Former Trial Counsel Buckley was constitutionally deficient for failing to move to dismiss Count 5 of the Superseding Indictment under Federal Rule of Criminal Procedure 12(b)(2). Rule 12(b)(2) of the Federal Rules of Criminal Procedure provides that "[a] party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial of the general issue." Under Rule 12, the defendant may move the court to dismiss an indictment prior to trial when the undisputed evidence cannot, as a matter of law, prove the charged offenses beyond a reasonable doubt. Fifth Circuit precedent embraces the pre-trial resolution of challenges to an indictment's legal sufficiency based on uncontested facts under Rule 12. *See United States*

v. Flores, 404 F.3d 320 (5th Cir. 2005).

In *Flores*, the Fifth Circuit rejected the government's argument that the district court procedurally erred in dismissing the indictment under Rule 12. *Id.* at 323-25. The *Flores* panel based its decision on controlling precedent which it endorsed as "correct for a number of reasons." *Id.* at 325. They noted that Rule 12 authorized the district court to rule on Flores' motion because the facts were undisputed and noted approvingly that doing so "avoid[ed] the waste of judicial resources that results from legally meritless cases being sent to trial." *Id.*

A motion to dismiss count 5 was required because the facts set forth in that count of the Superseding Indictment utterly failed, as a matter of law, to establish the crime charged beyond a reasonable doubt. Count 5 stated as follows:

COUNT FIVE
Sex Trafficking of Minors

From on or about November 1, 2006, through
December 27, 2006, in the Southern District of Texas
and elsewhere,

JASON GANDY,

defendants herein, in and affecting interstate commerce, knowingly recruited, enticed, harbored, transported, provided, obtained, advertised, maintained, patronized, and solicited by any means a person, namely a minor male known as Minor Victim #2, who had attained the age of 14, but was under 18, knowing and in reckless disregard of the fact that Minor Victim #2 had not attained that age of 18 years and would be caused to engage in a commercial sex act, and benefitted financially and by receiving anything of value from participation in a venture which has engaged in recruiting, enticing, harboring, transporting, providing, obtaining, advertising, maintaining, patronizing and soliciting by any means Minor Victim #2 knowing and in reckless disregard of the fact that Minor Victim #2 had not attained the age of 18 years and would be caused to engage in a commercial sex act.

**In violation of Title 18, United States Code,
Section 1591(a), (b) and 2.**

DE #115, pp. 4-5.

As the portion of Count 5 which tracks the statutory languages alleges, an element of the offense is that the alleged victim must be under 18 years of age at the time of the offense. *See 18 USC § 1591(a), (b)*. The reason that minimally competent counsel would have moved to dismiss is that no

reasonable juror could have found that the victim, born on December 28, 1987,¹³ was under 18 years of age at the time the offense was alleged to have occurred, from November 1, 2006 through December 27, 2006.¹⁴

Instead of moving to dismiss Count 5 of the Superseding Indictment on this basis, Former Counsel Buckley did nothing; he said as much when the prosecution sought to correct it was characterized as a “scrivener’s error.”¹⁵ Counsel’s failure to move to dismiss Count 5 fell below the minimal level of competence required of criminal defense counsel by the Sixth Amendment and constitutes deficient performance under *Strickland*.

[3]. Prejudice

Counsel’s deficiency in failing to move to dismiss Count 5, as set forth in §IV.B.2, *supra*, was sufficiently prejudicial to warrant vacation of the

¹³ See DE #190, pp. 165-66.

¹⁴ DE #115, pp. 4-5.

¹⁵ See DE 189, p. 10 (“MR. BUCKLEY: In the sense that on the face of the indictment, it was our belief that the government's proof that we anticipated at trial would not be sufficient to convict on that count. And that relates to the anticipated defensive strategy in this case as to that count, and I learned about this yesterday.”).

conviction and sentence on that count. See *United States v. Bass*, 310 F.3d 321, 329-30 (5th Cir. 2002). In *Bass*, the Fifth Circuit addressed a deficiency of counsel which, as here, only impacted one of several counts, the sentences for which were being served concurrently. *Id.* With respect to prejudice, the *Bass* panel held that:

As for *Strickland's* second prong, Bass was prejudiced by this deficient performance, albeit minimally. As Bass is serving all of his sentences concurrently, the sentencer did not impose a harsher prison term as a result of the CCE conviction; Bass's total time of incarceration will not be shortened as a result of our decision today to vacate his CCE conviction. In addition to prison, however, Bass was sentenced to pay an additional \$50 for his CCE conviction—a sum that he would not have been ordered to pay were it not for the CCE conviction.

Id. at 330.

This Court should vacate Mr. Gandy's conviction, sentence and special assessment imposed based on his conviction for the offense alleged in Count

5.

V. Conclusion

Mr. Gandy was deprived of his right to the effective assistance of counsel in preparation for and at trial in the underlying criminal proceeding. He is entitled to and seeks vacation of his convictions and sentence, and to be returned to the pre-trial stage of proceedings to pursue suppression, dismissal of Count 5, and ultimately to testify at his retrial, unconstrained by fear of impeachment with his involuntary July 20, 2012 statement, as would have occurred but for the deprivation of effective assistance of counsel.

Respectfully submitted, this ____th day of February, 2021.

LAW OFFICES OF D. CRAIG HUGHES

D. Craig Hughes
Attorney-in-Charge for Movant
State Bar No. 10211025
S.D. Texas Bar No. 10874
7324 Southwest Freeway-Suite 1466
Houston, Texas 77074
713-535-0683 - Direct
713-510-1856 - Fax
dcraighughes@msn.com (email)