Motion to Vacate, Set Aside, or Correct a Sentence By a Person in Federal Custody

(Motion Under 28 U.S.C. § 2255)

Instructions

1. To use this form, you must be a person who is serving a sentence under a judgment against you in a federal court. You are asking for relief from the conviction or the sentence. This form is your motion for relief.
2. You must file the form in the United States district court that entered the judgment that you are challenging. If you want to challenge a federal judgment that imposed a sentence to be served in the future, you should file the motion in the federal court that entered that judgment.
3. Make sure the form is typed or neatly written.
4. You must tell the truth and sign the form. If you make a false statement of a material fact, you may be prosecuted for perjury.
5. Answer all the questions. You do not need to cite law. You may submit additional pages if necessary. If you do not fill out the form properly, you will be asked to submit additional or correct information. If you want to submit any legal arguments, you must submit them in a separate memorandum. Be aware that any such memorandum may be subject to page limits set forth in the local rules of the court where you file this motion.
6. If you cannot pay for the costs of this motion (such as costs for an attorney or transcripts), you may ask to proceed *in forma pauperis* (as a poor person). To do that, you must fill out the last page of this form. Also, you must submit a certificate signed by an officer at the institution where you are confined showing the amount of money that the institution is holding for you.
7. In this motion, you may challenge the judgment entered by only one court. If you want to challenge a judgment entered by a different judge or division (either in the same district or in a different district), you must file a separate motion.
8. When you have completed the form, send the original and ____ copies to the Clerk of the United States District Court at this address:

   Clerk, United States District Court for
   Address
   City, State Zip Code

   If you want a file-stamped copy of the petition, you must enclose an additional copy of the petition and ask the court to file-stamp it and return it to you.
9. **CAUTION: You must include in this motion all the grounds for relief from the conviction or sentence that you challenge. And you must state the facts that support each ground. If you fail to set forth all the grounds in this motion, you may be barred from presenting additional grounds at a later date.**
10. **CAPITAL CASES: If you are under a sentence of death, you are entitled to the assistance of counsel and should request the appointment of counsel.**

AO 243 (Rev. 09/17)

MOTION UNDER 28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR CORRECT

SENTENCE BY A PERSON IN FEDERAL CUSTODY

United States District Court	District Middle District of Florida
Name *(under which you were convicted)*: Daniel Joseph Tisone	Docket or Case No.: 2:22-cr-00039-SPC-NPM
Place of Confinement: Pensacola Federal Prison Camp	Prisoner No.: 93800-509
UNITED STATES OF AMERICA	V. Movant *(include name under which convicted)* Daniel Joseph Tisone

MOTION

1. (a) Name and location of court which entered the judgment of conviction you are challenging:

United States District Court for the Middle District of Florida, Ft. Myers Division

(b) Criminal docket or case number (if you know): 2:22-cr-00039-SPC-NPM

2. (a) Date of the judgment of conviction (if you know): 2/23/2023

(b) Date of sentencing: 2/21/2023

3. Length of sentence: 87 months imprisonment and 3 years of supervised release, concurrent on each count

4. Nature of crime (all counts):

The Indictment alleged four counts of wire fraud pursuant to 18 U.S.C. §§ 1343 and 2; six counts of bank fraud affecting a financial institution pursuant to 18 U.S.C. §§ 1344 and 2; two counts of aggravated identity theft pursuant to 18 U.S.C. §§ 1028A(1)(a) and 2; five counts of illegal monetary transactions pursuant to 18 U.S.C. §§ 1957 and 2; and one count of possession of ammunition by a convicted felon pursuant to 18 U.S.C. §§ 922(g)(1) and 924(a)(2).

5. (a) What was your plea? (Check one)

(1) Not guilty ☐ (2) Guilty ☑ (3) Nolo contendere (no contest) ☐

6. (b) If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, what did you plead guilty to and what did you plead not guilty to?

Pled guilty to two counts of wire fraud, two counts of bank fraud, one count of illegal monetary transaction, and the count of possession of ammunition by a convicted felon. The remaining counts were dismissed at sentencing.

6. If you went to trial, what kind of trial did you have? (Check one) Jury ☐ Judge only ☑

7. Did you testify at a pretrial hearing, trial, or post-trial hearing? Yes ☐ No ☑

8. Did you appeal from the judgment of conviction? Yes [✓] No [ ]

9. If you did appeal, answer the following:

(a) Name of court: United States Court of Appeals for the Eleventh Circuit

(b) Docket or case number (if you know): 23-10715

(c) Result: Dismissed

(d) Date of result (if you know): 11/15/2023

(e) Citation to the case (if you know): Unpublished, available at 2023 WL 7687554

(f) Grounds raised:

I. Whether the district court erred in determining the loss amount attributable to the Appellant under the Sentencing Guidelines when it relied on intended losses rather than actual losses?
II. Whether the Government breached the plea agreement when it argued at sentencing in favor of a loss amount that relied on facts that the Government omitted from the factual basis of the plea agreement?

(g) Did you file a petition for certiorari in the United States Supreme Court? Yes [ ] No [✓]

If "Yes," answer the following:

(1) Docket or case number (if you know):

(2) Result:

(3) Date of result (if you know):

(4) Citation to the case (if you know):

(5) Grounds raised:

10. Other than the direct appeals listed above, have you previously filed any other motions, petitions, or applications, concerning this judgment of conviction in any court?
Yes [ ] No [✓]

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

(a) (1) Name of court:

(2) Docket or case number (if you know):

(3) Date of filing (if you know):

(4) Nature of the proceeding: ______

(5) Grounds raised:

______

(6) Did you receive a hearing where evidence was given on your motion, petition, or application?

Yes ☐ No ☐

(7) Result: ______

(8) Date of result (if you know): ______

(b) If you filed any second motion, petition, or application, give the same information:

(1) Name of court: ______

(2) Docket of case number (if you know): ______

(3) Date of filing (if you know): ______

(4) Nature of the proceeding: ______

(5) Grounds raised:

______

(6) Did you receive a hearing where evidence was given on your motion, petition, or application?

Yes ☐ No ☐

(7) Result: ______

(8) Date of result (if you know): ______

(c) Did you appeal to a federal appellate court having jurisdiction over the action taken on your motion, petition, or application?

(1) First petition: Yes ☐ No ☐

(2) Second petition: Yes ☐ No ☐

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

______

12. For this motion, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground. Any legal arguments must be submitted in a separate memorandum.

GROUND ONE: Petitioner Tisone entered the guilty pleas involuntarily and as result of ineffective assistance of counsel arising from his counsel's failure to discuss with him the discovery and potential loss amount

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

Mr. Tisone's counsel failed to review with him the Government's discovery prior to the entry of the guilty pleas. Counsel likewise failed to discuss with Mr. Tisone the concept of intended loss, the potential loss amount that would be attributed to him at sentencing, or the resulting Sentencing Guidelines range that he would face. Mr. Tisone entered the guilty pleas based on his belief that he would be held accountable for only the "loss amount" commensurate with the amount of the loans that were funded. The facts section of the plea agreement was consistent with that belief. Had Mr. Tisone been aware that he would likely be held accountable for the total amount of the loans applied for, to include those loan applications that were denied, he would not have entered guilty pleas. Because, however, counsel 1) failed to review discovery with Mr. Tisone, 2) failed to advise him of the potential that intended loss could be used to determine the applicable Guidelines range, and 3) failed to review and discuss the potential Sentencing Guidelines calculation applicable to him, Mr. Tisone did not enter the guilty pleas knowingly, intelligently, and voluntarily with a reasonable understanding of the consequences. But for the ineffective assistance of counsel in failing to review the discovery and the Sentencing Guidelines and to advise of the legal ramifications, Mr. Tisone would not have entered the guilty pleas. In turn, there exists a reasonable probability that the outcome of the case would have been different but for the ineffective assistance of counsel.

(b) **Direct Appeal of Ground One:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☑

(2) If you did not raise this issue in your direct appeal, explain why:

Claims of ineffective assistance of counsel are not generally cognizable on direct appeal.

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☑

(2) If you answer to Question (c)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

GROUND TWO: An actual conflict of interest existed between Mr. Tisone and his trial counsel. That conflict resulted in Mr. Tisone entering the guilty pleas unknowingly, unintelligently, and involuntarily.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

Prior to the entry of the guilty pleas, a contentious relationship developed between Mr. Tisone and his counsel. Mr. Tisone became upset that his attorney had not reviewed the case with him. He thereby requested his business attorney, Scott Weiselberg, to seek a refund of the fees he had paid trial counsel. Trial counsel declined to refund any of the fees. Mr. Tisone impulsively obtained an internet domain titled www.markeiglarshreviews.com. Trial counsel learned of Mr. Tisone's purchase of the domain name, which exacerbated the already contentious relationship. During a conference involving Mr. Weiselberg, trial counsel admitted to having been cavalier in his dealings with Mr. Tisone but stated that, as a condition of continued representation, he was requiring Mr. Tisone to enter into a non-disclosure agreement in which he would agree not to disparage counsel. Mr. Tisone entered into that agreement, believing that he would be without legal counsel if he did not do so. As set above, Mr. Tisone thereafter entered guilty pleas despite not having reviewed discovery with counsel and not having been advised on the application of the Sentencing Guidelines. He did so because he believed that he could not divulge his dissatisfaction with his counsel or the omissions made by his counsel as a result of the non-disclosure agreement he signed. Mr. Tisone did not, therefore, enter the guilty pleas knowingly, intelligently, and voluntarily.

(b) **Direct Appeal of Ground Two:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☑

(2) If you did not raise this issue in your direct appeal, explain why:

The grounds raised in this motion would not have been cognizable on direct appeal because additional fact-finding will be needed to resolve the claims set forth herein.

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☑

(2) If you answer to Question (c)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

GROUND THREE: Mr. Tisone suffered ineffective assistance of counsel as a result of his counsel's filing of an untimely sentencing memorandum that failed to properly address the pertinent issues.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

Prior to sentencing, Mr. Tisone inquired of his counsel as to what filings would made in preparation for sentencing. Mr. Tisone's counsel requested that he draft a sentencing memorandum. Mr. Tisone went on to find and review a sentencing memorandum that had been recently filed in another loan fraud case, United States v. Casey Crowther, No. 2:20-cr-00114. Mr. Tisone drafted a memorandum with information specific to his case and then included large unedited portions taken from the Crowther memorandum and provided that draft to his counsel anticipating that the memorandum would be edited. The draft that Mr. Tisone prepared was, however, submitted as it was. To Mr. Tisone's understanding, the Government recognized that memorandum as having been from the Crowther case and contacted Mr. Tisone's counsel and informed him as such. Counsel then lashed out at Mr. Tisone and asked him to rewrite the memorandum. Mr. Tisone did so, to the best of his ability. That memorandum was 244 pages long with attachments. (Doc. 90.) It was filed the night before the sentencing. At sentencing, the Court admonished counsel for filing such a lengthy memorandum on such short notice. But for the improper and untimely sentencing memorandum, there exists a reasonable probability that the result of the sentencing would have been different. That is particularly true given 1) the fact that the Dupree opinion had just recently issued and bore on the loss amount calculation objection and 2) that numerous 18 U.S.C. 3553(a)

(b) **Direct Appeal of Ground Three:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☑

(2) If you did not raise this issue in your direct appeal, explain why:

Claims of ineffective assistance of counsel are not generally cognizable on direct appeal.

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☑

(2) If you answer to Question (c)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

GROUND FOUR: The Government Failed to Disclose Favorable, Material Evidence in Violation of its Obligations under Brady v. Maryland and in Violation of Mr. Tisone's Due Process Rights

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

In the course of its investigation, the Government interviewed Roger Saad, an officer of SK2 Capital. Blue Ridge Bank, which received the loan applications at issue in this case, contracted Saad to review and, if applicable, approve the loan applications. Saad told the Government that he did not process Mr. Tisone's loan applications, but rather, that his employee Zhenya Slack had. Mr. Tisone has learned, however, that when the Government interviewed Zhenya Slack, Slack stated that Saad had lied to the Government and that she had not handled Mr. Tisone's loans in any way. Slack informed the Government that, on the contrary, Saad personally handled all aspects of the loan applications. She further stated to the Government that she witnessed Saad processing Mr. Tisone's loans and that she saw Mr. Tisone in Saad's office for hours at a time over a course of days as Saad sought documentation needed to process the loan applications. Slack opined that if anyone knew whether Mr. Tisone was qualified for the loans, it would been Saad. The Government did not disclose Slack's statements to the Defense. Slack's statements were, however, material evidence that was favorable to the Defense. see Addendum

(b) **Direct Appeal of Ground Four:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☑

(2) If you did not raise this issue in your direct appeal, explain why:

This Ground would not have been cognizable on direct appeal because additional fact-finding will be needed to resolve the claim.

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☑

(2) If you answer to Question (c)(1) is "Yes," state:

Type of motion or petition: ______

Name and location of the court where the motion or petition was filed:

______

Docket or case number (if you know): ______

Date of the court's decision: ______

Result (attach a copy of the court's opinion or order, if available):

______

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise the issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

______

Docket or case number (if you know): ______

Date of the court's decision: ______

Result (attach a copy of the court's opinion or order, if available):

______

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue:

______

13. Is there any ground in this motion that you have not previously presented in some federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them:

The grounds set forth in this motion have not previously been presented in any federal court. The grounds raised in this motion would not have been cognizable on direct appeal because additional fact-finding will be needed to resolve the claims set forth herein. Additionally, claims of ineffective assistance of counsel are not generally cognizable on direct review. Similarly, questions of whether a defendant entered a guilty plea knowingly, intelligently, and voluntarily are cognizable in Section 2255 proceedings. See Hulsey v. United States, 369 F.2d 284 (5th Cir. 1966). Given the circumstances, the filing of this 28 U.S.C. 2255 Petition is the first viable opportunity Mr. Tisone has had to raise these grounds.

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14. Do you have any motion, petition, or appeal now pending (filed and not decided yet) in any court for the you are challenging? Yes ☐ No ☑

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised.

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

(a) At the preliminary hearing:
N/A

(b) At the arraignment and plea:
Mark Eiglarsh, 3107 Stirling Rd #207, Fort Lauderdale, FL 33312

(c) At the trial:
N/A

(d) At sentencing:
Mark Eiglarsh, 3107 Stirling Rd #207, Fort Lauderdale, FL 33312

(e) On appeal:
J. Jervis Wise, 615 Turner Street, Clearwater, FL 33756

(f) In any post-conviction proceeding:
N/A

(g) On appeal from any ruling against you in a post-conviction proceeding:
N/A

16. Were you sentenced on more than one court of an indictment, or on more than one indictment, in the same court and at the same time? Yes ☑ No ☐

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? Yes ☐ No ☑

(a) If so, give name and location of court that imposed the other sentence you will serve in the future:

(b) Give the date the other sentence was imposed:

(c) Give the length of the other sentence:

(d) Have you filed, or do you plan to file, any motion, petition, or application that challenges the judgment or sentence to be served in the future? Yes ☐ No ☐

18. TIMELINESS OF MOTION: If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2255 does not bar your motion.*

* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. § 2255, paragraph 6, provides in part that:

A one-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of –

(1) the date on which the judgment of conviction became final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making such a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Therefore, movant asks that the Court grant the following relief:

Allow the filing of memoranda of law, conduct an evidentiary hearing and vacate the judgment and sentence (Doc. 93).

or any other relief to which movant may be entitled.

Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Motion under 28 U.S.C. § 2255 was placed in the prison mailing system on ________________.

(month, date, year)

Executed (signed) on August 29, 2024 (date)

Daniel Girone

Signature of Movant

If the person signing is not movant, state relationship to movant and explain why movant is not signing this motion.

ADDENDUM TO THE SUPPORTING FACTS OF GROUND FOUR

The evidence was, moreover, relevant and admissible as impeachment evidence of likely Government witness Roger Saad. The evidence was, in addition, exculpatory as substantive evidence because it would have supported a defense that Mr. Tisone lacked fraudulent intent and relied, to the contrary, on the representations of Saad in seeking the loans at issue.[1] Without knowledge of that favorable material evidence, however, Mr. Tisone entered the guilty pleas under the belief that he did not have a viable defense. Had he been aware of the available material evidence, he would not have entered the guilty pleas. He thereby suffered prejudice as a result of the Government's willfully or inadvertently suppression of Slack's statements.

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[1] As further support for that defense, Saad was also believed to have processed PPP loans on behalf of Blue Ridge Bank for at least one other applicant who was convicted of bank fraud based on the applications. *See United States v. Al Clint LaRoche*, No. 2:23-cr-00013 (M.D. Fla.).