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U.S. DISTRICT COURT  
N.D. OF ALABAMA

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Page 2

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U.S. DISTRICT COURT  
N.D. OF ALABAMAMOTION UNDER 28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR CORRECT  
SENTENCE BY A PERSON IN FEDERAL CUSTODY

CV-05-S-8065-S

United States District Court	District	NORTHERN
Name (under which you were convicted): <b>WILLIAM ANTHONY FAGNES</b>		Docket or Case No.: <b>CR-01-S-0414-S</b>
Place of Confinement: <b>Federal Correctional Institution, Ashland, KY 41105-6001</b>		Prisoner No.: <b>22619-001</b>
UNITED STATES OF AMERICA		Movant (include name under which convicted)
v. <b>WILLIAM ANTHONY FAGNES</b>		

## MOTION

1. (a) Name and location of court that entered the judgment of conviction you are challenging: UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA
- (b) Criminal docket or case number (if you know): CR-01-S-0414-S
2. (a) Date of the judgment of conviction (if you know): OCTOBER 28, 2002
- (b) Date of sentencing: OCTOBER 23, 2002
3. Length of sentence: 204 MONTHS
4. Nature of crime (all counts): Count One (21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), and 848 (attempt to possess with intent to distribute cocaine)).
5. (a) What was your plea? (Check one)
 

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

(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? N/A
6. If you went to trial, what kind of trial did you have? (Check one)
 

Jury ☐ Judge only ☐ N/A
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: N/A

(b) Docket or case number (if you know): N/A

(c) Result: N/A

(d) Date of result (if you know): N/A

(e) Citation to the case (if you know): N/A

(f) Grounds raised: N/A

(g) Did you file a petition for certiorari in the United States Supreme Court?

Yes ☐ No ☐ N/A

If "Yes," answer the following:

(1) Docket or case number (if you know): N/A

(2) Result: N/A

(3) Date of result (if you know): N/A

(4) Citation to the case (if you know): N/A

(5) Grounds raised: N/A

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: N/A

(2) Docket or case number (if you know): N/A

(3) Date of filing (if you know): N/A

(4) Nature of the proceeding: N/A

(5) Grounds raised: N/A

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

Yes ☐ No ☐ **N/A**

(7) Result: **N/A**

(8) Date of result (if you know): **N/A**

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

(1) Name of court: **N/A**

(2) Docket or case number (if you know): **N/A**

(3) Date of filing (if you know): **N/A**

(4) Nature of the proceeding: **N/A**

(5) Grounds raised: **N/A**

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

Yes ☐ No ☐ **N/A**

(7) Result: **N/A**

(8) Date of result (if you know): **N/A**

(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 ☐ **N/A**

(2) Second petition: Yes ☐ No ☐ **N/A**

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

**N/A**

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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.

GROUND ONE: Ineffective assistance of counsel.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): The guilty plea resulted from an actual conflict based on defense counsel's private financial interest that affected specific instances of his performance. The remaining facts, arguments, and supporting authority are set forth in the memorandum in support of this section 2255 motion, adopted and incorporated here by reference.

(b) Direct Appeal of Ground One:

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

Yes ☐ No ☐ N/A

(2) If you did not raise this issue in your direct appeal, explain why: There was no direct appeal and ineffective assistance of counsel claims are not required to be raised 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 your answer to Question (c)(1) is "Yes," state:

Type of motion or petition: N/A

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

Docket or case number (if you know): N/A

Date of the court's decision: N/A

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

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

Yes ☐ No ☐ N/A



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

Yes ☐ No ☐ **N/A**

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

Yes ☐ No ☐ **N/A**

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

Name and location of the court where the appeal was filed: **N/A**

Docket or case number (if you know): **N/A**

Date of the court's decision: **N/A**

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

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

GROUND TWO: **Prosecutor Misconduct.**

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): **The prosecutor, Assistant United States Attorney, Robert P. McGregor, manufactured a fraudulent indictment against Fagnes and thus, Fagnes was not properly under the district court's jurisdiction when he entered the guilty plea. The remaining facts, arguments, and supporting authority are set forth in the memorandum in support of this section 2255 motion, adopted and incorporated here by reference.**

(b) Direct Appeal of Ground Two:

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

Yes ☐ No ☐ **N/A**

(2) If you did not raise this issue in your direct appeal, explain why: **Prosecutor misconduct claims can be raised for the first time in a section 2255**

**proceeding, especially when the evidence underlying the claim is newly discovered as here.**

(c) Post-Conviction Proceedings:

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

Yes ☐ No ☒

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

Type of motion or petition: N/A

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

Docket or case number (if you know): N/A

Date of the court's decision: N/A

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

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

Yes ☐ No ☐ N/A

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

Yes ☐ No ☐ N/A

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

Yes ☐ No ☐ N/A

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

Name and location of the court where the appeal was filed: N/A

Docket or case number (if you know): N/A

Date of the court's decision: N/A

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

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

GROUND THREE: \_\_\_\_\_

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

(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: \_\_\_\_\_

(c) Post-Conviction Proceedings:

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

Yes ☐ No ☐

(2) If your 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 this 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: \_\_\_\_\_

Page 9

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: \_\_\_\_\_

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

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

(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: \_\_\_\_\_

\_\_\_\_\_

(c) Post-Conviction Proceedings:

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

Yes ☐ No ☐

(2) If your 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 this 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: Ground One and Two have never been presented and are not required to be presented until after exhausting the direct appeal. Ground Two relies on newly discovered evidence and questions the subject matter jurisdiction of the court, thus, the claim is never waived and always timely when presented.

14. Do you have any motion, petition, or appeal now pending (filed and not decided yet) in any court for the judgment 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. N/A

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 preliminary hearing: Randy Allen Dempsey, 1122 22nd Street, North, Birmingham, Alabama 35234

(b) At arraignment and plea: Same as above

(c) At trial: Guilty plea, same as above

(d) At sentencing: Same as above

(e) On appeal: No appeal

(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 count 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: N/A

(b) Give the date the other sentence was imposed: N/A

(c) Give the length of the other sentence: N/A

(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 ☐ N/A

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.\*

Randy Allen Dempsey represented Fagnes in the criminal matter that is the subject of this section 2255 motion.

Dempsey has repeatedly refused to release necessary documents to prepare a section 2255 motion that are in his possession.

Fagnes retained Jeffery M. Brandt, Esq., 11331 Grooms Road, Suite 3000, Cincinnati, Ohio 45242, for the purpose of filing a complaint with the Alabama State Bar Association to force Dempsey to release the subject documentation.

Dempsey has never released the complete files and records in the criminal matter, however, he did release some of the documentation after having the complaint filed against him.

Attorney Jeffery M. Brandt received the documentation on or about July 20, 2004.

The conduct of Dempsey constituted an external impediment that prevented Fagnes from complying with the one year limitation period under the AEDPA, and equitable tolled the statute of limitation period until July 20, 2005.

Inclusion of the 10 day period for filing a notice of appeal, the section 2255 motion is timely under the AEDPA if filed, or deposited in the institutional mail box, on or before July 30, 2005.

In addition, Ground Two in the section 2255 motion is based on newly discovered evidence and challenges the subject matter jurisdiction of the district court. Challenges to the subject matter jurisdiction are not subject to the AEDPA.

\* 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.

Page 13

Therefore, movant asks that the Court grant the following relief: Vacate, set aside, or  
correct the conviction and sentence, alternatively, hold an  
evidentiary hearing on the claims,  
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 \_\_\_\_\_  
07/14/05 (month, date, year).

Executed (signed) on 07/14/05 (date).

William A. Fagnas  
Signature of Movant

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

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CERTIFICATE OF SERVICE

I, William Anthony Fagnes, hereby certify that a copy of the "Motion Under 28 U.S.C. § 2255, To Vacate, Set Aside, Or Correct Sentence By A Person In Federal Custody," has been mailed with sufficient postage to carry same, first class, U.S. Mail, to the person at the address appearing below, this 25th day of July, 2005:

Robert P. McGregor  
Assistant U.S. Attorney  
1801 Fourth Avenue North  
Birmingham, AL 35203-2101

William Anthony Fagnes  
William Anthony Fagnes

William Anthony Fagnes  
Reg. No. 22619-001  
Federal Correctional Institution  
Post Office Box 6001  
Ashland, KY 41105-6001

FILED

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ALABAMA

2005 JUL 29 PM 1:22 S-414-S

WILLIAM ANTHONY FAGNES  
U.S. DISTRICT COURT  
N.D. OF ALABAMA

PETITIONER

-vs-

CV-05-S-8065-S

UNITED STATES OF AMERICA

RESPONDENT

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

NOW COMES, William Anthony Fagnes, and respectfully submits  
this memorandum in support of his motion pursuant to 28 U.S.C. §  
2255, to vacate, set aside, or correct sentence.

In support of same, Fagnes adopts and incorporates his motion  
under section 2255 as fully set forth herein, and states:

(a) Jurisdiction.

Jurisdiction is provided pursuant to Title 28, United States  
Code, Section 2255, which states in relevant part:

A prisoner in custody under sentence of a court  
established by an Act of Congress claiming the  
right to be released upon the ground that the  
sentence was imposed in violation of the Consti-  
tution or laws of the United States, or that the  
Court was without jurisdiction to impose such  
sentence, . . . may move the court which imposed  
the sentence to vacate, set aside or correct the  
sentence.

Id.

Fagnes contends that the federal conviction was obtained,  
and the sentence imposed thereunder, is in violation of his  
constitutional protection to Due Process of Law, a Grand Jury

Indictment, and Effective Assistance of Counsel under the Fifth and Sixth Amendment to the United States Constitution.

(b) Questions Presented.

I. Whether the guilty plea resulted from an actual conflict based on defense counsel's private financial interest that affected specific instances of his performance?

II. Whether the district court was without subject matter jurisdiction to accept a guilty plea and impose a sentence upon Fagnes, where the indictment was manufactured and fraudulent?

III. Whether Fagnes was denied Due Process of Law and a Grand Jury Indictment, in violation of the Fifth and Sixth Amendment?

### STATEMENT OF THE CASE

On October 19, 2000, William Anthony Fagnes was named in a single count indictment within the United States District Court, Northern District of Alabama. (Exhibit A). The indictment also named Edward Riley, Jr., as a co-defendant. The indictment charged that on or about the 9th day of December 1998, in the Northern District of Alabama, the defendants knowingly possessed with intent to distribute, and did distribute a controlled substance in excess of 500 grams of cocaine hydrochloride, in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(B).

On September 26, 2001, Fagnes was named in a second single count indictment within the United States District Court, Northern District of Alabama. (Exhibit B). The indictment charged that on or about the 7th day of September 2001, in the Northern District of Alabama, Fagnes knowingly attempted to possess with intent to distribute five kilograms or more of a mixture or substance containing a detectable amount of cocaine hydrochloride, a controlled substance, in violation of Title 21, United States Code, Sections 841(a)(1), (B)(1)(A), and 846.

On November 1, 2001, Fagnes was named in a superseding indictment within the United States District Court, Northern District of Alabama. (Exhibit C). The superseding indictment charged two counts. Count One charged Fagnes with knowingly and intentionally attempting to possess with intent to distribute in excess of five kilograms (approximately 29 kilograms) of a mixture and substance containing a detectable amount of cocaine



hydrochloride, a controlled substance, in violation of Title 21, United States Code, Sections 846, 841(a)(1), 841(b)(1)(A) and 846. Count Two charge that on or about the 9th day of December 1998, in Jefferson County, within the Northern District of Alabama, Fagnes knowingly and intentionally distributed a controlled substance, that is, a mixture and substance containing in excess of 500 grams (approximately two kilograms) of cocaine hydrochloride, in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(B).

Fagnes entered a guilty plea to Count One and Count Two of the superceding indictment was dismissed. Pursuant to the guilty plea, the Court imposed a sentence of 204 months imprisonment, and Judgment was entered on October 25, 2002. No appeal from the Judgment was taken, and the current section 2255 motion followed.