UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

NO. 02-14354-EE

UNITED STATES OF AMERICA

Plaintiff-Appellee,

v.

CHARLES EDWARD COLEMAN

Defendant-Appellant.

A DIRECT APPEAL OF A CRIMINAL CASE
FROM THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF FLORIDA

BRIEF OF APPELLANT

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NO. 02-14354-EE

United States v. Charles Edward Coleman

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Eleventh Circuit Rule 26.1-1, I HEREBY CERTIFY that the following named persons are parties interested in the outcome of this case:

1. Charlie Lee Adams

   Trial and appellate counsel for Hunter

2. Wayne E. Alley, United States District Judge

   Trial Judge

3. Nathaniel Brown

   Codefendant of Charles Edward Coleman

4. Robin E. Gerstein

   Assistant United States Attorney, Sentencing Counsel for the United States

5. Avise Merrill Hunter

   Codefendant

6. William Mallory Kent

   Appellate Counsel for Charles Edward Coleman

7. David Austin Makofka

   Trial Counsel for Nathaniel Brown

8. Thomas Morris, United States Magistrate Judge

9. Tamra Phipps

   Appellate counsel for the United States

10. Susan Humes Raab

    Appellate counsel for the United States

11. Julie A. Savell, Assistant United States Attorney

    Trial Counsel for the United States

12. Harvey E. Schlesinger, United States District Judge

    Sentencing Judge

13. Quentin Thomas Till

    Trial Counsel for Defendant-Appellant

14. Marcio W. Valladares

    Appellate counsel for the United States

STATEMENT REGARDING ORAL ARGUMENT

The appeals of Charles Edward Coleman, Avise Merrill Hunter and Nathaniel Brown have been consolidated. Charles Edward Coleman respectfully requests oral argument for his appeal. Coleman's appeal raises two issues, (1) whether the lower court erred in denying Coleman's objection to a mandatory life sentence under 21 U.S.C. § 851, based on Coleman's challenge of one of the two qualifying predicate convictions, and (2) a challenge to the jury selection process used by the visiting district judge who tried the case.

An extensive record was made below on the sentencing challenge. The trial court's error in not sustaining Coleman's objection to the use of one of his two prior convictions resulted in the imposition of a life sentence on a 31 year old man. This issue is important enough to merit oral argument so that the Court can be assured that any questions or doubts it may have about the record and issue framed may be answered by counsel at oral argument.

CERTIFICATE OF TYPE SIZE AND STYLE

Counsel for Appellant Charles Edward Coleman certifies that the size and style of type used in this brief is 12 point Courier or Courier New.

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STATEMENT OF JURISDICTION

This Court has jurisdiction over the appeal in this cause under 28 U.S.C. § 1291, which provides for an appeal from a final order of a district court and under 18 U.S.C. § 3742, which provides for appeal by a criminal defendant of a sentence imposed under the Sentencing Reform Act of 1984. This appeal was timely filed within ten days of entry of judgment and sentencing.

STATEMENT OF THE ISSUES

I. The District Court Erred in Imposing a Mandatory Life Sentence Based on Coleman's Two Prior Felony Drug Convictions, When One of the Two Prior Convictions Was Constitutionally Infirm, Because Coleman Had Been Denied Effective Assistance of Counsel On the Underlying Conviction By His Prior Counsel's Failure to Advise Him of or Raise a Statute of Limitations Defense to the Charges to Which He Entered His Guilty Pleas, and Had He Been Properly Advised of the Statute of Limitations Defense, He Would Not Have Entered Guilty Pleas to the Charges and Had Coleman's Counsel Properly and Timely Filed a Statute of Limitations Motion to Dismiss the Charges Would Have Been Dismissed.

II. The Visiting Trial Judge's Method of Empaneling the Jury Prevented Coleman from the Full, Unrestricted Exercise of His Right of Peremptory Challenge.

STATEMENT OF THE CASE

Course of Proceedings and Disposition in the Court Below and Relevant Facts

Charles Edward Coleman was named in three counts of a twenty-three count indictment that was filed on April 26, 2001 in the Jacksonville Division of the United States District Court for the Middle District of Florida. [R1] Count one charged conspiracy to distribute five kilograms or more of cocaine and fifty grams or more of cocaine base in violation of 21 U.S.C. § 846. The statutory penalty for this offense was a minimum mandatory ten years up to life. Counts thirteen and eighteen both charged distribution of five grams or more of cocaine base in violation of 21 U.S.C. § 841. The statutory penalty for these counts was a minimum mandatory five years up to forty years imprisonment. [R1]

On September 7, 2001, the government filed a notice pursuant to 21 U.S.C. § 851 of its intent to seek a mandatory life sentence under 21 U.S.C. § 841(b)(1)(A), based on an allegation that Coleman had two prior felony drug convictions. [R185]

Coleman and two codefendants, Avise Merrill Hunter and Nathaniel Brown, elected to go trial by jury. [R254]

The jury selection and trial were presided over by visiting Judge Wayne E. Alley of Oklahoma City, Oklahoma. [R163] Judge Alley utilized a non-standard method of selecting the jury, sometimes referred to as the "jury box" method. [R374-8-12] The venire was

called to the courtroom and twelve persons were randomly called forward to sit in the jury box. Only those twelve persons were subject to the voir dire (with the remaining potential jurors instructed to listen and make notes to themselves). The three codefendants were allowed a collective total of ten peremptory strikes and the government was allowed six peremptory strikes. [R374-47] Peremptory challenges had to be made to the twelve persons in the box, without having the benefit of a voir dire of the remaining potential jurors. [R374-49-50] This caused the exercise of the peremptory challenges to be made in a vacuum without any way to evaluate and weigh the relative merits of the potential jurors. When a potential juror was struck from the box, a replacement juror was randomly selected from the venire and only then was the replacement juror voir dired. [R374-49] This procedure was followed until a jury of twelve persons was seated. A similar procedure was used to seat the alternates. [R374-83] Neither the government nor defense counsel objected to the visiting judge's procedure for jury selection.

Compounding this problem, Judge Alley struck eight jurors *sua sponte* never giving any reason for doing so. [R374-21; R374-27; R374-34; R374-56; R374-79; R374-80; R374-82; R374-85] Judge Alley engaged in little if any effort to rehabilitate a juror who offered any answer that might indicate prejudice or partiality about the charges or defendants. Only with the first of the eight court

strikes did the court ask Coleman if he agreed, disagreed or might want to try to rehabilitate the juror before the juror was excused. Thereafter for the succeeding seven court strikes, the court struck jurors at the first sign of partiality with no effort to rehabilitate or inquire further of the juror. [R374-27; R374-34; R374-56; R374-79; R374-80; R374-82; R374-85]

Coleman was represented by court appointed counsel at trial, Quentin Thomas Till. [R57] Coleman was found guilty of all three counts. [R289; R290]

After trial but before sentencing, Coleman retained William Mallory Kent to represent him at sentencing. Kent filed a limited notice of appearance on February 20, 2002. [R348] On March 6, 2002 the court allowed Kent to appear as co-counsel for Coleman together with Mr. Till. [R357]

On May 29, 2002, Coleman, through Kent, filed an objection to the government's § 851 notice and intent to seek mandatory life imprisonment. [R372] Coleman filed a supplement to his objection on June 14, 2002. [R382] Coleman's supplemental objection addressed one narrow objection to one of his two alleged predicate felony drug convictions, his conviction in 1997 in Dade County, Florida for possession of cocaine. Coleman's objection was that the conviction was constitutionally infirm because Coleman's plea to that charge was not knowingly and intelligently made, having been the result of ineffective assistance of counsel. The claim of

ineffective assistance of counsel was based on a single ground, that Coleman had a complete legal defense to the 1997 charge, a statute of limitations defense, but that he did not himself know of the defense and was never advised of the statute of limitations defense by his then court appointed counsel. Coleman asserted that had he been advised of the statute of limitations defense, he would have asserted it instead of entering a guilty plea to the charge. [R382]

The government filed a response on June 28, 2002. [R384] The government response argued that Coleman could not attack the validity of the 1997 Florida conviction at his federal sentencing but instead that Coleman's remedy, if any, was limited to attacking the Florida conviction in the Florida courts. [R384]

On August 7, 2002, the district court set a hearing for August 28, 2002 on the issue of whether 21 U.S.C. § 851 creates a statutory basis for challenging Coleman's predicate 1997 Florida state court conviction on the grounds raised in the Coleman's first supplement to his response and objection to the government's information under 21 U.S.C. § 851. [R392] Coleman and the government were permitted to simultaneously file short memoranda of law addressing the issues specified in the district court's order setting the hearing. [R392]

The district court stated in its August 7, 2002 order that § 851 would appear to allow Coleman to challenge his 1997 Florida

conviction because it was within the five year window period for such challenges under § 851. [R392]

In response to the district court's order, the government filed a supplemental sentencing memorandum on September 2, 2002 [R402] in which the government conceded that its original response [R384] was wrong, and that Coleman could challenge his 1997 Florida conviction at his federal sentencing under 21 U.S.C. § 851. As to the merits of Coleman's argument, however, the government took the position that Coleman had not established in his pleadings a sufficient basis to invalidate the prior conviction. [R402] The government misunderstood the facts as alleged in Coleman's objection, mistakenly arguing that Coleman had entered a guilty plea *before* he later failed to appear. [R384-1] If Coleman had pled guilty and only failed to appear for sentencing, then the government would have been correct and there would have been no statute of limitations defense. However, the record was clear that Coleman, through counsel, first pled *not guilty*, then Coleman failed to reappear. [R382; Appendix, Item 3, Docket Entry 11/18/93] Coleman only pled guilty after he was rearrested on an unrelated matter and brought back before the Dade County court on the old, unresolved case. [R382; Appendix, Item 5] At that point, Coleman had a valid statute of limitations defense under Florida law, because Florida law at that time did not consider the failure of appearance by Coleman as any bar to assertion of a statute of

limitations defense.[1]

The hearing on the motion was continued until December 19, 2002. [R405] At that hearing the only witness was Coleman, who testified that he had not been advised of any statute of limitations defense by his court appointed counsel and did not himself know of the existence of the defense before he entered his guilty plea to the 1993 state charge. He further testified that had he been advised of the statute of limitations defense, he would not have pled guilty, but would have insisted on asserting the defense. [R441-4-6] The government did not cross examine Coleman.

Coleman testified that he had only met his lawyer one time, the day of his guilty plea, communicating with the lawyer for about two minutes through a glass in a holding cell behind the courtroom, with other inmates present. The holding cell and courtroom were inside the jail. The only information his court appointed lawyer gave him was that the lawyer told him if he pled guilty he would be sentenced to (four days) time served. Coleman said that he told the lawyer he would plead guilty. Coleman testified that he did not know about and was not advised by his lawyer that there was a statute of limitations defense to the charge. He further testified that had he been advised that there was a statute of limitations defense to the charge he would have instructed his lawyer to assert

[1] Florida has since amended its statute of limitations in this regard, but this amendment is not applicable to Coleman under the holding of *Stogner v. California*, ___ S.Ct. ___ (2003).

that defense, and would not have pled guilty. [R441-4-10]

The government stipulated to the admission of the court file in the underlying 1993 case, case number F 93-38507, the arrest report from January 5, 1997 where Coleman was arrested on an unrelated child support order, resulting in his return to court on the 1993 drug case, and the transcript of Coleman's change of plea and sentencing in 1997 on the 1993 charge. [R441-20-21] The government did not dispute any of the facts in the admitted records.

Counsel for Coleman argued his motion as follows:

> MR. KENT: But in a nutshell, the lawyer had -- because it's well established law, this is a typical *Strickland v. Washington* claim -- the lawyer has a duty to provide competent representation to a criminal defendant. The defendant, my client, Mr. Coleman, has a Sixth Amendment right to that effective representation of counsel, and that would include, where there's well established law, that is in terms of determining what is reasonable or competent representation, one of the things you look at? Well, the question, the issue is is it something that a reasonable competent lawyer should have been familiar with, and to determine that, you look at, well, was the law at the time that you're raising now well established. And so the answer on the Statute of Limitations defense is as to even this very particular fact scenario, the law was well established. Of course, it was, as I've attached the cases to the motion, for the Court's convenience. The cases were dispositive. Mr. Coleman would have been entitled, as a matter of law on these facts, to a dismissal of the charge. So that being well established law, it was a dispositive, affirmative defense that had to be asserted as an affirmative defense. For the lawyer to not have advised Mr. Coleman about the defense and asked Mr. Coleman: Do you want to take four days time served or do you want to raise this defense, and in fact, it's so well settled, I think the court would, you know, I think you're going to win this. You won't have a conviction. That was never discussed with Mr. Coleman.

> So he didn't get to make the strategic choice, and I would argue that we can't engage in a hypothetical analysis of, well, we know that he gave up a factual defense. He made that strategic choice, so I'm going to conclude he would have, had he been told about this, he would have also given up this defense because they're apples and oranges. A factual defense has to be decided by six people on the Florida jury, and a factual defense would maybe involve the jury finding out that Mr. Coleman has a prior drug conviction which would taint the jury's fact finding process against him. A factual defense involves it's Mr. Coleman's word against the police officer versus a pure question of law where there are no facts in dispute and the law is completely in his favor. And so a strategic choice about that might be different. And also, in Florida where there's a 175-day speedy trial rule in Florida, which typically is pushed to the limit, where the defendant sits at least six months before his case is started, before anyone starts to call the case for trial. So Mr. Coleman, who has failed to appear, knows he's not going to get bond and anticipates that he's going to serve at least a six-month sentence to assert that factual defense whereas his legal defense could have been raised immediately and would have been required to have been raised under Florida Rules of Criminal Procedure prior to or at arraignment, unless the Court's permission were granted to file the motion later. So the motion had to have been filed right then or as soon as the information was available to the lawyer to file it, and it would have been ruled on then promptly. So I don't think we can analogize between Mr. Coleman's decision to forgo a factual defense where he would sit in jail six months before it even goes to the jury, and the jury is going to hear that he's a convicted felon for a similar offense versus a legal defense, the law is already established, you win, Mr. Coleman, the judge has to hear the motion promptly because it's tolling speedy trial. So that's on that issue. [R441-24-26]

At that hearing the government did not dispute that Coleman had had a valid and dispositive statute of limitations defense to the 1993 Florida charge. [R441-30-31]

The government's only argument was that Coleman got the benefit of a good bargain therefore he did not have ineffective

assistance of counsel - even though his lawyer never raised a dispositive statute of limitations defense:

> [AUSA GERSTEIN] The defendant has not met his burden in this proceeding. Furthermore, we too rely upon the *Strickland versus Washington* case, and the evidence today even supported the position that the defendant's attorney back in 1997 was effective because not only did the defendant himself testify today, but also, according to the 1997 transcript, the defendant obtained the benefit of the bargain, four years time served, opposed to serving six years in the state penitentiary.
>
> THE COURT: Four days.
>
> MS. GERSTEIN: Four days. I apologize. Not only did the defendant obtain a bargain, but it was actually a good deal. The defendant himself also told the Court that it was only recently, upon conferring with Mr. Kent, that he realized that he had the Statute of Limitations potential issue in the year 2002, which obviously is five years removed from the date of those past proceedings. [R441-30-31]

In rebuttal Coleman argued:

> MR. KENT: Just, one rebuttal thought. Four days time served is a great deal except he got adjudicated guilty of a felony, and this defense would have prevented the adjudication of a felony. He might have ended up with fifteen days credit in the bank, no adjudication, no sentence, no conviction. And so clearly, that's not effective. If you can by simply filing a motion and raising the issue, avoid a felony adjudication. [R441-31]

The district court essentially adopted the government's reasoning in its order of February 5, 2003, denying Coleman's objection to the prior conviction. [R426] The district court noted that it appeared that the statute of limitations defense would have been successful, but found that it was unnecessary to determine the validity of the statute of limitations defense. [R426-3-footnote 2]

The district court found that Coleman's counsel had been effective, reasoning as follows:

> The Court finds that Defendant's counsel was not ineffective. Although not a model of thoroughness, Defendant's counsel's actions were effective as a practical matter. During the evidentiary hearing, Defendant testified that release was his primary concern during his incarceration, and the plea of guilty accomplished his immediate release from custody. Accordingly, asserting the statute of limitations defense would not have been effective, as defendant would have been in custody longer, while waiting for the filing of and ruling on his motion based on the statute of limitations defense. The main difference between the plea of guilty and asserting the statute of limitations defense is the prospective effects . . . [R426-4]

Having overruled Coleman's objections to the prior conviction, the district court subsequently imposed a mandatory life sentence under 21 U.S.C. § 841(b)(1)(A) based on the enhancement for two prior convictions. [R429]

This appeal followed in a timely manner.

Standards of Review

The district court's order denying Coleman's challenge to the government's information filed under 21 U.S.C. § 851 to his underlying state conviction on ineffective assistance of counsel grounds is subject to *de novo* review. It is comparable to appellate review of a habeas determination by a district judge. A district court's denial of habeas corpus relief is reviewed *de novo. See Dorsey v. Chapman,* 262 F.3d 1181, 1185 (11th Cir.2001). The district court's findings of fact are reviewed for clear error, *see O'Ryan Castro v. United States,* 290 F.3d 1270, 1272 (11th Cir.2002), while legal questions and mixed questions of law and fact are reviewed *de novo, see Tinker v. Moore,* 255 F.3d 1331, 1332 (11th Cir.2001). Whether a defendant received ineffective assistance of counsel is a mixed question of law and fact, and is therefore reviewed *de novo. See Hagins v. United States,* 267 F.3d 1202, 1204 (11th Cir.2001); *Brownlee v. Haley,* 306 F.3d 1043, 1058 (11th Cir. 2002).

Coleman's challenge to the visiting trial judge's jury selection method is subject to plain error review, because no contemporaneous objection was made by Coleman at the district court. However, restrictions on the right of exercise of peremptory challenges may be noticed as plain error. *United States v. Sams*, 470 F.2d 751, 755(5th Cir. 1972).

SUMMARY OF ARGUMENTS

I. The District Court Erred in Imposing a Mandatory Life Sentence Based on Coleman's Two Prior Felony Drug Convictions, When One of the Two Prior Convictions Was Constitutionally Infirm, Because Coleman Had Been Denied Effective Assistance of Counsel On the Underlying Conviction By His Prior Counsel's Failure to Advise Him of or Raise a Statute of Limitations Defense to the Charges to Which He Entered His Guilty Pleas, and Had He Been Properly Advised of the Statute of Limitations Defense, He Would Not Have Entered Guilty Pleas to the Charges and Had Coleman's Counsel Properly and Timely Filed a Statute of Limitations Motion to Dismiss the Charges Would Have Been Dismissed.

The government sought to have the court impose a mandatory life sentence under 21 U.S.C. § 841(b)(1)(A) based on an information filed under 21 U.S.C. § 851 alleging that Coleman had two prior felony drug convictions.

Coleman filed a written objection challenging one of the two prior convictions on constitutional grounds, arguing that his conviction was based on a plea that was the result of ineffective assistance of counsel.

The ineffective assistance of counsel claim was based on the fact that Coleman's underlying state prosecution was barred by the then Florida statute of limitations. Coleman argued that this defense was obvious from the face of the record.

The district court conducted an evidentiary hearing on the challenge. Uncontradicted evidence was admitted in the form of court records and Coleman's testimony that established that Coleman had a meritorious statute of limitations defense to the underlying charge but that he had not known of the defense and was not advised

of the defense by his court appointed counsel prior to entry of his guilty plea to the underlying charge. Coleman testified, and the court made no finding to the contrary, that had he been advised of the statute of limitations defense he would not have entered a guilty plea but would have asserted the defense.

Coleman argued that under *Hill v. Lockhart* and *Strickland v. Washington* his court appointed attorney rendered ineffective assistance of counsel and that he was entitled to have the plea and conviction thereunder set aside and if set aside it could not properly be used to enhance his sentence from twenty years to mandatory life imprisonment.

II. The Visiting Trial Judge's Method of Empaneling the Jury Prevented Coleman from the Full, Unrestricted Exercise of His Right of Peremptory Challenge.

The visiting trial judge used the "jury box" method of jury selection. This caused Coleman to exercise his peremptory challenges in a vacuum without knowing the makeup of the remaining venire persons. The prejudice of this method was compounded by the fact that the trial judge did not allow any additional peremptory challenges to the three codefendants who were trial jointly, resulting in Coleman having only three peremptory challenges of his own. The prejudice was further compounded by the idiosyncratic method the judge had of *sua sponte* striking potential jurors on their first utterance of any matter that the judge found objectionable - without consultation with or input by the

defendant.

Together, these factors resulted in a denial of Coleman's right to a fair cross section of the community on his jury and impermissibly limited his right to exercise peremptory challenges.

Although no contemporaneous objection was made by Coleman, our Circuit's precedent would permit noticing this error as plain error.

ARGUMENTS

I. The District Court Erred in Imposing a Mandatory Life Sentence Based on Coleman's Two Prior Felony Drug Convictions, When One of the Two Prior Convictions Was Constitutionally Infirm, Because Coleman Had Been Denied Effective Assistance of Counsel On the Underlying Conviction By His Prior Counsel's Failure to Advise Him of or Raise a Statute of Limitations Defense to the Charges to Which He Entered His Guilty Pleas, and Had He Been Properly Advised of the Statute of Limitations Defense, He Would Not Have Entered Guilty Pleas to the Charges and Had Coleman's Counsel Properly and Timely Filed a Statute of Limitations Motion to Dismiss the Charges Would Have Been Dismissed.

Mr. Coleman asserts that the 1997 Dade County, Florida state conviction in case number 93-38507, which the government and court below relied upon for the mandatory life enhancement, was obtained in violation of his Sixth Amendment right to effective assistance of counsel.

Mr. Coleman was arrested November 13, 1993 by an officer of the Metro Dade Police Department in Miami, Florida.[2] The arrest and booking report stated three state criminal charges and one county ordinance violation. The criminal charges were (1) possession of cocaine with intent to deliver in violation of Florida Statutes, § 893.13, (2) possession of stolen property in violation of Florida Statutes, § 810.02, and (3) possession of marijuana in violation of Florida Statutes, § 893.13. The county

[2] The factual basis for the argument herein is found in the records stipulated to by the government at the evidentiary hearing conducted December 19, 2002, and are found in the Appendix to Docket 382. The Appendix is not paginated, so there is no way to make specific reference to the pertinent page numbers.

ordinance violation was obstructing a police officer in violation of Dade County Code § M91083866. The cocaine was alleged to weigh 46 grams and the marijuana was alleged to weigh 6 grams. The cocaine charge was a felony offense and the marijuana charge was a misdemeanor offense. The possession of stolen property was also a felony. Both felonies were third degree felonies.

Coleman was released on bond on the following day, November 14, 1993.

The state made a filing decision to not file charges on the stolen property charge due to inability to prove knowledge that the property was stolen. A filing decision on the drug charges was delayed pending a lab report and a lab weight. A filing decision was to be announced in court on November 19, 1993.

Although no formal charges had been filed a written plea of not guilty was entered by a public defender on Mr. Coleman's behalf on November 18, 1993. Mr. Coleman was not present. Rule 3.160(a), Florida Rules of Criminal Procedure.

On or about December 3, 1993 the State Attorney for Dade County filed a two count information charging Mr. Coleman in count one with possession of cocaine on November 13, 1993 in violation of Florida Statutes, § 893.13(1)(f), a third degree felony, and in count two with possession of marijuana on November 13, 1993 in violation of Florida Statutes, § 893.13(1)(g), a misdemeanor. The case was assigned case number F 93-38507. Mr. Coleman failed to

appear for the December 3, 1993 arraignment.

The case was set for bond forfeiture on March 21, 1994 at which time with Mr. Coleman again not present, bond was revoked. *No capias was issued for his arrest however.*[3]

Mr. Coleman did not appear again in court until he was rearrested in Miami, Florida *on an unrelated warrant* out of Brevard County, Florida on January 5, 1997, more than three years after he failed to appear for court.[4]

Before being taken to Brevard County on the Brevard warrant, he was put back on the calendar on case number 93-38507 and made an appearance on January 6, 1997. He was represented at this appearance by Aniello Frank Siniscalchi, Esq., who at that time was a young state Assistant Public Defender.[5]

Without any knowledge about the case, without conducting any discovery,[6] without conducting any investigation, without considering the consequences for future habitualization,[7] and

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[3] The District Court accepted that there had most likely been no warrant for his arrest. [R441-17]

[4] Brevard County, Florida fugitive warrant #920049CFA.

[5] Mr. Siniscalchi was admitted to the bar in 1994.

[6] Florida allows liberal pretrial discovery, including the requirement that the state disclose within 15 days of demand by the defendant the names and addresses of all witnesses and the defendant is entitled to take pretrial depositions of all state witnesses. Florida Rules of Criminal Procedure, Rule 3.220.

[7] Under Florida law Mr. Coleman's prior felony drug conviction for possession with intent to sell in case number 90-

without considering or advising Mr. Coleman of the affirmative defense of statute of limitations, attorney Siniscalchi advised Mr. Coleman that the state was offering a sentence of four days time served in jail with credit for time served and an adjudication of guilt on both the felony and misdemeanor drug charges and advised that he take the offer.

In fact, under Florida law in effect at that time, there was a valid statute of limitations defense to the charge, and had a motion to dismiss on statute of limitations grounds been filed, both charges would have been dismissed.

Florida Statutes, § 775.15(1)(b) (1993), (a copy of which is included in the Appendix hereto for the court's convenience), sets a three year statute of limitations on the prosecution of third degree felonies, and sets a two year statute of limitations on first degree misdemeanors. § 775.15(1)(c). Section 775.15(5) requires that a capias be issued and that it be executed without unreasonable delay in order to toll the statute of limitations. Mere filing of the charging information alone does not, under the 1993 version of the statute of limitations, toll the statute of limitations. See Section 775.15(5).

Under Florida law Mr. Coleman was entitled to the application

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47806, Eleventh Circuit Court, Dade County, coupled with the new charge, if pled guilty to and adjudicated, would make Mr. Coleman an Habitual Offender under Florida Statutes, § 775.084, and subjected him to mandatory life imprisonment under 21 U.S.C. §§ 841 and 851.

of the statute of limitations in effect on the date of his offense. *Stogner v. California*, __ S.Ct. __, 2003 WL 21467073 (2003), *Brown v. State*, 674 So.2d 738, 739 n.1 (Fla. 2nd DCA 1995), *State v. White*, 794 So.2d 682 (Fla. 2nd DCA 2001).

Florida law also does not make any exception to non-tolling when the failure to proceed is the result of the defendant's own failure to appear. In fact, under the Florida law in effect at the time of Mr. Coleman's rearrest and conviction, the state had the burden of coming forward and proving that (1) a capias had been timely issued and (2) diligent efforts had been made to execute the capias. *State of Florida v. William Russell Watkins*, 685 So.2d 1322 (Fla. 2nd DCA 1996).

Coleman submitted to the district court a true, correct and complete copy of the state court file on the predicate conviction, certified by the Clerk of the Court in Dade County. Coleman also submitted to the district court a true, correct and complete copy of the Dade County jail booking record for the January 5, 1997 rearrest, showing that the arrest was for a *Brevard* fugitive warrant, not for any capias or warrant from the Dade County case.

No capias had been issued and the state could make and the government made no showing of any effort, much less a diligent timely effort, to execute any capias on these charges. Under *Watkins*, Coleman would have been entitled to have his charges dismissed.

Therefore, under these facts, Coleman would have had a complete legal defense to the 1993 drug charges based on the Florida statute of limitations in effect in 1993, and it was ineffective assistance of counsel for Coleman's counsel to not advise him of this defense and assert it on his behalf.

Mr. Coleman testified without contradiction at the hearing before the district court that had he been advised of the statute of limitations defense or any possibility that there could have been such a defense, even if counsel could not have assured him it would have been meritorious, he would not have entered the guilty pleas in this case. The district court did not dispute this testimony in its order denying relief.

Mr. Siniscalchi's performance, in failing to advise Mr. Coleman of the statute of limitations defense "fell below an objective standard of reasonableness" as defined by *Strickland v. Washington*, 466 U.S. 668 (1984).

The United States Supreme Court established the test for determining whether a plea is voluntary or intelligent when there is a claim of misadvice of counsel leading to the guilty plea, in *Hill v. Lockhart*, 474 U.S. 52, 57, 88 L. Ed. 2d 203, 106 S. Ct. 366 (1985). Under *Hill v. Lockhart* the defendant must show: (1) that his counsel's performance "fell below an objective standard of reasonableness" and (2) that he was prejudiced in the sense that there was a reasonable probability that, but for counsel's error,

he would not have pleaded guilty and would have insisted on going to trial.

Had Mr. Siniscalchi correctly advised the defendant regarding the possible statute of limitations defense he would not have entered guilty pleas to the charges. Accordingly, Mr. Coleman was denied effective assistance of counsel under the Sixth Amendment to the United States Constitution and this Court may not rely upon the 1997 Dade County conviction in case number 93-38507 to enhance his sentence to mandatory life imprisonment.

Wherefore, based upon the foregoing argument and authority, Charles Edward Coleman respectfully requests this honorable Court vacate the mandatory life sentence imposed by the district court and order that the district court resentence Coleman to the twenty (2) year minimum mandatory sentence authorized under 21 U.S.C. § 841(b)(1)(A) based on the remaining single prior felony drug conviction.

II. The Visiting Trial Judge's Method of Empaneling the Jury Prevented Coleman from the Full, Unrestricted Exercise of His Right of Peremptory Challenge.

The visiting trial judge utilized the so-called "jury box" method of jury selection. In the jury box method, the clerk calls the venire to the courtroom but then only calls forward twelve persons and places them in the jury box. The court then engaged in voir dire of only those twelve persons.

After that voir dire, the parties were called upon to exercise their peremptory challenges, going in rounds, from side to side. After a round, the struck juror or jurors were replaced from the venire and only the replaced juror or juror was subjected to voir dire, whereupon the judge again called for the exercise of peremptory challenges.

In addition and separate from this particular method, the judge repeatedly struck jurors on his own, *sua sponte*, without any meaningful follow up once he heard any response that he found objectionable. These *sua sponte* "court strikes" were done without any consultation with or consent by Coleman or any codefendant.

A criminal defendant's right to challenge some prospective jurors without cause is "one of the most important of the rights secured to the accused." *Pointer v. United States*, 151 U.S. 396, 408, 14 S.Ct. 410, 414, 38 L.Ed. 208 (1894). Although not a right protected directly by the Constitution, *see Swain v. Alabama*, 380 U.S. 202, 219, 85 S.Ct. 824, 835, 13 L.Ed.2d 759 (1965); *Stilson v.*

United States, 250 U.S. 583, 586, 40 S.Ct. 28, 29, 63 L.Ed. 1154 (1919), it nevertheless is considered essential to and inherent in the Anglo-American tradition of trial by jury, *see Swain v. Alabama*, supra, at 219-21, 85 S.Ct. at 835-836; *Hayes v. Missouri*, 120 U.S. 68, 70, 7 S.Ct. 350, 351, 30 L.Ed. 578 (1887); 4 W. Blackstone, Commentaries 353.

The general standard for measuring the acceptability of procedures through which peremptory challenges are exercised was articulated in *Pointer v. United States*, *supra*, at 408, 14 S.Ct. at 414. "Any system for the empanelling of a jury that pre(v)ents or embarrasses the full, unrestricted exercise by the accused of (his right to challenge peremptorily) must be condemned."

Although Coleman did not object at trial, our Circuit has held that a method of jury selection that contains an ingredient whereby the defendant is seriously limited in his exercise of his right to peremptory challenge must be noticed as plain error. *United States v. Sams*, 470 F.2d 751, 755 (5th Cir. 1972) (visiting judge's unannounced jury selection method prohibiting back striking plain error).

Coleman was deprived of a fair cross section of the community on his jury in violation of the Sixth Amendment by the trial judge's own *sua sponte* jury strikes without any opportunity for Coleman to participate in the process, in particular without allowing Coleman an opportunity to rehabilitate any juror the judge

struck.

Furthermore, Coleman's right to exercise his own peremptory challenges was diluted and impermissibly restricted by the trial judge's use of the "jury box" method of jury selection, that required Coleman to exercise his challenges in a vacuum without any knowledge of the makeup of the remaining venire panel. Given that the trial judge did not allow Coleman or any codefendant any additional peremptory strikes, as permitted by Rule 24 of the Federal Rules of Criminal Procedure, Coleman was forced to share the permitted ten peremptories with his two codefendants, meaning Coleman had only three peremptory challenges of his own. To then dilute or restrict those three peremptories by requiring Coleman to strike from the box, when the judge himself was permitted to shape the makeup of the box by the judge's strikes, crossed the line of permissible restriction and must be condemned under *Pointer*, *Swain*, *Sams* and the Sixth Amendment.

This impermissible invasion of and restriction upon Coleman's right to trial by a jury of his peers, subject to his fundamental right to exercise peremptory challenges, requires that his convictions on all three counts be reversed and the case be remanded for a new trial.

CONCLUSION

Appellant Charles Edward Coleman respectfully requests this honorable Court reverse his convictions as to all three counts based on the impermissible restriction on his right to exercise peremptory challenges during voir dire, or in the alternative, to vacate his mandatory life sentence and remand to the district court for imposition of a twenty year minimum mandatory sentence based on the remaining single predicate felony drug conviction.

Respectfully submitted,

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RULE 28-1(m) CERTIFICATE OF WORD COUNT AND

CERTIFICATE OF SERVICE

I HEREBY CERTIFY pursuant to 11th Cir.R. 28-1(m) and FRAP 32(a)(7) that this document contains 7,288 words.

I ALSO HEREBY CERTIFY that two copies of the foregoing have been furnished to Marcio W. Valladares, Esquire, Assistant United States Attorney, Office of the United States Attorney, 300 North Hogan Street, Suite 700, Jacksonville, Florida 32202, David Makofka, Esquire, 24 North Market Street, Jacksonville, Florida 32202, to Charlie Lee Adams, Esquire, 610 Blodgetts Lane, Jacksonville, Florida 32206, and to Mr. Charles Edward Coleman, Reg. No. 29396-018, Pollock USP, P. O. Box 1000, Pollock, Louisiana, 71467, by United States Postal Service, first class mail, postage prepaid, this July 2, 2003.

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William Mallory Kent

APPENDIX

Florida Statutes, § 775.15(1)(b) (1993)