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IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JAVID NAGHDI, Petitioner, v. UNITED STATES OF AMERICA, Respondent.	Criminal No. 88-0768-K Civil No. 96-1528-K POINTS AND AUTHORITIES IN SUPPORT OF OPPOSITION TO PETITION FILED UNDER 28 U.S.C. § 2255

I

NATURE OF THE CASE

On September 5, 1996, Petitioner Javid Naghdi (hereinafter referred to alternative as "Petitioner" or "Naghdi") has filed a motion under Title 28, United States Code, Section 2255 contending his nine count wire fraud conviction should be set aside because of improper conduct by this Court and defense counsel. In his motion, Petitioner raised four specific grounds for relief.

1) The trial court erred when it found Naghdi to be an organizer, pursuant to USSG § 3B1.1(a).

2) The trial court erroneously utilized intended, rather than actual, loss when calculating Petitioner's sentence.

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3) The trial court erred in considering the Los Angeles guilty plea at the sentencing phase of Petitioner's trial.[1/]

4) The attorney who represented Petitioner at trial was incompetent.[2/]

II

STATEMENT OF FACTS

On June 26, 1987, in Los Angeles, California, Petitioner pled guilty to four counts charging him with conspiracy, manufacturing, and distributing a counterfeit drug, and trafficking in goods bearing counterfeit trademarks ("Los Angeles case") (RT Page 58).[3/] Naghdi then failed to appear for sentencing on August 3, 1987. On that date, the district court issued a no-bail arrest warrant for Petitioner (RT 135-137).

On August 8, 1988, the United States Department of State sent a telex to the American Embassy in London, England, instructing them to request a provisional arrest warrant for Petitioner based on his conduct in the Los Angeles Case (RT Page 171 - 182). Then on August 11, 1988, Scotland Yard arrested Petitioner pursuant to

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[1/] Petitioner alleges that such consideration amounted to a separate prosecution for conduct that Naghdi was not specifically extradited for, and thus, the conviction is in violation of the extradition treaty with the United Kingdom.

[2/] Petitioner argues that his attorney was incompetent because he: (1) failed to present Petitioner's public authority defense; (2) failed to object to Petitioner being characterized as an organizer under the USSG; (3) failed to object to the court utilization of intended loss at sentencing; and (4) failed to object to the court's violation of the extradition treaty with the United Kingdom.

[3/] "RT" refers to the reporter's transcripts of the trial and related proceedings. The trial transcripts are identified by use of Roman numerals respectively as:

the provisional warrant (RT 186 - 187). Thereafter, Petitioner was extradited to the United States so that he could: (1) be sentenced for the Los Angeles case; and (2) stand trial in the present case.

During pretrial proceedings, Petitioner raised numerous objections. In particular, on November 15, 1989, Petitioner raised a "public authority" defense. On that date, he submitted the first of two notices pursuant to Federal Rule of Criminal Procedure 12.3.

On December 1, 1989, the CIA and NSA received Rule 17(c) subpoenas authorized by this Court based upon Petitioner's previous counsel's ("counsel") affidavit. On December 4, 1989, the government responded to the two subpoenas. Neither agency had any information relating to the listed operations. In fact, neither agency had any information related to Petitioner.

On January 30, 1990, this Court held a hearing to determine whether to issue 17(b) subpoenas for a variety of high United States Government Officials. At that hearing this Court ordered Petitioner to file a notice pursuant to the classified information and Procedure Act ("CIPA") the following day. Despite Petitioner's failure to comply with CIPA, the Court agreed to issue seven of the eighteen requested subpoenas.

On January 31, 1990, the Court reconsidered its ruling from the previous day. The Court found that Petitioner had not produced sufficient evidence to demonstrate that the subpoenas were relevant and necessary. The Court held that absent corroboration, it would issue the subpoenas only if Petitioner

signed an affidavit demonstrating the relevance of the subpoenas. On February 1, 1990, Petitioner refused to file such an affidavit for fear of later perjury charges.[4/]

On February 12, 1990, out of the presence of the jury, the Court held another hearing on the propriety of issuing the Rule 17(b) witness subpoenas. Once again, the Court rejected the issuance of the subpoenas, as there was simply no evidence to support the issuance.

Petitioner's jury trial began on February 6, 1990, and the jury returned a verdict on February 28, 1990. Subsequently, on May 7, 1990, Petitioner was sentenced to fourteen years in prison, which was imposed consecutively to a five year sentence imposed in the Central District of California based on the Los Angeles case.

At the sentencing phase of Petitioner's trial this Court found the total offense level to be "thirty-one, the criminal history score . . . three, which means that his [Naghdi] guidelines would be a hundred and thirty-five to a hundred and sixty-eight months." (RTS at 54)[5/]. In imposing the high end of the range, the Court found that:

> [T]his fraud was so callous and so extensive and so vast; he basically learned nothing on the Los Angeles case. It was - there's an element of cruelty in this offense that it is not taken account of in the guidelines. And the cruelty is the fact that Mr. Naghdi, as a pharmacist, or a trained person in

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[4/] In requiring the affidavit, the Court noticed that Petitioner's previous subpoenas had failed to produce any relevant evidence.

[5/] "RTS" refers to the reporter's transcript of the sentencing hearing.

> pharmacology, would understand the danger of giving persons with ulcers, aspirin.
>
> I mean, somebody that was a pharmacist knew the danger of what he was doing and he did not care and I find it was one of the most callous cruel, insensitive crimes I've ever seen. And under the circumstances, I feel that Mr. Naghdi deserves the high end of the guidelines I found. (Id.)

The offense level was initially set at level six. The base offense level was then increased by eleven based upon an intended loss of $606,002,292.[6/]

The Court determined the $606,002,292 loss figure by adding the amount of Petitioner's proposed sale of counterfeit Tagamet, Anspor, and Naprosyn to Belrico ($579,002,292) to the amount of his sale of counterfeit Tagamet to the undercover agent ($27,000,000). In computing the guidelines, the Court next added two points for conduct involving more than minimal planning under USSG § 2(f)(1.1)(B)(2)(a), and two points for Naghdi's use of special skill under USSG § 3(b)(1.3).

Finally, the Court found that Naghdi was an "organizer" within the meaning of the guidelines.[7/] Although Petitioner's counsel argued that another coconspirator, Jack Russell was the "organizer", the Court disagreed. The Court found that "Mr. Naghdi was the organizer of this fraud, unquestionably the organizer of this fraud." (RTS at 48). The Court then went on to find that the fraud was otherwise extensive, and that Naghdi was

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[6/] The court used an arithmetic progression for the portion of loss over five million dollars that increased the offense level by 6 points.

[7/] At this time, the government also argued that the fraud was otherwise extensive as defined by the guidelines.

in fact eligible for "organizer" points. Thus, four points were added to the offense level.[8/]

III

ARGUMENT

A. THIS COURT CORRECTLY FOUND NAGHDI TO BE AN ORGANIZER FOR SENTENCING PURPOSES

According to the United States Sentencing Commission, Guidelines Manual, Ch.3, Pt.B, intro. comment.(1988), a sentencing court may apply Section 3B1.1 of the Federal Sentencing Guidelines ("§ 3B1.1"), when "an offense is committed by more than one participant". USSG § Ch.3, Pt.B, intro. comment. However, Petitioner mistakenly asserts that Application Note 2 of § 3B1.1 ("Application Note 2") requires a sentencing court to find that there were at least three "participants" involved in the fraud before it can consider an organization to be "otherwise extensive", as defined in subsection (a) of § 3B1.1 ("subsection (a)").[9/] Application Note 2 to the United States Sentencing Commission, Guidelines Manual, §3B1.1(1988) states that;

> [i]n assessing whether an organization is "otherwise extensive," *all* persons involved during the course of the entire offense *are* to be considered. Thus, a fraud that involved only three participants but used the unknowing services of many outsiders *could* be considered extensive. USSG §3B1.1, comment. (n.2)(emphasis added).

[8/] In the presentence report ("PSR") the probation officer noted that an upward adjustment was warranted for several reasons. As noted above by this court the reason for departure was the magnitude of the fraud and the risk of physical and psychological injury.

[9/] "If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by 4 levels." USSG § 3B1.1(a).

Nowhere does Application Note 2 state that a finding of three "participants" is a requirement of the "otherwise extensive" provision of subsection (a). Instead, it states that "*all* persons involved . . . *are* to be considered" when determining the applicability of the "otherwise extensive" provision. The use of the words "all" and "are", suggest that the "otherwise extensive" provision is to be determined under the totality of the circumstances, and that a rigid numerical requirement is to be avoided. This interpretation is highlighted by the fact that the "otherwise extensive" provision is an alternative to the rigid "five or more" standard stipulated in the first half of subsection (a).[10/]

The second sentence of Application Note 2 further supports the notion that the "otherwise extensive" provision does not create a rigid numerical requirement. The second sentence merely exemplifies one situation in which this provision may be applied. For example, the use of the word "could" suggests that the Sentencing Commission only intended to provide the reader with an example of one possible application, and not a requirement.

This interpretation is also supported and clarified by the subsequently added Application Note 2 to §3B1.1.[11/] In pertinent

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[10/] Additionally, the lack of a minimum participant requirement in the wording of the provision itself, and the placement of a minimum "participant" requirement in the introductory commentary, also suggest that Application Note 2 does not mandate a three "participant" minimum requirement.

[11/]The previous Application Note 2 is now Application Note 3, and remains unchanged.

part the new Application Note 2 states that "[t]o qualify for an adjustment under this section, the defendant must have been the organizer . . . of one or more other participants." USSG § 3B1.1, comment. (n.2) (Nov. 1995). Since, the addition of the above Application Note does not change the substance of §3B1.1, it should be retroactively applied for clarification purposes. United States v. Flores, 93 F.3d 587, 591, (9th Cir. 1996); United States v. Kimple, 27 F.3d 1409, 1412 (9th Cir. 1994).[12/]

Even Petitioner's own supporting cases on the issue, recognize the minimum requirement set by the Introductory Commentary. In Petitioner's most recent case, Anderson, the Ninth Circuit held that "§ 3B1.1 only applies when the offense is committed by more than one person who is criminally responsible for the commission of the offense." United States v. Anderson, 942 F.2d 606, 617 (9th Cir. 1991), *abrrogated on other grounds*, 508 U.S. 36 (1993).

Petitioner fails to recognize that the Ninth Circuit has stated that the USSG §3B1.1(a), organizer characterization, is not susceptible to the very interpretation asserted by Petitioner. United States v. Leung, 35 F.3d 1402, 1407 (9th Cir. 1994), *cert. denied*, __ U.S. __, 115 S.Ct. 954. In Leung, the court stated that:

> [a]lthough, as Wai Chong contends, Application Note 3 [previously Application Note 2] refers to the number of people involved or connected with the conspiracy,

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[12/]"If a court . . . applies an earlier Guidelines Manual . . . subsequent amendments are given retroactive effect if they make clarifying rather than substantive changes." United States v. Flores, 93 F.3d 587, 591 (9th Cir. 1996).

> nothing in the text of 3B1.1 or the Application Notes expressly limits the relevant inquiry to the number of *persons* involved in the criminal activity. Moreover, the phrase 'otherwise extensive' is not susceptible to such a narrow interpretation. Id.

Although, Leung, was decided under a later version of the Federal Sentencing Guidelines, nothing substantive has changed. The relevant sections are still intact, and the only pertinent change is the addition of the clarifying Application Note 2. Because the new Application Note 2 only clarifies the previous Guidelines, and does not add anything, it should be retroactively applied. Flores, supra.

B. THE DISTRICT COURT CORRECTLY DETERMINED THE AMOUNT OF LOSS TO BE SIX HUNDRED AND SIX MILLION, AND TWO THOUSAND, TWO HUNDRED NINETY-TWO DOLLARS

Petitioner would have this Court believe that the proper calculation of the amount of loss is only the actual amount lost. However, this view is contradicted by both the Application Notes to § 2F1.1 of the USSG (1988) ("§ 2F1.1"), and the extant Ninth Circuit precedent.

Section 2F1.1, Application Note 7 ("Application Note 7") provides that "[i]n keeping with the Commission's policy on attempts, if a probable or intended loss that the defendant was attempting to inflict can be determined, that figure would be used if it were larger than the actual loss." (emphasis added). Further, Application Note 8 of § 2F1.1 states that "[t]he amount of loss need not be precise . . . [t]he court need only make a reasonable estimate of the range of loss, given the available information. . .[and finally] [t]he offender's *gross* gain from

committing the fraud is an alternative that ordinarily will understate the loss." (emphasis added).

Since an offender's "gross gain" is an appropriate alternative to loss valuation, the "intended" or "probable" reasoning announced in note 7, should also apply to "gross gain". Consequently, because the "intended" gross gain of the offender is a proper method with which to determine the appropriate loss valuation, the district court did not err.

"Under section 2F1.1 of the Guidelines, the district court is to use the 'probable or intended' loss resulting from the crime or attempt, not the actual loss sustained." United States v. Hernandez, 952 F.2d 1110, 1118 (9th Cir. 1991), *cert. denied*, 506 U.S. 920 (1992), quoting United States v. Davis, 922 F.2d 1385, 1391 (9th Cir. 1991). The "amount of loss ordinarily should reflect the estimated market value of the goods." Id. Hernandez also recognized that the profit lost by victims is not a mandatory valuation for sentencing purposes and that it was reasonable to use the market value of counterfeited tapes instead of the profit lost by the recording industry. Id. at 1118-19. Finally, the court in Hernandez, recognized that the Sentencing Guidelines do not require the valuation of loss to be precise. Id. at 1118.

Petitioner's allegation that the district court erred in its upward adjustment, past level 11, is also without merit. Application Note 10 of § 2F1.1, provides that "[t]he adjustments for loss do not distinguish frauds involving losses greater than $5,000,000. Departure above the applicable guideline may be warranted if the loss *substantially* exceeds that amount."

(emphasis added). It is doubtful, that even Petitioner would argue that a loss in excess of $600,000,000 is not substantial in excess of $5,000,000.

Petitioner's reliance on § 2F1.1 Application Note 9(f) is completely misplaced. Application Note 9, states that because the "[d]ollar loss often does not capture the harmfulness and the seriousness of the conduct . . . an upward adjustment may be warranted. Examples may include the following: (f) completion of the offense was prevented, or the offense was interrupted before it caused serious harm." Although, the district court could have applied section (f), it decided to base its decision on subsection (c). The district court explicitly found that "the offense caused or risked physical or psychological harm," which according to note 9(c) may warrant an upward adjustment (RTS at 54). Pursuant to either, subsection (c) or (f) the district court would have been authorized to make an upward adjustment, and thus the district court did not err.[13/]

C. THE DISTRICT COURT DID NOT ERR WHEN IT CONSIDERED NAGHDI'S PAST CRIMINAL HISTORY AT NAGHDI'S SENTENCING HEARING

Petitioner correctly notes that pursuant to the applicable extradition treaty, and the Specialty Doctrine, the requesting nation may not prosecute an extradited defendant for crimes other than those which were granted by the extraditing country.

[13/] Finally, petitioner offers no precedent to support his fanciful argument that a failure to find one possible applicable subsection negates the application of another applicable subsection.

However, Naghdi was not prosecuted for crimes other than those which were granted for extradition. Petitioner offers no evidence to support his allegation that he was not extradited for the Los Angeles case. Second, Naghdi's conviction was based solely upon the Belrico and Owens & Miner deals, the crimes for which he was extradited. (RTS at 50).

The Supreme Court recently recognized that the criminal history portion of the Federal Sentencing Guidelines is a sentencing enhancement regime "evincing the judgement that a particular offense should receive a more serious sentence within the authorized range if it was . . . preceded by additional criminal activity." Witte v. United States, __ U.S. __, 115 S.Ct. 2199, 2208 (1995). The Court then held that "where the legislature has authorized such a particular punishment range for a given crime, the resulting sentence within that range constitutes punishment *only for the offense of conviction* for purposes of the double jeopardy inquiry." Id. (emphasis added). Pursuant to explicit holding of the Supreme Court, it is clear that Naghdi was not prosecuted at the sentencing phase for the Los Angeles crime.

The Introductory Commentary to § 4A specifically recognizes that prior criminal behavior is directly relevant to the determination of future dangerousness, and must be considered. Thus, at the sentencing phase of the trial, after Naghdi's

conviction, this Court appropriately considered Naghdi's criminal history, when deciding the appropriate sentence.[14/]

However even if Naghdi was prosecuted for the Los Angeles case, Petitioner's claim still fails short. Petitioner has offered no evidence which shows that he was not in fact extradited for the Los Angeles case. In fact the evidence suggests that the opposite of Petitioners allegation is true. At a status hearing Officer Challis, of Scotland Yard, testified as to the existence of flight charges in the extradition warrant. (RTMH I at 4)[15/]. At that hearing Counsel asked Challis about the extradition arrest warrant. Id. In pertinent part the line of questioning is as follows:

> Q. Was there actually an extradition warrant issued before his arrest?
> A. Yes.
> Q. [W]ere you aware of any other charges other than flight pending against him in the United States prior to his arrest?
> A. I was aware that there may be further charges. Exactly what, I didn't Know.
> Id.

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[14/] This court explicitly found that the Los Angeles crime and the Belrico/Owens & Miner crime did not involve the same counterfeiting scheme, and thus, "[t]hey were separate cases." (RTS at 50). In other words, this court recognized that the Belrico/Owens & Miner conviction was not based upon the Los Angeles criminal conduct.

[15/]"RTMH I" refers to the reporter's transcript of the status hearing held on December 5, 1989.

D. PETITIONER'S PREVIOUS COUNSEL DID NOT VIOLATE PETITIONER'S SIXTH AMENDMENT RIGHT TO COMPETENT ASSISTANCE OF COUNSEL

1. Introduction

To prevail on an ineffective assistance of counsel claim, petitioner must show that counsel's actions or omissions fell below the prevailing professional norm. Strickland v. Washington, 466 U.S. 668, 688 (1984). Pursuant to the standards set forth by the Supreme Court, the petitioner must demonstrate that counsel's actions were outside the wide range of professional competent assistance, and that the defendant was prejudiced by reason of counsel's actions. Lockhart v. Fretwell, 506 U.S. 364, 368 (1993); Strickland v. Washington, 466 U.S. at 687. Furthermore, "[t]here is a strong presumption that counsel's performance falls within the 'wide range of professional assistance,' [citation omitted]." Kimmelman v. Morris, 477 U.S. 365, 381 (1986); Smith v. Ylst, 826 F.2d 872, 875 (9th Cir. 1987)("there is a strong presumption that a lawyer is competent and that presumption must be overcome with concrete evidence"), cert. denied, 488 U.S. 829 (1988).

"[E]very effort [must] be made to avoid the distorting effects of hindsight." Bonin v. Calderon, 59 F.3d 815, 833 (9th Cir. 1995), *cert. denied*, __ U.S. __, 116 S.Ct. 718 (1996), *and reh'g denied*, __ U.S. __, 116 S.Ct. 977 (1996), quoting Campbell v. Wood, 18 F.3d 662, 673 (9th Cir. 1994) (en banc), *reh'g and reh'g en banc denied*, 20 F.3d 1050 (9th Cir. 1994), *and cert. denied*, ___ U.S. ___, 114 S.Ct. 2125 (1994). Thus, counsel's performance must be evaluated under the circumstances of the time

period in which the decision was made. Lockhart v. Fretwell, 506 U.S. at 368; Strickland v. Washington, 466 U.S. at 687. Additionally, there is a presumption that under the circumstances the challenged action might be considered sound trial strategy. United States v. Quintero-Barraza, 78 F.3d 1344, 1348 (9th Cir, 1995), *cert. denied*, __ U.S. __, 65 U.S.L.W. 3259 (1996), citing Strickland, 466 U.S. at 689.

The burden of establishing both prongs of the Strickland standard lies with the petitioner. Kimmelman v. Morrison, 477 U.S. at 381; United States V. Olson, 925 F.2d 1170, 1173 (9th Cir. 1991); United states v. Quintero-Barraza, 577 F.3d 836, 839 (9th Cir. 1995). If petitioner fails to sufficiently prove either prong of the standard, the claim is extinguished. United States v. Olson, 925 F.2d 1170, 1173 (1991).

Petitioner's burden required by the first prong, mandates that he identify material, specific errors and omissions. United States v. Molina, 934 F.2d 1440, 1447 (9th Cir. 1991). This burden cannot be fulfilled through allegations that are merely conclusory. Shah v. United States, 878 F.2d 1156, 1161 (9th Cir. 1989), cert. denied, 493 U.S. 869 (1989); United States v. Schaflander, 743 F.2d 714, 721-22 (9th Cir. 1984), cert. denied, 470 U.S. 1058 (1985). "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgements support the limitations on investigation." Bonin v. Calderon, 59 F.3d at 833 quoting,

Strickland v. Washington. "[A] particular decision not to investigate must be directly assessed for reasonableness in all circumstances, applying a heavy measure of deference to counsel's judgements." Id, quoting, Strickland v. Washington. Furthermore, the Ninth Circuit has recognized that it is not for the Court to second guess counsel's decisions. Bonin v. Calderon, 59 F.3d at 833; Campbell v. Wood, 18 F.3d at 673. The reasoning for such a rigorous standard is that "[t]here are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." Strickland v. Washington, 466 U.S. at 690-91, referencing, Goodpaster, The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N. Y. U. L. Rev. 299, 343 (1983). Finally, were evidence is found to be admissible, counsel's failure to file a motion to suppress is not ineffective assistance of counsel. United States v. Molina, 934 F.2d at 1447. (Court also declined to address ineffective assistance of counsel claim on inadequate pretrial investigation because the record did not contain sufficient evidence to overcome presumption [atty didn't pursue defense that defendant wanted]).

The "purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, . . . [it] is simply to ensure that criminal defendants receive a fair trial." Strickland v. Washington, 466 U.S. at 690-91. Therefore, pursuant to the second prong (prejudice), petitioner must show that "counsel's deficient performance render[ed] the result of the trial unreliable or the

proceeding fundamentally unfair." Lockhart v. Fretwell, 506 U.S. 364, 368 (1993). In Lockhart, the Supreme Court went on to state that "an analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective. To set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle him." Lockhart v. Fretwell, 506 U.S. at 368; United States v. Cronic, 466 U.S. 648, 658; United States v. Quintero-Barraza, 78 F.3d at 1348; United States v. Palomba, 31 F.3d 1456, 1461 (9th Cir. 1994).

2. Naghdi's Previous Counsel Was Not Ineffective In Failing To Object To Naghdi's Characterization as An Organizer

Petitioner argues that Naghdi's previous counsel ("counsel") was ineffective because counsel did not properly object to Naghdi being characterized as an "organizer". However, it is worth noting, that counsel did object to organizer points, after the Government sought such a characterization. (RTS at 47).

Within the same breath, Petitioner further alleges that counsel directly caused this Court to find that Jack Russell was the only co-conspirator. The evidence does not support this conclusion. Counsel clearly objected to Naghdi being characterized as an "organizer", by alleging that Jack Russell was the organizer of the criminal operation instead. Furthermore, the government had already alleged that Jack Russell was a co-

conspirator before the sentencing hearing had even started.[16] At the February 21, 1990 status hearing the government stated that it was obvious that Jack Russell was a co-conspirator. (RTSH III at 22).[17]

At the time Naghdi was sentenced there was still some dispute as to whether §3B1.1 required more than one participant. The Ninth Circuit recognized this dispute, and provided a lengthy discussion on the reasoning behind its decision. U.S. v. Anderson, 942 F. 2d 606, 614-17 (1991), *abrogated on other grounds*, 508 U.S. 36 (1993).[18] Since this area was in dispute at the time of Naghdi's sentencing, it was reasonable for counsel to believe that an "organizer" characterization might not depend upon the existence of another participant. Consequently, if counsel is found to have stipulated to Russell being a co-conspirator, it was justified at the time, and was a proper strategic decision

Furthermore, as illustrated above, it is Petitioner's burden to overcome the "virtually unchallengeable" presumption that at that time, counsel's strategic decisions were competent. Bonin, quoting Strickland, supra. Therefore, since Petitioner has not provided any evidence with which to evaluate counsel's performance at the time in question, the presumption of competence must stand.

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[16]Petitioner, mistakenly asserts that the government took the position that Jack Russell was a victim.

[17]"RTSH III" refers to the report's transcript of the status hearing held on February 21, 1990.

[18]The 9th Circuit, also recognized that the Fifth Circuit precedent could easily be interpreted as not requiring an additional participant. U.S. v. Anderson, 942 F. 2d at 617.

As previously noted, the district court correctly found Naghdi to be an organizer. Thus, there was no ineffective assistance of counsel on this issue. United States v. Molina, 934 F.2d at 1447. Even if counsel was deficient, the outcome cannot be considered "unfair" or "unreliable", as Jack Russell was properly found by the Court to be a co-conspirator. (RTS at 48). This finding clearly made Naghdi eligible for "organizer" points. In conclusion, because Naghdi was properly characterized as an organizer, there was no prejudice, and the ineffective assistance of counsel claim on this issue must fail.

3. Naghdi's Counsel Was Not Ineffective In Failing To Object To The District Court's Determination Of The Amount Of Loss

As noted above the district court properly determined the amount of loss applicable to Naghdi's criminal activities. Accordingly, counsel's failure to object was not deficient. United States v. Molina, 934 F.2d at 1447. Even if counsel's omission was deficient, it did not prejudice the defendant since the amount of loss was properly determined.

4. Naghdi's Previous Counsel Was Not Ineffective In Failing To Object To The District Court's Consideration Of The Los Angeles Crime

As stated above the district court properly considered the Los Angeles crime at the sentencing hearing. Thus, counsel was not ineffective in failing to object to such evidence. United States v. Molina, 934 F.2d at 1447. Even if counsel's failure to object is considered deficient, Naghdi was not prejudiced by the admission since such evidence is proper when evaluating the appropriate sentence for the convicted.

5. Naghdi's Previous Counsel Was Not Ineffective In Failing To Present The CIA Defense

As stated above it is Petitioner's burden to overcome the "virtually unchallengeable" presumption that a counsel's strategic decisions are competent. Bonin, quoting Strickland, supra. However, Petitioner has offered no concrete evidence from which to evaluate counsel's actions. Because there is insufficient evidence with which to evaluate counsel, Petitioner's claim must fail.

First, Petitioner has produced no evidence whatsoever, that counsel's concern about Naghdi's self-incrimination rights was unfounded. Instead, Petitioner merely offers inappropriate, and distorting "hindsight" proof of counsel's alleged ineffectiveness. Bonin, at 833. Petitioner's only evidence of ineffectiveness is the unpublished appellate decision disagreeing with counsel's assessment of the situation. Consequently, since Petitioner has offered no evidence which evaluates counsel's actions at the time of performance, this claim too must fail.

Furthermore, Petitioner has not shown that counsel's decision was based upon the self incrimination concern. All that Petitioner has shown, is that at a status hearing counsel was concerned with his client losing protection against self-incrimination. Counsel could just as easily decided that this defense was not worth pursuing, or that it would conflict with the defense used at trial. This supposition is supported by the fact that there was not even enough evidence to support the issuance of the subpoenas as to high governmental officials. (RTSH I at 23,

and RTHS I at 31).[19] The affidavit signed by Naghdi under the penalty of perjury was only one alternative in which to authorize the issuance of the subpoenas. The district court gave appellant the opportunity to establish his position through any means possible. (RTCC at 13-14).[20] Because there was so little evidence, counsel could have merely used the argument for its appellate value. It is important to note that at the January 31, 1990 in chambers conference, counsel was concerned with perjury charges being brought against his client. Counsel then tried to shield Naghdi from the possibility of perjury charges by alleging that the Fifth Amendment protected against a requirement that subjected Naghdi to the possibility of a perjury. (RTCC at 17).[21] In the light of this evidence it is very likely that counsel decided that the defense was so flimsy that it did not warrant the possibility of a subsequent perjury charge.[22]

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[19]Specifically, the Court stated, "there's just not enough corroboration been submitted that would say that what is apparently inherently incredible may, still, in fact, be true because of the corroborated data." (RTSH I pg. 23 lines 17-20). "RTSH I" refers to the reporter's transcript of the status hearing held on February 1, 1990. "RTHS I" refers to the reporters transcript of hearing re subpoenas held on February 12, 1990.

[20]"RTCC" refers to the reporter's transcript of the in chambers conference held on January 31, 1990.

[21]At the status hearing counsel stated that "I suppose the issue is, if it was ever attempted to be used in a later Fifth Amendment -- in a later perjury proceeding" pg 17 of Jan. 31 Status Hearing.

[22]The government does not address the thoroughness of the investigation, as petitioner only alleges that counsel's strategic decision was ineffective. See Bonin, quoting Strickland supra.

According to the second prong (prejudice), the ineffective assistance claim must also fail. Petitioner merely alleges that Naghdi was not allowed a chance to present the CIA defense, he does not make any attempt to show that the defense would have materially affected the outcome of the case. (which is below the standard required by the Supreme Court). In fact the evidence suggests that the CIA defense was meritless. First, at the sentencing hearing, the Court explicitly found that the counterfeit pharmaceuticals existed. (The Court stated that it found "overwhelmingly, that the drugs existed.") (RTS at 34-36). Second, in the light of the failure of the Rule 17(c) subpoenas to uncover any evidence whatsoever, the witness' would presumably have badly damaged Naghdi's case.[23/]

[23/]See also footnote 19 supra.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JAVID NAGHDI, Petitioner, v. UNITED STATES OF AMERICA, Respondent,	Criminal No. 88-0768-K Civil No. 96-1528-K CERTIFICATE OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN DIEGO)

IT IS HEREBY CERTIFIED THAT:

I, Teresa Martin am a citizen of the United States over the age of eighteen years and a resident of San Diego County, San Diego, CA; my business address is 880 Front Street, San Diego, California; I am not a party to the above-entitled action; and,

On this date I deposited in the United States mail at San Diego, California, in the above-entitled action, in an envelope bearing the requisite postage; Government's Response And Opposition To Petition Filed Under 28 U.S.C. § 2255, addressed to Job Serebrov, P.O. Box 1457, Siloam Springs, AR 72761-1457, the last known address at which place there is delivery service of mail from the United States Postal Service.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 21, 1996.

Teresa Martin
TERESA MARTIN