UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

UNITED STATES OF AMERICA

vs. **Case No. 5:00-cr-21-Oc-32GRJ**

MICHAEL SPIELVOGEL

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PETITIONER SPIELVOGEL'S FIRST AMENDMENT TO BOND MOTION

Comes Now MICHAEL SPIELVOGEL, by and through his counsel, WILLIAM MALLORY KENT, pursuant to this Court's order permitting an amendment of his motion for release pending his habeas proceeding, and amends the motion by the addition of the following arguments:

Release pending habeas corpus is expressly authorized by Rule 23, Federal Rules of Appellate Procedure, which provides:

> Rule 23. Custody or Release of a Prisoner in a Habeas Corpus Proceeding
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> (a) Transfer of Custody Pending Review. Pending review of a decision in a habeas corpus proceeding commenced before a court, justice, or judge of the United States for the release of a prisoner, the person having custody of the prisoner must not transfer custody to another unless a transfer is directed in accordance with this rule. When, upon application, a custodian shows the need for a transfer, the court, justice, or judge rendering the decision under review may authorize the transfer and substitute the successor custodian as a party.
>
> (b) Detention or Release Pending Review of Decision Not to Release.

> While a decision not to release a prisoner is under review, the court or judge rendering the decision, or the court of appeals, or the Supreme Court, or a judge or justice of either court, may order that the prisoner be:
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> (1) detained in the custody from which release is sought;
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> (2) detained in other appropriate custody; or
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> (3) released on personal recognizance, with or without surety.
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> (c) Release Pending Review of Decision Ordering Release. While a decision ordering the release of a prisoner is under review, the prisoner must--unless the court or judge rendering the decision, or the court of appeals, or the Supreme Court, or a judge or justice of either court orders otherwise--be released on personal recognizance, with or without surety.
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> (d) Modification of the Initial Order on Custody. An initial order governing the prisoner's custody or release, including any recognizance or surety, continues in effect pending review unless for special reasons shown to the court of appeals or the Supreme Court, or to a judge or justice of either court, the order is modified or an independent order regarding custody, release, or surety is issued.[1]

In *Gomez. United States*, 899 F.2d 1124, 1125 (11th Cir. 1990), the Eleventh Circuit, without reference to Rule 23, held that the governing standard for such release is as follows:

> A prisoner seeking release pending habeas corpus can be granted bail under two sets of circumstances: *first,* he must demonstrate a likelihood of success on the merits of a substantial constitutional claim; *second,*

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[1] *But see Pethtel v. Attorney General of Indiana*, 704 F.Supp. 166 (N.D. Ind. 1989), finding Rule 23 inapplicable before entry of an order on a habeas.

> extraordinary and exceptional circumstances must exist which make the grant of bail necessary to preserve the effectiveness of the habeas corpus relief sought. *Calley v. Callaway,* 496 F.2d 701, 702 (5th Cir.1974).

However, that decision, as noted, failed to cite Rule 23, and instead cited a pre-Rule 23 case, *Calley v. Calloway.*[2] Rule 23 has been interpreted by the United States Supreme Court in *Hilton v. Braunskill*, 481 U.S. 770, 777, 107 S.Ct. 2113, 2120 (1987) in the context of release pending review, to require consideration of the factors that would apply to a civil stay. In particular the Supreme Court noted that an important factor is the length of sentence remaining to be served. Where the remaining sentence is short, the factor weighs in favor of the defendant's release:

> The State's interest in continuing custody and rehabilitation pending a final determination of the case on appeal is also a factor to be considered; *it will be strongest where the remaining portion of the sentence to be served is long, and weakest where there is little of the sentence remaining to be served*.

(Emphasis supplied)

Gomez can be reconciled with *Hilton* and Rule 23 by interpreting *Gomez*'s requirement of "extraordinary and exceptional circumstances" . . . "necessary to preserve the effectiveness of the habeas corpus relief sought," in light of *Hilton's*

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[2] Rule 23 went into effect in 1986, *Calley* was decided in 1974. *Cf. In re Wainwright,* 518 F.2d 173, 174 (5th Cir.1975) (*per curiam*) ("In spite of the lack of specific statutory authorization, it is within the inherent power of a district court of the United States to enlarge a state prisoner on bond pending hearing and decision on his application for a writ of habeas corpus.")

consideration of the length of sentence remaining to be served. This is consonant with the alternative finding permitting release under 18 U.S.C. § 3143, which provides:

> (b) Release or detention pending appeal by the defendant.--
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> (1) Except as provided in paragraph (2), the judicial officer shall order that a person who has been found guilty of an offense and sentenced to a term of imprisonment, and who has filed an appeal or a petition for a writ of certiorari, be detained, unless the judicial officer finds–
>
> (A) by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released under section 3142(b) or (c) of this title; and
>
> (B) that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in–
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> (i) reversal,
>
> (ii) an order for a new trial,
>
> (iii) *a sentence that does not include a term of imprisonment, or*
>
> (iv) *a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process.*
>
> If the judicial officer makes such findings, such judicial officer shall order the release of the person in accordance with section 3142(b) or (c) of this title . . .

18 U.S.C. § 3143 (emphasis supplied).

The Government concedes that Spielvogel is not a danger or risk of flight, so

the decision depends ultimately on finding a "substantial question of law or fact" which is "likely to result in" either "a new trial" or a sentence "that does not include a term of imprisonment" or is "less than the time already served plus the expected duration" of the habeas proceeding.

The circuits disagree as to Congress's intent in defining the phrase "substantial question." Two standards have evolved from the circuits' attempts to define a "substantial question." One view states that a substantial question is "one which is either novel, which has not been decided by controlling precedent, or which is fairly doubtful or debatable." *United States v. Miller*, 753 F.2d 19, 23 (3rd Cir. 1985); *United States v. Handy*, 761 F.2d 1279, 1282 (9th Cir. 1985); *see also United States v. Messerlian,* 793 F.2d 94, 96 (3d Cir.1986). This view is referred to as the "fairly debatable" standard. The second interpretation defines a substantial question as "a 'close' question or one that very well could be decided the other way." *United States v. Giancola*, 754 F.2d 898, 901 (11th Cir. 1985). This view is referred to as the "close question" standard. Our Circuit applies a mix of the fairly debatable and the close question standard under § 3143.

What is a "substantial question" must be decided on a case by case basis:

> In short, a "substantial question" is one of more substance than would be necessary to a finding that it was not frivolous. It is a "close" question or one that very well could be decided the other way. Further,

> there are no blanket categories for what questions do or do not constitute "substantial" ones. Whether a question is "substantial" must be determined on a case-by-case basis.

United States v. Giancola, 754 F.2d 898, 901 (11th Cir. 1985).

The issues presented by Spielvogel's 2255 petition satisfy the above standard as will be explained more fully below - the issues are substantial, that is fairly debatable, and the petition presents the extraordinary circumstance that but for release pending habeas corpus Spielvogel will serve the entire balance of his sentence before the habeas can be decided.[3]

In his 2255 petition, Spielvogel argues that he requested his then appellate counsel, Brodersen, to appeal his convictions and sentence. His lawyer failed to appeal two of his five counts of conviction, counts four and five, laboring under the mistake of law and fact that Spielvogel had not yet been sentenced on those two counts, therefore the appeal was not ripe.

Although there has been no evidentiary hearing as of yet on the 2255 petition, we know counsel Brodersen's reasoning for not appealing counts four and five,

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[3] Spielvogel has approximately eight months credit for time served and his sentence was 18 months. Allowing for the additional credit for good behavior under 18 U.S.C. § 3624(b), Spielvogel has approximately seven to seven and a half months left to serve. We ask the Court to take judicial notice that it is unlikely that a 2255 petition involving a record as complex and lengthy as this with evidentiary hearings anticipated would be decided in seven months.

because this Court itself asked Brodersen this very question in a telephonic conference prior to the resentencing.

> [BRODERSEN] Mr. Spielvogel, I guess, is -- you could refer to it as a quirk -- was never really sentenced on Counts IV and V. The presentence investigation and the presentence report did not address Counts IV and V independently. And Judge Hodges, in the initial sentencing of the defendant, did not -- did not impose a sentence on Count IV and V.
>
> That's not to say that Mr. Spielvogel was not convicted of Counts IV and V, because, as we know, he was. Having said all of that, I really do not have a -- a preference either way.

[Transcript, January 30, 2003 conference, p. 15]

At a later May 30, 2003 telephonic conference counsel Brodersen explained why he did not appeal counts four and five:

> [BRODERSEN] I represented him [Spielvogel] in the appeal on a retained basis. And I made a decision - - or, I don't even know if I would refer to it as a decision. *I was of the opinion that because he had not been sentenced on counts four and five, that they were not ripe for appeal and unless and until he was sentenced on counts four and five,*

you know, he didn't have - - ***he didn't even have the right to appeal those counts, or, you know, the conviction on those counts.*** *And, you know, I may or may not ultimately be deemed to have made a mistake, I just don't know.*

[Transcript, May 30, 2003 hearing, page 5, emphasis supplied].

This Court asked counsel Brodersen:

[THE COURT] [W]here are you getting the idea that counts four and five were not the subject of the [first] appeal and have not already been ruled on by the Eleventh Circuit? . . .

[MR BRODERSEN] Well, again, the idea because they were not - - they were not addressed - - well, I wrote the initial brief on behalf of Mr. Spielvogel, as well as the reply brief. I did not address the convictions on counts four and five in any respect whatsoever in the initial brief. I attempted to raise them in the reply brief because Mr. Spielvogel urged me to. He was incarcerated at the time. And we had a long telephone conversation and the government moved to strike it, saying you can't raise it for the first time in the reply brief, correctly, and the court struck them, the arguments relating to counts four and five. So, I was never able to make - - perhaps - - and again, as I said before, *perhaps through*

my own mistakes I was never able to argue the merit of his convictions on counts four and five, and therefore, they were never considered by the Court of Appeals.

[Transcript, May 30, 2003 hearing, pages 8-9].

Following the first appeal Spielvogel was resentenced on the two remaining, unappealed counts. At that point Spielvogel's counsel belatedly attempted to comply with Spielvogel's request that his conviction on those two counts, as well as the sentence, be appealed. Spielvogel's counsel raised meritorious arguments - - or at least arguments which meet the appeal bond standard of being fairly debatable and warranting encouragement - - on the resentencing appeal, challenging the convictions for the first time. In response the Government did not bother to address the merits of the challenge to the convictions, arguing correctly, that the merits arguments were waived by the failure to present them in the first appeal. The Eleventh Circuit agreed with the Government's argument and declined to address the challenge to counts four and five. Spielvogel's challenge to the merits of his conviction has never been heard by the court of appeals.

On these facts Spielvogel is entitled to a belated appeal as a remedy for his counsel's failure to comply with his instruction to appeal his convictions. Counsel labored under the mistake of law and fact that Spielvogel ***did not have a right to***

appeal counts four and five. No reasonably competent attorney could have reached this conclusion on the record in this case. The judgment and sentence clearly convicted and sentenced Spielvogel on counts four and five. Counts four and five were not omitted from the judgment or sentence. Counsel's actions deprived Spielvogel of his right of appeal of these two convictions; counsel's performance was deficient and Spielvogel was prejudiced. The prejudice, in the first instance was the denial of his right of appeal and the complete deprivation of counsel for that appeal - that is, as to counts four and five, the only remaining counts of conviction.

> We have long held that a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable. See *Rodriquez v. United States,* 395 U.S. 327, 89 S.Ct. 1715, 23 L.Ed.2d 340 (1969); cf. *Peguero v. United States,* 526 U.S. 23, 28, 119 S.Ct. 961, 143 L.Ed.2d 18 (1999) ("[W]hen counsel fails to file a requested appeal, a defendant is entitled to [a new] appeal *without showing that his appeal would likely have had merit*").[4]

Roe v. Flores-Ortega, 528 U.S. 470, 477, 120 S.Ct. 1029, 1035 (2000) (emphasis supplied).

This is not a case of counsel making a strategic choice to focus his arguments on those *issues* that counsel thinks most likely to prevail on appeal - clearly counsel can choose the *issues* to appeal. I. *Holladay v. Haley,* 209 F.3d 1243, 1256 (11th Cir.

[4] Spielvogel bears no burden to establish that there would be merit to the new appeal. "Where counsel has ignored a direct request to prosecute an appeal, the defendant is entitled to an out-of-time appeal without any showing that there are viable grounds on which to base an appeal." *Montemoino v. United States,* 68 F.3d 416, 417 (11th Cir.1995).

2000) ("In order to render effective assistance, counsel need not raise every possible nonfrivolous issue on appeal." citing *Jones v. Barnes,* 463 U.S. 745, 751, 103 S.Ct. 3308, 3312, 77 L.Ed.2d 987 (1983)). Rather, this was a complete *Cronic*[5] failure of counsel to act as counsel guaranteed under the Sixth Amendment and a violation of Spielvogel's right to Due Process in frustrating Spielvogel's right of appeal by entirely failing to challenge *two counts of conviction* solely as a result of counsel's mistake of law and fact that Spielvogel did not have a right to appeal these two counts.[6]

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[5] *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039 (1984).

[6] We frame this argument in Sixth Amendment terms as well as Due Process, cognizant, however, that the Supreme Court prefers to analyze appellate rights under the Due Process clause. The Supreme Court's decision in *Martinez v. Court of Appeal of California,* 528 U.S. 152, 120 S.Ct. 684, 145 L.Ed.2d 597 (2000), stands for this proposition. In that case, Martinez, a self-taught paralegal with twenty-five years' legal experience, was convicted of embezzlement in California state court. *Martinez,* 528 U.S. at 154-55, 120 S.Ct. 684. Martinez appealed his conviction and sought to represent himself, invoking his Sixth Amendment right to conduct his own defense, as articulated in *Faretta v. California,* 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). *Id.* The California Court of Appeals denied his request to defend himself, stating:

There is no constitutional right to self-representation on the initial appeal as of right. The right to counsel on appeal stems from the due process and equal protection clauses of the Fourteenth Amendment, not from the Sixth Amendment, which is the foundation on which *Faretta* is based. *Id.* (citing *People v. Scott,* 64 Cal.App.4th 550, 554, 75 Cal.Rptr.2d 315 (Cal.Ct.App.1998)).

The United States Supreme Court affirmed. *Id.* The Court began its analysis by

> A defendant, this Court affirmed, has "the ultimate authority" to determine "whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal." *Jones v. Barnes,* 463 U.S. 745, 751, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983); *Wainwright v. Sykes,* 433 U.S. 72, 93, n. 1, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977) (Burger, C. J., concurring). Concerning those decisions, an attorney must both consult with the defendant and obtain consent to the recommended course of action.

Florida v. Nixon, 543 U.S. 175, 187, 125 S.Ct. 551, 560 (2004).

Brodersen did not have the right, even had he had a reasonable basis for his decision, to choose to forego Spielvogel's right of appeal to counts four and five without Spielvogel's express consent.

Even if counsel were granted the latitude to choose to forego an appeal of a felony conviction despite a defendant's express instruction to appeal that conviction -

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observing that the federal constitution does not require states to provide any form of appellate review whatsoever. *Id.* at 159, 75 Cal.Rptr.2d 315; *see also McKane v. Durston,* 153 U.S. 684, 687-88, 14 S.Ct. 913, 38 L.Ed. 867 (1894). Because "[t]he right of appeal, as we presently know it in criminal cases, is purely a creature of statute . . . [i]t necessarily follows that the [Sixth] Amendment itself does not provide any basis for finding a right to self-representation on appeal." *Martinez,* 528 U.S. at 160, 120 S.Ct. 684 (citation omitted). The Court continued: "*In light of our conclusion that the Sixth Amendment does not apply to appellate proceedings,* any individual right to self-representation on appeal based on autonomy principles must be grounded in the Due Process Clause." *Id.* at 161, 120 S.Ct. 684 (emphasis added).

However, the Supreme Court has applied Sixth Amendment analysis to counsel's performance or lack of performance on appeal. *See e.g., Roe v. Flores-Ortega*, 528 U.S. 470, 120 S.Ct. 1029 (2000).

- discretion we argue counsel is not allowed because to allow such discretion to appellate counsel is the functional equivalent of allowing *counsel* to concede guilt which clearly only the defendant, not counsel, has the right to choose to do or not do (*see Florida v. Nixon, supra*) - - the choice by counsel to do so would have to be a *reasonable* strategic choice, based on sound reason which other competent counsel under like circumstances would have chosen. That is not what happened here. This Court queried the appellate counsel on his choice to forego appealing the two omitted counts in a telephonic conference prior to the resentencing, and in response counsel gave his reason for not appealing the two counts - - his reason was that the two counts were not yet ripe for appeal because, he asserted, Spielvogel had not yet been sentenced on the two counts. This answer was patently wrong - - and in that conclusion we are supported and this Court is bound by the decision of the Eleventh Circuit in the second appeal in which it denied that claim on the merits.

Therefore there was no reasonable strategic choice to forego the appeal of the two omitted counts, rather, instead, counsel was ineffective because he based his decision on a mistake of fact and law, a mistake that no reasonably competent counsel would have made.

On these facts, as to this issue, Spielvogel's right to a belated appeal, the Government will have to concede Spielvogel is entitled to the requested relief, that

is, a belated appeal. Therefore, Spielvogel has presented an issue that is not only fairly debatable among jurists of reason, but is clearly meritorious for purposes of this 2255, accordingly, Spielvogel qualifies for release pending disposition of the habeas, given both a substantial, *i.e.,* meritorious, issue and the extraordinary circumstance that without release pending appeal the sentence will be completed during the habeas process.

The remedy under Eleventh Circuit precedent when a petitioner makes out a *Rodriguez* failure to appeal claim is to simply vacate the judgment and reimpose the same judgment and sentence triggering once again the right to file a notice of appeal. *United States v. Phillips,* 225 F.3d 1198, 1201 (11 Cir. 2000). Spielvogel is entitled to this remedy without the necessity of showing merit to the appeal issues themselves.[7]

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[7] When a 2255 petition presents mixed issues of both belated appeal and underlying merits issues, the proper approach is for the court to grant the belated appeal and hold the remaining issues in abeyance pending the outcome of the appeal.

> The Fifth Circuit has suggested that the district court could grant the petitioner a new trial if it found merit in any of the petitioner's other collateral claims, thereby pretermitting the claim based on counsel's failure to file a notice of appeal, or it could hold the remaining claims in abeyance or dismiss them without prejudice pending the outcome of the reinstated direct appeal. *Orozco-Ramirez,* 211 F.3d at 871 n. 15. We think the best approach is to dismiss without prejudice or hold in abeyance the resolution of remaining collateral claims pending the

However, come that belated appeal, Spielvogel will challenge his sentence on *Booker* Sixth Amendment grounds. Again, the Government will have to concede error in that Spielvogel's sentence resulted from *Booker* constitutional error, because of the use of judicial fact finding to determine that Spielvogel obstructed justice by his alleged false testimony at trial.

> direct appeal. There are significant inefficiencies to any other approach. If the district court were to deny a collateral claim under a different standard of review than applies on direct appeal, then the defendant might be entitled to relitigate the same claim in his reinstated direct appeal. Moreover, both the government and the petitioner could pursue collateral appellate proceedings on other claims that the outcome of the direct appeal might render unnecessary. Although in *Clisby v. Jones,* 960 F.2d 925, 936 (11th Cir.1992), we instructed district courts to resolve all claims in petitions brought pursuant to 28 U.S.C. § 2254, equally clear precedent of this Court directs that collateral claims should not be entertained while a direct appeal is pending. *See Welsh v. United States,* 404 F.2d 333 (5th Cir.1968) (binding authority in the Eleventh Circuit under *Bonner v. Prichard,* 661 F.2d 1206, 1209 (11th Cir.1981) (en banc)); *see also* Rules Governing 2255 Proceedings, Rule 5, advisory committee note; *United States v. Cook,* 997 F.2d 1312, 1319 (10th Cir.1993); *United States v. Gordon,* 634 F.2d 638, 638-39 (1st Cir.1980); *United States v. Davis,* 604 F.2d 474, 484 (7th Cir.1979); *Jack v. United States,* 435 F.2d 317, 318 (9th Cir.1970); *Womack v. United States,* 395 F.2d 630, 631 (D.C.Cir.1968); *Masters v. Eide,* 353 F.2d 517 (8th Cir.1965). Once the court has determined that the petitioner is entitled to a direct appeal, such an appeal is "pending" for all relevant policy purposes.

McIver v. United States, 307 F.3d 1327, 1332 (11th Cir. 2002).

Spielvogel will be able to satisfy this Circuit's plain error standard for unpreserved *Booker* claims, *United States v. Rodriguez*, 398 F.3d 1291, 1298 (11th Cir. 2005), based on this Court's prior statement that it would consider imposing a lesser sentence were it given the opportunity to do so on remand for resentencing. In its order releasing Spielvogel on the current appeal bond this Court stated that it would consider a lesser sentence, even a low end sentence not requiring incarceration if the guideline range were reduced to permit such a sentence.

Therefore, Spielvogel additionally meets the standard for release *pending the belated appeal* because his appeal will present a fairly debatable, *i.e.,* meritorious, *Booker* sentencing issue, and his sentence, as corrected under *Booker,* would be less than the time required for completion of the appeal itself, which is one of the two alternative standards for an *appeal* bond under 18 U.S.C. § 3143.

We do not think, under *McIver*, footnote 7, *supra*, that this Court should proceed to any further 2255 issue beyond a determination of the right to a belated appeal. Spielvogel meets the standard for release pending habeas corpus by virtue of the belated appeal argument.

That being said, there is clear merit to Spielvogel's arguments to reverse his convictions as to counts four and five. The argument is not simply spill-over prejudice, but that substantial, prejudicial evidence that was *not admissible* based on

the Eleventh Circuit's decision in the first appeal and this Court's order granting in part Pendergraft's motion *in limine* before the aborted second trial [Doc. 254], was considered by the jury in reaching its verdict as to counts four and five. Clearly this Court cannot be confident beyond a reasonable doubt that had the improperly admitted evidence not been admitted that the verdict would have been the same. As to Dr. Pendergraft's case, the exclusion of this evidence was serious enough that the Government obtained the permission of the Solicitor General to engage in an interlocutory appeal (which it lost), and then agreed to negotiate a sentence of time served for Dr. Pendergraft.

This is at least a fairly debatable question meriting, under the extraordinary circumstances of this case, release pending habeas corpus.

CONCLUSION

Accordingly, based on the above authority and just cause, Petitioner MICHAEL SPIELVOGEL respectfully requests that this honorable Court permit his continued release on conditions pending the resolution of the habeas proceeding.

Respectfully submitted,

THE LAW OFFICE OF
WILLIAM MALLORY KENT

s/William Mallory Kent
William Mallory Kent
Florida Bar No. 0260738
1932 Perry Place
Jacksonville, Florida 32207-3443
(904) 398-8000
(904) 348-3124 FAX
(904) 662-4419 Cell Phone
kent@williamkent.com
ATTORNEY FOR SPIELVOGEL

CERTIFICATE OF SERVICE

I hereby certify that on May 11, 2006, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following:

Assistant United States Attorney Mark Devereaux

mark.devereaux@usdoj.gov

and to all other counsel of record who are registered with the CM/ECF system.

s/William Mallory Kent
William Mallory Kent