

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
GAINESVILLE DIVISION

UNITED STATES OF AMERICA

vs.

Case No. 1:94-cr-01009-MP-1

JOHN RICHARD KNOCK
_____ /

**KNOCK'S MEMORANDUM OF LAW IN SUPPORT OF PETITION FILED
UNDER 28 U.S.C. § 2255**

Comes Now WILLIAM MALLORY KENT, as habeas counsel for JOHN RICHARD KNOCK, and files this his Memorandum of Law in Support of Petition Filed Under 28 U.S.C. § 2255.

**ISSUES AND SUPPORTING ARGUMENT TOGETHER WITH
POINTS AND AUTHORITIES OF LAW**

I. Madrid Plea Agreement

A. Knock was denied effective assistance of counsel by his trial counsel's failure to object to the admission of the Madrid plea agreement on the ground that the plea agreement constituted a guilty plea of a non-testifying co-defendant.

Probably the single most damaging piece of evidence in Knock's trial was the admission of his co-defendant, Albert Madrid's, Canadian plea agreement, under which Madrid had pled guilty to what amounted to a sub-conspiracy of the overarching conspiracy alleged in the indictment. The importance of this evidence was reflected in the prolonged effort by all parties to either exclude or admit this

evidence. Madrid objected on various grounds and Knock objected on the sole ground that he was denied his right of confrontation under the Sixth Amendment.¹

It was error to admit this plea agreement because it constituted a guilty plea of a non-testifying co-defendant. The law of this circuit is well settled that a non-testifying co-defendant's guilty plea (to the same or related charges) is reversible, plain error. Therefore, Knock received ineffective assistance of counsel² by his trial counsel's failure to object on this ground to the admission of the Madrid plea agreement. *United States v. Eason*, 920 F.2d 731 (11th Cir. 1990); *United States v. McLain*, 823 F.2d 1457 (11th Cir. 1987); *United States v. de la Vega*, 913 F.2d 861 (11th Cir. 1990).

¹ The denial of his right of confrontation was a valid argument. Indeed we argue in subsection I(C) *infra*, that it was ineffective assistance of appellate counsel for Knock's appellate counsel to not raise the confrontation argument on appeal.

² All ineffective assistance of counsel claims in this memorandum are based on the Sixth Amendment to the United States Constitution.

B. Knock was denied effective assistance of appellate counsel by the failure of his appellate counsel to argue the inadmissibility of the Madrid plea agreement on the basis of plain error.

The admission of the Madrid Plea Agreement against Knock was plain error and could have been raised on direct appeal even absent an appropriate and contemporaneous objection at the district court. *United States v. Eason*, 920 F.2d 731 (11th Cir. 1990). Had the error been raised on direct appeal, because it was plain error, Knock would have been entitled to a new trial. Accordingly it was ineffective assistance of appellate counsel for Knock's appellate counsel to not raise the issue on appeal. This constitutes cause and prejudice excusing Knock's failure to raise this issue on direct appeal. *United States v. Frady*, 456 U.S. 152, 167-168, 102 S.Ct. 1584, 1594 (1982).

C. Knock was denied effective assistance of appellate counsel by the failure of his appellate counsel to argue the inadmissibility of the Madrid plea agreement on the basis of the violation of Knock's right of confrontation, an objection which was preserved at the trial court level.

Knock's trial counsel did object on confrontation clause grounds to the admission of the Madrid Plea Agreement against Knock. This objection was well founded. *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004). *Crawford* was decided March 8, 2004, just two weeks after certiorari was denied on Knock. If Knock had raised a *Crawford* issue on appeal as he should have, either his petition

for certiorari would have been held pending disposition of *Crawford*, or if not, he would have been within time to petition for rehearing under Rule 44, Supreme Court Rules, therefore he would have been entitled to the benefit of the *Crawford* rule on his direct appeal. *Griffith v. Kentucky*, 479 U.S. 314, 107 S.Ct. 708 (1987).

D. Knock was denied effective assistance of counsel by the failure of his trial counsel to move to sever his trial from Madrid's trial in anticipation of the admission of the Madrid plea agreement.

Alternatively, Knock's trial counsel should have moved to sever Knock from Madrid in anticipation of the government's intention to use the Madrid Plea Agreement or moved for mistrial upon its admission based on the failure to sever. The plea agreement was arguably admissible against Madrid as a statement against interest, but it was not admissible against Knock. Therefore, despite the common rule that coconspirators are normally to be tried jointly, under these circumstances, if the government persisted in seeking to admit the Madrid Plea Agreement, Knock was entitled to severance. *United States v. Posner*, 764 F.2d 1535, 1537 (11th Cir. 1985).

II. Statute of Limitations

A. The court misadvised the jury as to the applicable statute of limitations and the erroneous instruction prejudiced Knock's defense.

Knock was indicted March 10, 1994 and re-indicted in a superseding indictment February 17, 1999. Knock went to trial on the superseding indictment.

The superseding indictment substantially broadened the charges both temporally and factually.

The applicable statute of limitations for all three counts in the superseding indictment was five years. Because the superseding indictment substantially broadened the charges from those set forth in the original indictment, the original indictment did not toll the statute of limitations, rather the statute of limitations ran from the date of the superseding indictment.

The trial court, however, instructed the jury that the governing date for the statute of limitations was March 10, 1989. This was incorrect. The correct statute of limitations date was February 17, 1994.

This error was not harmless in light of the evidence and defense presented in the trial. That is, the overwhelming bulk of the evidence in the case related to events well prior to 1994, and the defense in the case was that Knock had withdrawn from the conspiracy as to any agreement to import or distribute marijuana in the United States or to launder any money in the United States outside the statute of limitations. Even under the erroneous statute of limitations instruction given, this was a close case, with a jury which deliberated for two days before returning its guilty verdicts against Knock.

Knock's counsel was ineffective for failing to object to the improper jury

instruction on the statute of limitations and for failing to present the withdrawal-statute of limitations defense consistent with the law and facts. The law was well settled at the time of the trial that a superseding indictment which broadened the scope of the charges resulted in the statute of limitations not being tolled by the original indictment. Reasonably competent criminal defense counsel should have recognized this error and objected to the court's erroneous jury instruction which misstated the applicable date for the statute of limitations defense. The failure to object resulted in a jury instruction on statute of limitations which prejudiced Knock's defense resulting in the denial of Knock's Sixth Amendment right to effective assistance of counsel. *United States v. Ratcliff*, 245 F.3d 1246 (11th Cir. 2001); 18 U.S.C. § 3282.

B. Knock received ineffective assistance of counsel by his counsel's failure to object to the court's erroneous application of the statute of limitations to his superseding indictment and failure to properly present the statute of limitations defense to the jury as a theory of defense.

Because Knock's trial counsel failed to correctly apply controlling Eleventh Circuit precedent to the determination of the statute of limitations, he mis-argued the defense to the jury. This error denied Knock his Sixth Amendment right to effective assistance of counsel, because the error would not have been made by reasonably effective criminal defense counsel and prejudiced Knock's defense.

C. Knock received ineffective assistance of appellate counsel by his appellate counsel's failure to object to the erroneous jury instruction on the statute of limitations.

Although no objection was made at trial, it was fundamental error to misapply the statute of limitations when the correct date was readily determinable from the face of the record on appeal. This was plain error and should have been raised on direct appeal. Had it been raised on direct appeal Knock would have been entitled to reversal because the general verdict in his case does not preclude the possibility that the jury convicted him under a legally invalid theory of the statute of limitations. *United States v. Fuchs*, 218 F.3d 957 (9th Cir. 2000); *See Yates v. United States*, 354 U.S. 298, 312, 77 S.Ct. 1064, 1 L.Ed.2d 1356 (1957) *overruled on other grounds*, *Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978).

Knock received ineffective assistance of appellate counsel as a result of his appellate counsel's failure to raise the statute of limitations issue on direct appeal, because reasonably competent criminal appellate counsel would have recognized the error and the error was likely to result in reversal on appeal had it been raised on direct appeal. Ineffective assistance of appellate counsel constitutes cause for issue preclusion purposes. Alternatively if the error was not plain for appellate review

purposes, then the issue is not precluded by not having been raised on direct appeal.³

III. Knock Received Ineffective Assistance of Counsel Due to His Counsel's Concession of Guilt Due to His Own Misunderstanding of the Law Governing the Offense.

In opening statement May 2, 2000, Knock's trial counsel conceded that Knock had been engaged in an ongoing conspiracy to distribute marijuana as charged in the indictment, but that this was not a crime in the United States, only a crime in Canada. Shortly thereafter and while the trial was still in progress, this Court issued an order *sua sponte* May 10, 2000 [Docket 609], advising that the Court doubted that the theory of defense offered by Knock was legally sound, and requested the parties brief the question whether 21 U.S.C. §§ 841 and 846 applied extraterritorially. The Court suggested in Order 609 that it was of the opinion that §§ 841 and 846 applied extraterritorially.⁴

³ This same reasoning as to issue preclusion for failure to raise an issue on direct appeal applies to the remaining issues in this petition.

⁴ It is true that the government withdrew its request that the Court affirmatively instruct the jury that this was not a defense, but more important, the court did not give an instruction supporting Knock's counsel's assertion of his single theory of defense in opening statement. Indeed, Knock's counsel changed theories of defense after Order 609 and the government response 630, switching to a multiple conspiracies defense in closing argument. Knock's counsel then knew that the Court would not give an instruction supporting his opening statement theory of defense so he abandoned it. The bell could not be unrung, however, and the jury had heard the concession.

In response the government argued that §§ 841 and 846 applied extraterritorially [Docket 630]. The government and this Court were correct, §§ 841 and 846 apply extraterritorially as explained in the government and this Court's memoranda of law [Docket 609, 630]. Therefore, Knock's trial counsel's opening statement conceded the offense and was the functional equivalent of a guilty plea to count one of the superseding indictment.

We know this concession was based on his counsel's misapprehension of the law and not as the result of a reasonable strategic choice, because Knock's counsel filed an opposing brief [Docket 634] in which he persisted in his view that it was a defense to present a "Canada only" defense. Knock's counsel conceded Knock's guilt in his opening statement because he was laboring under a misunderstanding of the controlling law. Therefore it could not have been a reasonable strategic choice to concede guilt when the choice was dictated by a mistake of law. In any event it could not have been a reasonable strategic choice to concede guilt to count one of the superseding indictment when that count alone carried a life penalty, and indeed Knock was sentenced to life imprisonment for count one.

Conceding guilt constitutes ineffective assistance of counsel when the concession is based on a mistake of law. Concession of guilt inevitably results in actual and substantial disadvantage to the defendant. *Francis v. Spraggins*, 720 F.2d

1190 (11th Cir. 1983)(concession of guilt constitutes ineffective assistance of counsel and results in actual and substantial disadvantage to defendant); *Young v. Zant*, 677 F.2d 792 (11th Cir.1982)(concession based in part on mistaken understanding of trial process).

The decision to plead "guilty" or "not guilty" is a decision reserved solely for the accused based on his intelligent and voluntary choice. *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). An attorney may not admit his client's guilt which is contrary to his client's earlier entered plea of "not guilty" unless the defendant unequivocally understands the consequences of the admission. *Brookhart v. Janis*, 384 U.S. 1, 8, 86 S.Ct. 1245, 1249, 16 L.Ed.2d 314 (1966). Counsel may believe it tactically wise to stipulate to a particular element of a charge or to issues of proof. However, an attorney may not stipulate to facts which amount to the "functional equivalent" of a guilty plea. *United States v. Brown*, 428 F.2d 1100 (D.C. Cir. 1970); *Cox v. Hutto*, 589 F.2d 394 (8th Cir. 1979); *Achtien v. Dowd*, 117 F.2d 989 (7th Cir. 1941); *Wiley v. Sowders*, 647 F.2d 642, 650 (6th Cir.), cert. denied, 454 U.S. 1091, 102 S.Ct. 656, 70 L.Ed.2d 630 (1981)(cited with approval by our Circuit in *Francis, supra*).

IV. Money Laundering

A. The indictment alleged that Knock conspired to commit money laundering in violation of 18 U.S.C. § 1956(h) from January 1982 through April 1996, but conspiracy to commit money laundering under § 1956(h) was not made a crime until October 1992, therefore Knock may have been convicted based on conduct which was not criminal at the time it was committed, and Knock's sentencing guidelines were determined using pre-offense dollar amounts that could not properly be scored; the spill-over prejudice of this error in the indictment and presentation of the government's case invalidates the convictions under all three counts in this close case.

The superseding indictment under which Knock went to trial charged in count three that Knock conspired to launder money in violation of 18 U.S.C. § 1956(h). The indictment specifically alleged that Knock committed this offense from January 1982 through April 1996. Indeed, the bulk of the money laundering evidence focused on the time period prior to October 1992.

This was error as a matter of law, because conspiracy to launder money was not a criminal offense prior to October 28, 1992. Act of October 28, 1992, Pub.L. No. 102- 550, § 1530, 106 Stat. 4066 (originally codified at 18 U.S.C. § 1956(g); now codified at 18 U.S.C. § 1956(h)).

Knock's trial attorney did not object to the error in the indictment and did not object to the government's argument that Knock had conspired to launder money during a ten year period of time in which the conduct was not a criminal offense.

Reasonably competent criminal defense counsel would have objected to the

error in the indictment and the error in the government's presentation of the case to the jury. Knock was prejudiced by the failure of his counsel to object to the error in the indictment and presentation of the case. Knock was denied effective assistance of counsel by this failure. *United States v. Miranda*, 197 F.3d 1357 (11th Cir. 1999).

Knock's money laundering conviction also violated the *ex post facto* provision of the United States Constitution, because this court cannot be confident beyond a reasonable doubt that Knock was not convicted for conduct which occurred prior to the effective date of the statute. *Cf. United States v. Torres*, 901 F.2d 205 (2nd Cir. 1990).

Substantial testimony was presented to show that Knock had engaged in a criminal conspiracy to launder drug proceeds for an entire decade during which such conduct was not a criminal offense. The government was on clear notice as a matter of law that the offense it charged was not a criminal offense. There is no way to dispel this prejudice to Knock which not only spilled over, but was continually intermingled with the evidence of the drug conspiracy itself. Therefore Knock is entitled to have all three counts vacated due to the spill over prejudice of this error. *United States v. Adkinson*, 135 F.3d 1363 (11th Cir. 1998).

B. Knock is entitled to be resentenced due to the error in the application of the facts to the money laundering guidelines.

The presentence investigation report used at Knock's sentencing included in relevant conduct for count three the dollar amounts derived during the ten year period of time that it was not a crime to conspire to launder money. This was error under then controlling case law in the Eleventh Circuit. Knock is entitled to resentencing, and because the three counts were sentenced as part of a sentencing package, Knock is entitled to a *de novo* resentencing on all three counts. *United States v. Miranda, supra, United States v. Watkins*, 147 F.3d 1294 (11th Cir. 1998)(interdependence of guidelines sentencing results in sentencing package that is unbundled upon reversal of sentence on single count).

C. Knock received ineffective assistance of trial and appellate counsel as a result of the failure to object at trial or argue on appeal the error in connection with the money laundering allegation in the indictment.

The failure to object to the inclusion of pre-October 1992 conduct in the indictment and the inclusion of the pre-October 1992 money amounts in the determination of the offense level for the money laundering conspiracy constituted ineffective assistance of counsel because reasonably competent criminal defense counsel would have known that under the statute itself, the conduct was not a crime until October 1992, and controlling Eleventh Circuit precedent such sums could not

be scored. This was plain error and should have been raised on direct appeal, and it was ineffective assistance of appellate counsel to fail to do so. *United States v. Ard;ey*, 273 F.3d 991 (11th Cir. 2001)(court of appeals can correct sentencing error as plain error under Rule 52(b)).

V. Knock Received Ineffective Assistance of Counsel Due to His Counsel's Failure to Object to the Admission of Evidence of Foreign Importations Inadmissible under 21 U.S.C. § 952 or to Request Limiting Instructions.

Knock received ineffective assistance of trial and appellate counsel in the failure to object to the admission of evidence of foreign drug importations when Knock was charged with conspiracy to import marijuana into the United States.

It was an abuse of discretion to permit the government to present evidence of a conspiracy to import marijuana into countries other than the United States, when Knock was charged with conspiracy to import marijuana into the United States, and *not charged* with conspiracy to *export* marijuana from the United States to another country. The government's case focused on multiple importations into foreign countries, including Australia, Canada, and Holland. Indeed, the majority of the evidence in the case related solely to foreign importations. It was an abuse of discretion to admit such evidence in Knock's trial when he was charged with conspiracy to import marijuana into the United States. *United States v. Bolinger*, 796 F.3d 1394 (11th Cir. 1986); *United States v. Londono-Villa*, 930 F.3d 994 (2nd Cir.

1991); *United States v. Cabaccang*, 332 F.3d 622 (9th Cir. 2003).

Knock was denied effective assistance of counsel by his trial counsel's failure to object to the evidence of foreign importations. Reasonably competent counsel would have objected. The error prejudiced Knock because the majority of the evidence presented in the trial was evidence of foreign importations. Knock was denied effective assistance of appellate counsel by his appellate counsel's failure to raise this issue on direct appeal. The admission of such overwhelming evidence of foreign importations was plain error and had it been raised on appeal would have resulted in a reversal of the convictions. Alternatively, if not plain error, then the failure to raise the issue on direct appeal does not preclude consideration of the issue in this habeas.

VI. Knock Received Ineffective Assistance of Counsel Due to His Counsel's Spousal Privilege Arguments at Trial and On Appeal.

Knock received ineffective assistance of counsel by his trial and appellate counsel's presentation of the spousal testimonial privilege argument the merits of which had been foreclosed by controlling decisional authority from the United States Supreme Court, that is, that it was not Knock's privilege to assert. This misunderstanding of law undermined the reasonableness of the strategy (a) to object to the government's disqualification motion, (b) to object to the admission of the

privileged testimony, and (c) to focus the direct appeal on this merit-less issue.

The Supreme Court had foreclosed Knock's argument in *Trammel v. United States*, 445 U.S. 40, 100 S.Ct. 906 (1980), which held that the non testifying defendant could not assert the spousal testimonial privilege to exclude the testimony of the his spouse. Yet the linchpin of Knock's argument on appeal was that this Court had erred in admitting the spousal testimony. The Eleventh Circuit summarily denied this argument by citing *Trammel*.⁵

Knock's trial counsel also admits in Issue V of his direct appeal brief that his decision to oppose the disqualification motion was predicated on the mistaken belief that the spousal privilege would bar the admission of this testimony at trial, therefore he persisted in his opposition to the disqualification on the basis of this misunderstanding of the controlling law.

⁵ Although Knock also cited *Trammel* in his initial appeal brief, its significance was ignored. No argument was presented to explain why *Trammel* should not apply to Knock's appeal, or why the rule in *Trammel's* case should be revisited, reconsidered or overruled - which the Eleventh Circuit could not undertake in any event. Instead Knock exclusively argued in Issue I of the direct appeal brief that this Court erred in creating a joint participant in crime exception to the privilege. That argument overlooked the threshold obstacle that Knock did not have standing to assert it.

VII. Conflict of Interest

A. Knock was denied effective assistance of counsel and was irreparably prejudiced in the defense of his case by his own counsel's conflict of interest arising out of counsel's criminal involvement in the same criminal conduct as to which Knock was charged.

Only after Knock's conviction was final on direct appeal was evidence available to show that the government in fact had had Knock's trial and appellate counsel under criminal investigation *for criminal involvement in the Knock money laundering conspiracy.*

Knock's trial and appellate counsel entered a guilty plea on November 1, 2004 in the United States District Court for the District of New Jersey in case number 2:04-mj-08160 to a misdemeanor charge of failure to supply tax information in violation of 26 U.S.C. § 7203. This plea was entered under a written plea agreement by which the government and Knock's counsel agreed that the government could have prosecuted Knock's counsel for money laundering under 18 U.S.C. § 1956 or 1957 for the period 1996 to 2000. Although the written plea agreement itself is silent on the exact nature of the money laundering charges, a parallel criminal forfeiture complaint sworn to and filed by the United States in August 2004 sets forth in great detail the government's case that Knock's counsel had been engaged in a criminal conspiracy with the Knock-Duboc group to engage in money laundering and engaged

in substantive acts of money laundering for the Knock-Duboc group during the very time period alleged in the Knock's counsel's plea agreement.

The government did not disclose this conflict of interest to the district court prior to Knock's trial, although in hindsight it is clear that the secret grand jury proceedings in New Jersey as to which the government advised the district court that Knock's counsel was a *subject*, was in fact a grand jury investigating Knock's counsel for his own criminal conspiracy with the Knock-Duboc group in its money laundering activities. The government took the position at the district court in this district prior to Knock's trial that *it could not disclose the details of the investigation* due to the grand jury secrecy rule. However, what the government knew - and we submit Knock's counsel knew as well - was that it had Knock's counsel under criminal investigation for criminal involvement in a continuation of the very conspiracy as to which Knock was to go to trial and as to which the government presented evidence in Knock's trial - that is, the testimony of Naomi Phillips and others concerning the suitcase with a million dollars cash in Deutsch Marks.

The government did not make the necessary disclosures to allow this Court to make an informed determination whether there was a conflict of interest and if so, if it were a conflict which if disclosed to Knock could be waived by him.

Instead the government merely made the veiled suggestion that this Court

should consider the possible impact of *United States v. Fulton*, 5 F.3d 605 (2nd Cir. 1993). Knock was deprived of effective assistance of counsel as a result of his trial and appellate counsel's criminal involvement and criminal investigation. *United States v. Williams*, 372 F.3d 96 (2nd Cir. 2004); *United States v. Fulton*, 5 F.3d 605 (2nd Cir. 1993); *United States v. McLain*, 823 F.2d 1457 (11th Cir. 1987).

B. The criminal involvement of Knock's counsel in the Knock conspiracy was not considered in the Garcia hearing and was not waived by Knock, nor was it subject to his waiver.

Criminal involvement of a lawyer in the criminal conduct of the client is per se prejudicial. *Fulton*.

C. Alternatively, Knock's defense was in fact prejudiced by his counsel's criminal conflict of interest because Knock's defense was adversely affected by his counsel's criminal conflict of interest.

To prove adverse effect, a habeas petitioner must satisfy three elements. First, he must point to "some plausible alternative defense strategy or tactic that might have been pursued." *United States v. Fahey*, 769 F.2d 829, 836 (1st Cir.1985); see also *Porter v. Wainwright*, 805 F.2d 930, 939-40 (11th Cir. 1986). Second, he must demonstrate that the alternative strategy or tactic was reasonable under the facts. Because prejudice is presumed, see *Strickland v. Washington*, 466 U.S. 668, 692, 104 S.Ct. 2052, 2067 (1984), the petitioner "need not show that the defense would necessarily have been successful if [the alternative strategy or tactic] had been used,"

rather he only need prove that the alternative "possessed sufficient substance to be a viable alternative." *Fahey*, 769 F.2d at 836. Finally, he must show some link between the actual conflict and the decision to forgo the alternative strategy of defense. In other words, "he must establish that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests." *Id.* Applying this test to the actual conflict Knock's counsel suffered under reveals that it had an adverse effect on his performance. *See* Knock's trial counsel's own admission of adverse effect set forth in Issue IV of Knock's initial appeal brief, which is incorporated herein by reference.

VIII. Booker Arguments

A. Knock's decision to go to trial and forego a plea agreement was not knowingly and intelligently made because he was misadvised by his counsel and the court as to the sentencing consequences of a guilty plea, that is, that he would have to be sentenced in accordance with the sentencing guidelines which mandated a life sentence.

Knock was advised by his counsel that under the applicable sentencing guidelines the Court would have no choice but to sentence Knock to life imprisonment on counts one and two if Knock entered a guilty plea. Knock chose to go to trial based on this advice of his trial counsel that the court was *required* to impose a life sentence under the federal sentencing guidelines, that the guidelines were mandatory, not advisory. We believe Knock was given similar advice by the

Magistrate Judge as to the mandatory nature of the guidelines at his first appearance and arraignment.

However, as *United States v. Booker*, 125 S.Ct. 738 (2005), teaches, a mandatory application of the sentencing guidelines violates the Sixth Amendment, therefore the guidelines are not mandatory, but merely advisory.

The effect of this is that Knock entered his plea of not guilty and took his case to trial based on a misunderstanding that he faced, upon a guilty plea, a *de facto* minimum mandatory life sentence. Therefore his plea was not entered knowingly and intelligently, and he should be allowed to withdraw his plea of not guilty. *Boykin v. Alabama, supra*; *cf. United States v. Gaviria*, 116 F.3d 1498, 1512-13 (D.C. Cir. 1997) (defendant was advised that he faced life imprisonment on a plea and mandatory life on conviction at trial, when he actually faced only fifteen to twenty-one years on the plea); *Sparks v. Sowders*, 852 F.2d 882, 884-85 (6th Cir. 1988) (defendant was wrongly advised that he faced life without parole if he went to trial); *United States v. Rumery*, 698 F.2d 764, 766 (5th Cir. 1983) (holding that the defendant was grossly misinformed that he was charged with three counts and faced thirty years imprisonment when he was only charged in one count and faced only five years imprisonment); *United States v. Pitts* 763 F.2d 197 (6th Cir. 1985)(affirmative misstatement of the maximum possible sentence invalidates a guilty plea).

B. Knock is entitled to resentencing because his sentence was imposed in violation of *Apprendi v. New Jersey*, as expanded by *Blakely v. Washington* and *United States v. Booker*, and a timely *Apprendi* objection was made at the district court and preserved on direct appeal.

Knock preserved his *Apprendi* objection (*Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000)) at sentencing and on direct appeal, therefore the Court's application of the sentencing guidelines to impose a mandatory life sentence is subject to review in this habeas. Under *United States v. Booker*, 125 S.Ct. 738 (2005), the Court violated Knock's Sixth Amendment right to have the jury and not a judge determine any fact which would increase the applicable guideline range. Knock is entitled to resentencing at which the applicable sentencing guidelines will be considered advisory and not mandatory.

Under *Yates v. Aiken*, 484 U.S. 211, 108 S.Ct. 534 (1988) and *Penry v. Lynaugh*, 492 U.S. 302, 314-315, 109 S.Ct. 2934, 2944-2945 (1989), *Booker* is not subject to retroactivity analysis and Knock is entitled to the application of *Booker* to his habeas, because *Booker* is not a "new rule" but is merely an extension of the rule announced in *Apprendi*.

Only "new constitutional rules" are subject to retroactivity analysis under *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060 (1989). A case announces a new constitutional rule if the Supreme Court bases its decision in the Constitution and the

rule it announces was not dictated nor compelled by precedent. *Beard v. Banks*, ___ U.S. ___, 124 S.Ct. 2504 (2004). As dramatic as *Booker* seems, *Booker* merely reiterates the holding in *Apprendi* that, under the Sixth Amendment, all facts used to increase a defendant's sentence beyond the statutory maximum must be charged and proven to a jury. The rule announced in *Booker* was clearly dictated and compelled by *Apprendi* and its progeny.

Booker is merely an application of the rule of *Apprendi* to a new set of facts. The result in *Booker* was dictated and compelled by *Apprendi*. Therefore, under *Yates v. Aiken* and *Penry v. Lynaugh*, Knock is entitled to the application of *Booker* to his timely first petition under 28 U.S.C. § 2255. To decide Knock's petition, therefore, it is not necessary to determine whether *Booker* is *retroactively* applicable to cases on collateral review under *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060 (1989).

Many "new" holdings are merely applications of principles that are well settled at the time of conviction. As Justice Harlan explained in *Desist v. United States*, 394 U.S. 244, 89 S.Ct. 1030 (1969):

The theory that the habeas petitioner is entitled to the law prevailing at the time of his conviction is, however, one which is more complex than the Court has seemingly recognized. First, it is necessary to determine whether a particular decision has really announced a 'new' rule at all or whether it has simply applied a well-established constitutional principle

to govern a case which is closely analogous to those which have been previously considered in the prior case law . . ." 394 U.S., at 263-264, 89 S.Ct., at 1041.

This reasoning, which the Supreme Court endorsed in *Yates v. Aiken*, is controlling in Knock's case, because the decision in *Booker* was merely an application of the principle that governed the decision in *Apprendi*, which had been decided before Knock's sentencing took place.

Alternatively, If *Booker* is a "new rule," it should be accorded retroactive application because it is a watershed development and requires the observance of procedures implicit in the concept of ordered liberty and as such is retroactive under *Teague v. Lane*. But see *Varela v. United States*, ___ F.3d ___ (11th Cir. February 17, 2005)(*Booker* not retroactive because it fails *Teague* test, but not addressing *Yates-Perry* claim).

IX. Forfeiture

The forfeiture judgment in count four of the indictment must be vacated if either counts one or two are vacated, because the forfeiture was based upon the conviction in counts one and two.

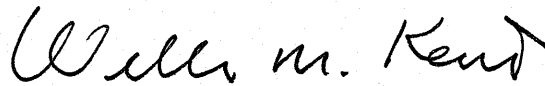
CONCLUSION

Based on the foregoing arguments and authorities Knock requests this Honorable Court vacate his conviction, sentence and fines on all three criminal counts

in the superseding indictment and the forfeiture judgment (and subsequent substitute property forfeiture orders) based on count four of the superseding indictment, and reset the case on the court's trial calendar, or in the alternative, set the petition for an evidentiary hearing upon due notice,⁶ or in the alternative, set the case for resentencing.

Respectfully submitted,

THE LAW OFFICE OF
WILLIAM MALLORY KENT

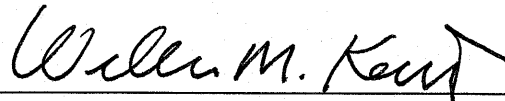


William Mallory Kent
Florida Bar No. 0260738
1932 Perry Place
Jacksonville, Florida 32207-3443
(904) 398-8000
(904) 348-3124 FAX
(904) 662-4419 Cell Phone
kent@williamkent.com

⁶ Petitions under 18 U.S.C. § 2255 typically require an adversarial hearing when factual disputes exist. Section 2255 requires the District Court to hold a hearing unless the court summarily grants relief, unless the files and records conclusively show that the petitioner is not entitled to relief. *Solis v. United States*, 252 F.3d 289, 294 (3rd Cir. 2001).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served on the office of the United States Attorney, Gainesville and Tallahassee Divisions, by United States Mail, First Class, Postage Prepaid, this 22nd day of February 2005.

A handwritten signature in cursive script that reads "William M. Kent". The signature is written in black ink and is positioned above a horizontal line.

William Mallory Kent