UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
GAINESVILLE DIVISION

JOHN RICHARD KNOCK,

Petitioner

vs. **Case No. 6:04-cv-1452-ORL-31KRS**

UNITED STATES,

Respondent
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PETITIONER KNOCK'S REPLY TO GOVERNMENT'S ANSWER

Pursuant to Rule 5 and this Court's order JOHN RICHARD KNOCK hereby files his reply to the Government's answer to Knock's petition under 28 U.S.C. § 2255.

Issue I - Madrid Plea Agreement

The Government argues that the admission of the Madrid plea agreement was harmless error, basing this assertion on a statement in the Eleventh Circuit's decision in *Madrid's* appeal that it was harmless error *as to Madrid* to introduce *hearsay as to his own inculpatory plea agreement,* and refers to this statement from the *Madrid* decision as "law of the case." [Government Answer, hereinafter referred to as "GA," p. 3]

Obviously a decision in *Madrid's* appeal cannot be law of the case as to Knock.

Even if Knock had joined in Madrid's issue on appeal, which he did not do, it still would not be law of the case, because there is no identity of issues.

The issue raised by Madrid on appeal as to the admission of his plea agreement, was a hearsay objection to the admission of his own guilty plea. Aside from the fact that that was a frivolous argument - at least prior to *Crawford v. Washington*[1] - that is not the issue being raised by Knock in his habeas petition.

Our argument, the merits of which the Government does not address,[2] is that the admission of a non-testifying co-defendant/co-conspirator's guilty plea was plain error - not because of hearsay but because of the denial of Knock's right to cross-examine Madrid and because the Eleventh Circuit has repeatedly ruled that the plea agreement of a non-testifying coconspirator is inadmissible *per se*. As the Eleventh Circuit has squarely held, this constitutes plain error because of the danger that the jury will abdicate its responsibility and regard the matter of the guilt of the

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[1] *Crawford v. Washington*, 541 U.S. 36 (2004).

[2] By failing to respond to the merits of Knock's argument, we contend that the government has waived this issue and has conceded the merits, and on this basis alone, Knock should prevail. *Riverside Press, Inc. v. N.L.R.B.*, 415 F.2d 281, 284-285 (5th Cir. 1969) ("The company, however, though preserving its rights to raise such issues by objecting before the NLRB, did not choose to press them before us, either by brief or oral argument. So far as its petition to review and set aside is concerned, this was a waiver. (footnote omitted))

coconspirator as being settled and the trial as a formality:

> In evaluating the judge's determination [to admit the guilty plea of the non-testifying co-conspirator], it must be remembered that a jury "has an obligation to 'exercise its untrammeled judgment upon the worth and weight of testimony' and to 'bring in its verdict and not someone else's.' " *United States v. Sorondo,* 845 F.2d 945, 949 (11th Cir.1988) (quoting *United States v. Johnson,* 319 U.S. 503, 519, 63 S.Ct. 1233, 1241, 87 L.Ed. 1546 (1943)). Where evidence of a coconspirator's conviction is admitted, however, a jury may abdicate its duty. "The jury may regard the issue of the remaining defendant's guilt as settled and the trial as a mere formality." *Griffin,* 778 F.2d at 711. For this reason, the admission of guilty pleas or convictions of codefendants or coconspirators not subject to cross-examination is generally considered plain error. *United States v. McLain,* 823 F.2d 1457, 1465 (11th Cir.1987) (citations omitted).

United States v. Eason, 920 F.2d 731, 734 (11th Cir. 1990)(footnote omitted)

This error and this argument was never presented to the Eleventh Circuit, so it is incorrect to assert or even suggest that any statement in the Eleventh Circuit decision could be law of the case for this issue in this habeas.

Because the issue was not presented to the Eleventh Circuit it would be error to assume that the same harmless error result would have been reached had this issue been presented. What is overwhelming evidence in one context is not necessarily overwhelming in another. The Eleventh Circuit was not presented with any harmless error analysis as to Knock's convictions and no such arguments were made.

The *Eason* court was correct that advising the jury that a non-testifying

coconspirator has pled guilty makes any trial a futile exercise.

Regarding the prejudice from this error, it is facile and wrong to say that the evidence was overwhelming as to Knock. One obvious indicator of this is that the jury was out for over 20 hours. And if the government is correct that the drug laws have no extraterritorial effect, then the evidence of United States drug activity was limited to a 1987 and a 1988 load of marijuana and hashish and then a 1993 load that the government itself concedes that Knock was not involved in. [GA p. 35]

This leaves the evidence of any United States crime by Knock to the 1987 and 1988 conduct, summarized by the Government in its brief [hereinafter referred to as "GB"] to the Eleventh Circuit as follows:

> In 1987, pursuant to Knock and Duboc's direction, Julie Roberts organized an offload crew which unloaded 30 tons of hashish from a mothership onto another vessel and transported it into the San Francisco, California, area. (R821-192- 195, 198-211). The drugs were taken to Madrid's nearby property, where Knock, Madrid and Roberts's boyfriend's sons repackaged the drugs for distribution. (R821-208-215; R877-12-19, 25-26, 31, 39-47). Buxton and various of his underlings distributed the drugs throughout the United States. (R821-212-13; R877-47-48, 134-35, 170-71).
>
> In 1988 Knock and Duboc oversaw the importation of a 56 ton load of marijuana and hashish 1988 into San Francisco which was seized by law enforcement. (R821-222-24; R877-111; R893-3-12; R900-90).

There was no further violation of United States drug statutes by Knock after the May 1988 seizure of the load in San Francisco. This is the point the government's

own witnesses made when they testified that Knock was no longer willing to do business in the United States.[3]

Therefore it simply is not true that the evidence against Knock was overwhelming - rather it was a close case - which may have come down to nothing more than Julie Roberts uncorroborated testimony that Knock continued to supervise the attempts to collect the outstanding $20 million dollars from the 1992 Canadian load - evidence which is not even legally relevant if the government is correct in its belated change of position that the United States drug statutes do not apply extraterritorially.[4]

Bruton

The government's discussion of *Bruton* is not relevant to the Madrid plea agreement issue. [GA p. 3] Knock is not raising a *Bruton* objection. The government states that it was not error to admit the Madrid Plea Agreement in Knock's trial [GA p. 27] citing a string of *Bruton* cases. (*Richardson v. Marsh* [*Bruton*], *United States*

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[3] This in turn leads directly to the statute of limitations defense - which clearly was defeated by the court's jury instruction that:

> If a defendant is involved in an on-going conspiracy to violate United States law, he does not withdraw from the conspiracy simply by moving his activities to a foreign country.

[4] The significance of the Canadian evidence for Knock was that the Canadian evidence may have been the only credible evidence to convince the jury that Knock continued in the conspiracy after 1987-88.

v. Thayer [*Bruton* claim], *United States v. Taylor* [*Bruton*], *United States v. Brazel*, [*Bruton*], *United States v. Garrett* [*Bruton*], and *United States v. Satterfield* [*Bruton*])

These cases and the government's *Bruton* argument miss the point.

The government finally cites *United States v. McLain*, 823 F.2d 1457, 1464-66(11th Ci3. 1987), a case Knock relied upon in his memorandum of law, and argues that under *McLain* admission of a redacted plea agreement of a non-testifying codefendant can be appropriate.[5] However, the circumstance which made it permissible in that case was the defense counsel's strategic decision to open the door to the admission of the plea agreement, and his strategy of using the plea agreement as part of his defense. There was no objection to the admission of the plea agreement.

Finally, an unspoken but decisive difference in Knock's case is that Madrid was not available to be called as a witness by either the government or Knock, whereas the co-defendants in question in *McLain* were on the government's witness list and could have been called by either party.

Jury Instruction

Although the court instructed the jury that the Madrid Plea Agreement "in and of itself" did not establish Knock's guilt [GA p. 4], that was the wrong instruction to

[5] Of course *McLain* was reversed in part for the admission of another non-testifying codefendant's plea agreement, the very error of which Knock complains.

give. No instruction could be correct because the Madrid Plea Agreement was simply not admissible, but given that the court admitted it, the correct instruction, had the admission been correct, would have been that the jury not consider the Madrid Plea Agreement as evidence against Knock whatsoever.

But, as the Eleventh Circuit noted in *Eason,* there is no presumption that a jury would heed such an instruction, rather, according to the Eleventh Circuit, the presumption is that the jury would not follow its instructions and instead would see the trial as a mere formality based on the admission of a guilty plea of a non-testifying coconspirator.

Admissible versus Inadmissible Plea Agreements

Kennedy's acknowledgment of the Vacca and Martenyi plea agreements was correct and has no bearing on this question. Both Vacca and Martenyi testified at trial and were cross-examined, thus their plea agreements were properly admitted - but there should have been a corresponding instruction as to the use of that evidence, and there was not. [GA p. 4]

The government points out that Duboc's conviction was also spread before the jury, as well as his false cooperation, and $50,000,000 forfeiture. [GA p. 5] That too was error. It should not have been admitted for the same reasons urged against the admission of the Madrid Plea Agreement, and we ask the court to consider the

admission of the DuBoc conviction as additional evidence of the error complained of in Issue I.

Miscellaneous

The fact that Kennedy raised numerous objections other than the correct objection to the admission of the Madrid Plea Agreement [GA p. 4] is irrelevant to the determination whether Kennedy was ineffective for failing to assert the legally correct objection under *Eason.*

Daar's Strategy

Likewise, what Daar as counsel for *Madrid* did in response to the Madrid Plea Agreement is irrelevant to *Knock's* claims. [GA p. 4]

IAAC Based on Failure to Raise Madrid Plea Agreement Issue on Appeal

The government argues that Kennedy "did not take action no competent counsel would take by winnowing his arguments [on appeal] to exclude such a claim." [GA p. 29] It hardly qualifies as competent winnowing to raise the adverse spousal privilege issue - an issue directly foreclosed by binding Supreme Court precedent - and instead fail to raise an issue already held by our Circuit to constitute plain error. It hardly qualifies as winnowing to raise the conflict of interest issue on direct appeal when you were the very attorney who counseled in favor of waiver of the conflict at the district court and indeed brought in special counsel to argue that it

would be error for the court to not permit the waiver.

Instead, had Knock's counsel properly persisted in his confrontation objection, then the admission of the plea agreement would additionally have been reversible error under *Crawford v. Washington* as explained in Knock's initial memorandum of law. The government asserts without explanation that *Crawford* would have no impact on a confrontation objection, then proceeds to elide into a lack of retroactivity argument.[6]

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[6] *See United States v. Jones,* 371 F.3d 363, 368-369 (7th Cir. 2004):

> The *Bruton* line of cases deals with situations in which the confession of one defendant is offered at a joint trial where the statement is redacted to omit any explicit reference to the co-defendant and the jury is instructed to consider the statement only against the *declarant. Id.* Here, Rock, the declarant, was not present at the trial, so his confession was obviously intended to be used *against Jones.* Until recently, cases interpreting the Confrontation Clause required that a co-conspirator's statement incriminating the defendant contain " 'particularized guarantees of trustworthiness' such that cross-examination would be of marginal utility in determining the truthfulness of the statements." *United States v. Ochoa,* 229 F.3d 631, 637 (7th Cir.2000) (quoting *Lilly v. Virginia,* 527 U.S. 116, 134 & n. 5, 136, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999)); *see also Ohio v. Roberts,* 448 U.S. 56, 66, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980). As discussed below, we have doubts about the reliability of Rock's confession, and we question whether it would satisfy this standard. But since the parties filed their supplemental briefs, the Supreme Court issued its opinion in *Crawford v. Washington,* 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). *Crawford* holds that "the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Id.* at 1374. *Crawford*

Although Knock asserts that *Crawford* is retroactive, *cf. Bockting v. Bayer*, 399 F.3d 1010 (9th Cir. 2005) (*Crawford* retroactive for purpose of timely first 2255); *see also Lave v. Dretke*, ___ F.3d ___, 2005 WL 1581090 (5th Cir. July 7, 2005) (granting COA on issue of retroactivity of *Crawford* rule), his argument is not dependant on retroactivity, rather he argues that Knock's decision was not final on direct appeal at the time *Crawford* was decided and had Knock's appellate counsel merely persisted in his well founded confrontation argument he would have been entitled to the application of *Crawford on his direct appeal.*

However, we reiterate that it is our view that *Crawford* is retroactive and applies to this petition, reinforcing our argument in Issue I generally that it was error to admit the Madrid Plea Agreement when Madrid was not available as a witness for cross-examination.

Issue II - Statute of Limitations

The government argues that the only difference between the first Knock indictment and the superseding indictment was the extension of the applicable time

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> curtails the inquiry into a statement's reliability by holding that "the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." *Id.* Jones never had an opportunity to cross-examine Rock and thus, under *Crawford,* no part of Rock's confession should have been allowed into evidence.

period by a little over two years.

Knock argues that the superseding indictment expanded the scope of the charged conduct, therefore the government did not get the benefit of the rule allowing the tacking on to the original indictment date for purposes of the statute of limitations - and this in turn has two consequences - first, that the withdrawal defense relates back to an earlier date, a five year earlier date - the statute of limitations date under the original indictment - and second, that the superseding indictment itself is subject to a statute of limitations defense.

The government seeks to minimize the expansion of the scope of the superseding indictment by stating that the superseding indictment merely expanded the temporal scope of the indictment by over two years. [GA p. 5] That is so, of course, but the question is what conduct occurred during those two years that the government added to the indictment and proof of the case? The indictment itself was a bare bones, three page document, which did not purport to provide a bill of particulars as to the charged conduct, instead the trial served that purpose, and at trial the conduct alleged in the following two years dramatically expanded the scope of the originally charged conspiracy.

The GB summarizes much of this evidence,

In March of 1994 Roberts met with Madrid, who was still out on bond,

in New Mexico. (R875-95-96) While Roberts was in New Mexico, Duboc informed her by telephone that he was going to Hong Kong to clean out his accounts before the authorities arrived, and if anything happened to him Knock would be taking over the collections from Rogerson. (R875-96). On March 10, 1994, Duboc was indicted, and on March 25, 1994, he was arrested in Hong Kong. (R2; R878-24- 28). The next day Knock called Roberts in New Mexico at a number Roberts had given Duboc. (R875-96-99). Knock gave Roberts various numbers at answering services where he could be contacted and told Roberts he was taking over the collection of the money and he wanted to keep in contact with her. (R875-96-99; R876-97-98).

For about six months Roberts continued to attempt to collect the $20,000,000.00 from Rogerson and continuously reported her efforts to Knock. (R875-102-03, 107-08; R876-97-102). Knock, Madrid and Darmon made suggestions to Roberts about methods to induce Rogerson to pay the money. (R875-102-04; R876-97-102). Madrid went with Roberts and personally met with Rogerson on one occasion and attempted to induce him to pay the money he owed. (R875-104; R876-97-102). With Madrid's knowledge, Roberts made plans to keep up to $7,000,000.00 for herself but continued to try to collect the money for Knock and Madrid. (R875-102-05).

Roberts decided she would eventually turn herself in; she stopped actively trying to collect the money; but she kept in contact with Knock and Madrid about collecting the money. (R875-108-111). Roberts moved to Spain where she was joined by Madrid who had jumped his bond in Canada. (R875-108- 110; R879- 134-39). Madrid later went to Mexico, where on May 10, 1996, pursuant to information provided by the then-cooperating Roberts, he was arrested at the request of Canadian authorities. (R879-134-39). Roberts surrendered to authorities in February of 1996, and on April 11, 1996, under law enforcement surveillance Roberts, wearing a recording device, met with Rogerson. (R875-108, 115-121; R879-140-44; GX-152A&B). At that meeting Rogerson discussed his role in the conspiracy, the money he owed and that Madrid had met with him several times. (R875-120-21; GX-152A&B).

This evidence primarily related to a *Canadian* load, the 1992 Vancouver load, that the government now asserts was not part of the charged conspiracy, because the government now argues that there is no extraterritoriality to the United States drug laws. In any event, this certainly amounted to an expansion of the charged conduct to an extent sufficient to trigger a new statute of limitations under *Ratcliff*.

But perhaps most important, the superseding indictment added Madrid to the indictment. In the interim, between the first and second indictments, the government had persuaded the Canadians to encourage Madrid to enter into the complained of Canadian plea agreement [July 22, 1996], which put Madrid, of course, but Knock as well, in an impossible position in defending their cases. This was a strategic coup on the part of the government that certainly expanded the scope of what Knock had to deal with far beyond anything contemplated by the original indictment.

Obviously the failure to raise a well founded statute of limitations defense would be ineffective assistance of counsel and particularly so on the facts of this case. Whether the limitations date was five years later than the court instructed the jury, when a defense was withdrawal and statute of limitations, and when there was no or virtually no evidence of Knock's participation in the alleged conspiracy as of the later date, was obviously prejudicial to this defense and the court cannot have confidence beyond a reasonable doubt that the outcome of the trial would have been the same had

the correct limitations instruction been given.

Issue III - Concession of Guilt

The government now argues for the first time that neither §§ 841 nor 846 apply extraterritorially. The government flatly argued the contrary position at trial. [Docket 630] The government now asserts that it "*conceded that §§ 841 and 846 do not apply extraterritorially*. . . " [GA p. 6] This is not correct. The government never conceded lack of extraterritoriality - rather without explanation other than stating that the law was "unclear" the government withdrew its proposed extraterritoriality instruction. [R900-122; R884-70-71] Clearly this court had concerns - concerns that Kennedy had misargued the law in his opening statement - prompting this court to issue its own order [Docket 609] in which this court suggested that §§ 841 and 846 applied extraterritorially.

After this court's order [Docket 609] and the government's response [Docket 630], Kennedy was in no position to ask for and we submit this court would not have given the reciprocal instruction - which is what Kennedy argued in opening - that it was not a crime for Knock to continue his drug business in Canada. Instead Knock ended up being hit with a withdrawal special instruction that told the jury that moving your drug business to a foreign country is not withdrawal. That was pretty much the end of the case.

Additionally, we submit that it is a Due Process violation for the government to take inconsistent positions at the same court on the same issue. Even in its brief on direct appeal, the government referred to the Canadian activity as part of "the conspiracy," *see e.g.,* "At that meeting Rogerson discussed his role in ***the*** conspiracy . . . " [GB *supra;* emphasis supplied]

The government suggests that Knock's counsel's argument and theory of defense was a classic strategic decision - the decision to concede the Canadian drug activity, etc. [GA 34] That is not the end of the analysis, however, but only the beginning. That a choice is a strategic choice does not of course shield the choice from an IAC claim. Instead the court must decide whether the choice was a reasonable choice that competent counsel would have made. We submit that it cannot be a reasonable choice to concede guilt - particularly when that concession is premised on a mistaken understanding of the controlling law.

Issue IV - Money Laundering Count

The government omits to state that the indictment alleged that the money laundering conspiracy commenced January *1982.* The government concedes, as it must, that the money laundering conspiracy statute under which Knock was indicted did not take effect until *1992*.

It cites as authority for its proposition that it was permissible to indict Knock

for a crime that did not exist, *United States v. Hersh*, 297 F.3d 1233, 1244 (11th Cir. 2002). *Hersh*, in turn, cites more cases, but they all share this distinguishing factor - in *Hersh the crime at issue already existed*, but the statute as alleged in the indictment had been *amended*. *Hersh* itself acknowledged that the issue was the increase in punishment for a crime already in existence, and that increased punishment was held to not violate the *ex post facto* clause for a continuing offense crime. That has no parallel to Knock's indictment, which indicted Knock for a *non-existent crime*.[7]

Issue V - Evidence of Foreign Importations

The government belatedly argues that the evidence of foreign drug importations was admissible under Rule 404. If that had been the government's theory of the case, one would have expected the trial to have been interrupted innumerable times by 404(b) cautionary instructions from the court. That never happened because this was not seen as 404(b) evidence and it is too little, too late to

[7] The government's assertion that Knock could have been convicted for a violation of Title 18, U.S.C. § 371 deserves a prize for novelty. It is an interesting argument but shares the same flaw as the original indictment. Even if Count III were looked on as a *de facto* § 371 conspiracy it would fail, because the object of the Count III conspiracy was a violation of 18 U.S.C. § 1956 *and 18 U.S.C. § 1956 did not exist in 1982.* The first money laundering statute was not enacted until 1986 and did not go into effect until November 1, 1987. Knock will not trouble the court with a line by line parsing of the history of the money laundering statute but suffice it to say that no aspect of what is now punished as money laundering was a crime before November 1, 1987.

call it that now. The jury has already gone home and no one told them.

The truth is closer to reality than that. The government conceived of this foreign importation evidence as substantive evidence of guilt as to count one, because the government thought that §§ 841 and 846 applied extraterritorially. The government presented this not as 404(b) evidence but as evidence of a single, multinational conspiracy operating at home and abroad.

The government has now switched horses and decided that sticking with the extraterritoriality approach - the approach the indictment and trial were built upon - results in having to accept that Kennedy conceded Knock's guilt by admitting Knock's Canadian drug dealing. The government believes this new strategy is less dangerous from a strategic point of view in this case at this time, although one wonders what the Department of Justice would think of this position in the bigger scheme of things.

So for strategic reasons, post-trial, the government has adopted the 404(b) approach. But this approach has its dangers too, because it cannot account for the failure to give any 404(b) or other limiting instructions as to this foreign drug activity evidence. If it really is not evidence of the crime charged in Count I, and it obviously (to us lawyers, no one helped explain this to the jurors) was not evidence as to Count II, then what evidence was left to on which to convict Knock? Not a lot, in fact, very,

very little, and most of it over twelve years old by the time of the trial.

Issue VI - Spousal Privilege Arguments

The government filed an affidavit regarding questions posed at oral argument in the direct appeal. [GA 11, GX 5 to GA] No devil's advocate question at oral argument can overcome the fact that the Court of Appeals held that John Knock had no standing to assert Naomi Knock's spousal privilege - and indeed this holding was dictated by binding precedent of the United States Supreme Court which was in effect at the time of Knock's trial, *Trammel*. *QED*.[8]

Issue VII - Conflict of Interest

The government states that Knock "was made fully aware of all possible conflicts relating to Kennedy . . ." [GA p. 11] This simply is not correct. Knock's Appendix, items 23-26, set forth the government's own assertions against Kennedy which were not disclosed to Knock during the *Garcia* inquiry. Knock was advised

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[8] Knock was of course prejudiced by Naomi Knock's testimony. The government conceded that the evidence of Naomi dealing and transferring the money was relevant to show that Knock had not withdrawn from the conspiracy. [Knock Appendix, Volume III, p. 57] This was accomplished through her testimony regarding the paying of Kennedy's attorney's fees, and was followed by Weinberg's testimony that it is legal to use "drug proceeds" to pay attorneys' fees.

This was one of the main ways the government tried to prove Knock's guilt - - based on the jury instruction that a conspiracy continues by continuing to live off of illegal drug proceeds. This was demonstrated solely through the admission of Naomi Knock's testimony regarding the source of Knock's counsel's fees.

that there was a New Jersey grand jury as to which Kennedy was a *subject* but because of the grand jury secrecy rules it could not disclose the information before that grand jury.

We know too that Knock waived the conflict in large part due to his counsel's legally mistaken advice (*cf. Trammel*) that the court could not admit Naomi's testimony implicating Knock's counsel - therefore the waiver was based upon constitutionally bad advice. After the jury heard from Naomi Knock about Knock's counsel's shenanigans, what credibility did his counsel retain? None. Which explains why what otherwise could have been a winning defense - *despite everything* - came away a loser.

This was Knock's prejudice from the conflict, that his lawyer lost all credibility in the eyes of the jury, because unlike *Freund v. Butterworth* or any case cited by the government, in Knock's case Knock's own jury learned that his lawyer was criminally implicated in Knock's crimes which destroyed the lawyer's credibility with the jury, thereby destroying any chance of acquittal.

There was classic prejudice as well. We submit that each of the errors outlined in Knock's petition and reiterated and supplemented herein, are inexplicable for a counsel of the experience and ability of Knock's counsel, were it not for the pressure the government had him under with the threat of felony indictment for money

laundering, a threat that hung over counsel until just this past year.

How else can one explain not challenging the statute of limitations, not challenging the effective date of the money laundering count, not asking for 404(b) or limiting instructions, not moving to sever, not filing a motion in limine on the Madrid plea agreement, not filing a motion in limine on the Naomi testimony.

VIII. Booker Issues

Issue VIII. A.

Knock is making two different arguments in Issue VIII - VIII. A and VIII. B - the government only addressed the second issue, VIII. B. We would ask the court treat the government as having waived and forfeited any response as to issue VIII. A.

Knock's argument in VIII. A is that he was advised by the court and counsel that if he pled guilty the court would be required to sentence him in accordance with the *mandatory* federal sentencing guidelines, and absent substantial assistance and its vagaries, the court would be required, on the facts of this case, to sentence Knock to life. That this was the advice given Knock can dare be gainsaid.

Given this advice, there could have been but one sane choice, take the case to trial, because worst case Knock's trial outcome would be the same as a guilty plea, and best case, there was hope of an acquittal, a mistrial, appellate error, etc. any one of which could have resulted in a better disposition than life.

That advice was wrong as a matter of law. *Booker*.

Therefore the decision to plead guilty was not a knowing and intelligent decision freely and voluntarily made, but instead was a plea coerced by the threat of an unconstitutional application of the federal sentencing guidelines and a decision based upon wrong legal advice about the application of the guidelines and the consequences of a guilty plea. Knock should be entitled to withdraw that plea.

Issue VIII. B.

Knock stands by his statement of Issue VIII. B.

Concluding Observations

At some point the government should candidly concede that this indictment and the government's presentation of the prosecution case and the defense presentation of the defense were seriously flawed and or designed to deny Knock a fair trial.

A fair reading of the record reveals the following:

1. The government conceived the indictment under the impression that §§ 841 and 846 applied extraterritorially. The government now says that theory of the law was wrong. However it must be beyond dispute this extraterritorial theory was the theory the government labored under when it drafted the indictment and built and presented its case at trial, which is the only possible explanation for the focus of the

trial on the Australian, Canadian and Dutch marijuana importations - the United States activity is a relatively minor part of the trial.

2. The government conceived the indictment believing it was a criminal offense to conspire to commit money laundering commencing at least as early as 1982. The jury was presented a case that was predicated on a crime that did not exist.

3. The government sandbagged both Knock and Madrid by first indicting Knock alone, then having the Canadians extradite Madrid to Canada, lure Madrid into a sham plea deal that was too good to be true, have Madrid plea guilty, then bring him back to the United States, supersede Knock's indictment, add Madrid, and then torpedo them both with Madrid's freshly inked Canadian plea deal - evidence which was not admissible under binding Eleventh Circuit precedent. This was a clever strategy but legally wrong.

4. The government created a conflict with Knock's trial lawyer placing both Knock and his lawyer in a Mexican standoff. After Knock retained his counsel of choice and paid him several million dollars, the government began a grand jury in New Jersey and made Knock's lawyer a "subject" of that grand jury; shortly before trial the government turned the screws again on Knock's lawyer by raiding his offices in New York and going off with some of his files. This too was a clever strategy because it was a no lose strategy for the government - either the court would

disqualify Knock's counsel leaving Knock asset-less and forced to look to CJA counsel for what everyone acknowledged was one of the biggest drug cases in the history of the Department of Justice - or if the court did not disqualify Knock's counsel that was just as well, because he had been neutered by the government's pretrial and still ongoing tactics aimed at subduing him. It was a Mexican standoff because if one were to assume that Knock and his counsel were in fact involved in joint criminal conduct how could either turn his back on the other - there simply were no good choices and without assets, Knock had no choice anyway.

5. Knock's counsel made an obvious legal blunder in conceding that his client had engaged in drug dealing in Canada when to do so was to admit his guilt. If he had been correct he would have asked for and gotten an instruction supporting his opening statement concessions. He neither asked nor received such supporting instructions from this court because the government's response to this court's order [Docket 609] - an order which brought both sides up short - quickly educated him in the error of his ways. Knock's counsel effectively failed to operate as meaningful counsel under the Sixth Amendment. The cumulation of errors identified in this petition individually and cumulatively entitle Knock to a new trial.

Conclusion

For the reasons set forth in the initial memorandum of law and petition as supplemented herein, Knock respectfully requests this Honorable Court vacate his judgment and conviction and the forfeiture judgments entered thereon. In the event this Court is not inclined to summarily grant such relief, Knock requests an evidentiary hearing to establish any disputed facts.

THE LAW OFFICE OF
WILLIAM MALLORY KENT

__s/ William Mallory Kent_____
William Mallory Kent
Florida Bar Number 0260738
1932 Perry Place
Jacksonville, Florida 32207
904-398-8000
904-348-3124 Fax
kent@williamkent.com
www.williamkent.com

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served on Assistant United States Attorney Robert Davies by filing the same electronically with the Clerk of the Court's CM ECF system this July 11, 2005.

___s/William Mallory Kent_____
William Mallory Kent