UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
GAINESVILLE DIVISION

JOHN RICHARD KNOCK, Petitioner

Criminal Case No: 1:94-cr-01009-MP-AK
vs. Civil Case No: 1:05-cv-00041-MP-AK
Eleventh Circuit Court of Appeals No: 08-11966-D

UNITED STATES OF AMERICA, Respondent
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PETITIONER KNOCK'S REQUEST FOR CERTIFICATE OF APPEALABILITY UNDER TITLE 28, U.S.C. SECTION 2253(c)

Comes Now the Petitioner, **JOHN RICHARD KNOCK**, by his undersigned counsel, and files this his request for Certificate of Appealability ("COA") of the Order dated March 24, 2008 and entered March 25, 2008 [Docket 1059], denying his Petition filed under 28 U.S.C. § 2255, and the Clerk's Judgment thereon dated and entered March 25, 2008 [Docket 1060], dismissing the petition, and requests this honorable Court issue a COA, pursuant to Title 28, United States Code § 2253(c)(1)(B), and Rule 22(b), Federal Rules of Appellate Procedure. Rule 22(b) of the Federal Rules of Appellate Procedure and Title 28 U.S.C. § 2253 require issuance of a COA before an appeal may be heard of a denial of a petition for relief under 28 U.S.C. §2255. Knock previously filed a timely notice of appeal April 16, 2009 and

entered April 17, 2008 [Docket 1069]. Knock did not ask this Court to treat his notice of appeal as a request for COA as permitted under Rule 22(b)(2), instead on April 21, 2008 Knock requested an extension of time to file this separate request for COA [Docket 1075], which this Court granted April 22, 2008 [1080], allowing Knock until May 23, 2008 to file his request for COA. This request has followed in a timely manner.

The Antiterrorism and Effective Death Penalty Act ("AEDPA") amended 28 U.S.C. § 2253 to require a petitioner request a COA instead of a certificate of probable cause ("CPC"), in order to appeal the denial of a petition filed under 28 U.S.C. § 2254, see *Henry v. Department of Corrections*, 197 F.3d 1361, 1364-66 (11th Cir.1999) (describing statutory history), and established a statutory standard, set out in section 2253(c)(2), for the issuance of a COA. See 28 U.S.C. § 2253(c)(2) (Supp. IV 1999). Unlike the procedure for the issuance of a CPC, under the amended version of section 2253, the district court, when granting a COA, must "indicate [for] which specific issue or issues" the petitioner has "made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2), (3). *Peoples v. Haley*, 227 F.3d 1342 (11th Cir. 2000). The Supreme Court, in *Slack v. McDaniel*, 529 U.S. 473, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000), held that, in a section 2254 or 2255 proceeding:

> when a habeas corpus petitioner seeks to initiate an appeal of the dismissal of a habeas corpus petition after April 24, 1996 (the effective date of the AEDPA), the right to appeal is governed by the certificate of appealability (COA) requirements now found at 28 U.S.C. §§ 2253(c) (1994 ed., Supp. III). This is true whether the habeas corpus petition was filed in the district court before or after AEDPA's effective date.
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> Subsection (c), as amended by the AEDPA, provides:
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> (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from--
> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
> (B) the final order in a proceeding under section 2255.
> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
> (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

In *Slack* the Supreme Court decided that the pre-AEDPA showing a petitioner had to make to obtain a CPC and the post-AEDPA statutory standard for obtaining a COA are substantially the same. See *Slack*, 529 U.S. at 483-84, 120 S. Ct. at 1603, ("Except for substituting the word 'constitutional' for the word 'federal,' § 2253 is a codification of the CPC standard announced in *Barefoot v. Estelle* . . . ."). The primary difference between the certificates, then, is that a COA must specify on its face the issues on which the petitioner has been granted leave to appeal. Appellate review of an unsuccessful habeas petition is limited to the issues enumerated in the

properly granted COA. See *Murray v. United States*, 145 F.3d 1249, 1251 (11th Cir. 1998); *Eagle v. Linahan*, 268 F.3d 1306 (11th Cir. 2001).

In *Slack*, the Supreme Court clearly laid out the test that courts should apply in deciding whether to grant a COA, both as to claims disposed of by the district court on the merits and those disposed of on procedural grounds. "***Where a district court has rejected the constitutional claims on the merits, . . . the petitioner [seeking a COA] must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong***." *Slack*, 529 U.S. at 484, 120 S. Ct. at 1604 [emphasis supplied]. Where a district court has disposed of claims raised in a habeas petition on procedural grounds, a COA will be granted only if the court concludes that "jurists of reason" would find it debatable both "whether the petition states a valid claim of the denial of a constitutional right" and "whether the district court was correct in its procedural ruling." *Franklin*, 215 F.3d at 1199 (quoting *Slack*, 529 U.S. at 484, 120 S. Ct. at 1604).

The standard for issuance of a CPC is found in Barefoot v. Estelle, 460 U.S. 880, 893 (1983). To qualify under Barefoot, an appeal must raise at least one issue as to which the petitioner makes a substantial showing of the denial of a federal right. Cf. Agan v. Dugger, 828 F.2d 1496 (11th Cir. 1987), cert. denied, 487 U.S. 1205 (1988).

A certificate *must* issue if the appeal presents a "question of some substance,"

i.e., at least one issue (1) that is "'debatable among jurists of reason'"; (2) "'that a court *could* resolve in a different manner'"; (3) that is "'adequate to deserve encouragement to proceed further'"; or (4) that is not "squarely foreclosed by statute, rule, or authoritative court decision, or . . . [that is not] lacking any factual basis in the record." Barefoot, supra, 463 U.S. at 893 n.4, (quoting White v. Florida, 458 U.S. 1301, 1302 (1982)).

> The fact that other district courts and our circuit court have granted probable cause certificates based on the same or similar issues is a reason for granting a certificate of probable cause. See, e.g., Ford v. Strickland, 734 F.2d 538, 543 (11th Cir.) (per curiam), aff'd sub nom., Wainwright v. Ford, 467 U.S. 1220 (1984)(mem.).

Knock's § 2255 Petition and supporting memorandum of law filed February 22, 2005 [Docket 962; 963] raised eighteen (18) grounds under eight (8) headings and adopted [Docket 988] with the Court's permission [Docket 997] five (5) grounds under two (2) headings from co-defendant Albert Madrid's parallel § 2255 petition. Knock also filed on February 22, 2005 a timely supplement to his § 2255 petition including an express challenge to the forfeiture judgment and substitute property forfeiture orders entered in the case. [Docket 961] The issues are:

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.

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.

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.

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.

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.

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.

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.

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.

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.

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

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.

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.

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

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.

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.

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.

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.

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.

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.

The grounds adopted from Madrid's § 2255 Petition were:

I. ***Booker/Blakely/Apprendi* Issues: Knock is Entitled o be Resentenced Under the Authority of *United States v. Apprendi, Blakely v. Washsington* and *United States v. Booker.***

A. Knock was Sentenced Under an Unconstitutional Sentencing Scheme in Violation of His Sixth Amendment Right to A Jury Trial.

B. Knock's Sentencing Violated His Fifth Amendment Right to have All Relevant Facts Proves Beyond a Reasonable Doubt.

C. The Sentence Imposed was Unreasonable.

D. *Blakely* and *Booker* are Applicable to this Case, Even Under Retroactivity Analysis.

II. Ineffective Assistance of Counsel: Knock was Denied the Effective Assistance of Counsel by Counsel's Failure at Trial and on Appeal to Investigate, Research and Present Factual Information and Controlling Legal Authority which would have Excluded "Appendix A" of the Canadian Agreement from Evidence; and the Admission of "Appendix A" into Evidence Prejudiced Knock.

ARGUMENT AND FURTHER AUTHORITIES

INCOMPLETENESS OF DISTRICT COURT'S ORDER

Perhaps unintentionally this Court's order [Docket 1059] fails to specifically address a number of the grounds included in the Petition. For example no reference is made to the *Crawford* confrontation aspect of the Madrid Plea Agreement [Ground I. C.] or the Madrid Plea Agreement severance claim [Ground I.D.]. Nor is there any specific mention of the argument that Knock's counsel conceded guilt in his opening statement due to his own misunderstanding of the law governing the offense. [Ground III] Likewise, the Court's order did not specifically address Knock's counsel's failure

to object to the evidence of *foreign* importations inadmissible under 21 U.S.C. § 952 or to request limiting instructions. [Ground V] The Court's order failed to specifically address ineffective assistance relative to the misunderstanding of the spousal privilege. [Ground VI] Finally, the Court did not address the argument that Knock's decision to go to trial was not knowingly and intelligently made because he was advised that if he pled guilty the court would have no option but to impose a life sentence under guidelines that were then viewed as mandatory. [Ground VIII. A.]

It is true that the order states that this Court reviewed the Magistrates R&R *de novo* and states that it adopts the Magistrate's Report & Recommendation ("R&R") [Docket 1047], so from a technical point of view the order is sufficient (*see Andrews v. Deland*, 943 F.2d 1162 (10th Cir. 1991)), but the form and structure of the order suggest that the Court was not intending to adopt the R&R without discussion, but instead was, at least in a general way, intending to engage in a *de novo* summary discussion of the conclusions that the Court was accepting. If the Court intended nothing more, Knock is not suggesting that more must be done, but Knock would not want the Court to leave its order in this condition if this is not what the Court intended.

PRELIMINARY CONSIDERATIONS - THE STANDARDS APPLICABLE TO ISSUANCE OF A COA.

In order to obtain a COA a petitioner must make "a substantial showing of the

denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Pagan v. United States*, 353 F.3d 1343, 1346 (11th Cir.2003). In determining whether to grant a COA, the Court of Appeals "look[s] to the District Court's application of AEDPA to petitioner's constitutional claims and ask[s] whether that resolution was debatable amongst jurists of reason." *Miller-El v. Cockrell*, 537 U.S. 322, 336, 123 S.Ct. 1029, 1039, 154 L.Ed.2d 931 (2003).

Miller-El explained what is required. As mandated by federal statute, a prisoner seeking a writ of habeas corpus has no absolute entitlement to appeal a district court's denial of his petition. 28 U.S.C. § 2253. Before an appeal may be entertained, a prisoner who was denied habeas relief in the district court must first seek and obtain a COA from a circuit justice or judge. This is a jurisdictional prerequisite because the COA statute mandates that "[u]nless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals ...." § 2253(c)(1). As a result, until a COA has been issued federal courts of appeal lack jurisdiction to rule on the merits of appeals from habeas petitioners.

A COA will issue only if the requirements of § 2253 have been satisfied. "The COA statute establishes procedural rules and requires a threshold inquiry into whether the circuit court may entertain an appeal." *Slack v. McDaniel*, 529 U.S. 473, 482, 120 S.Ct. 1595 (2000); *Hohn v. United States*, 524 U.S. 236, 248, 118 S.Ct. 1969 (1998).

Section 2253(c) permits the issuance of a COA only where a petitioner has made a "substantial showing of the denial of a constitutional right." In *Slack*, supra, at 483, 120 S.Ct. 1595, the Court recognized that Congress codified the prior judicial certificate of probable cause ("CPC") standard, announced in *Barefoot v. Estelle*, 463 U.S. 880, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983), for determining what constitutes the requisite showing.

Under the controlling standard, a petitioner must "sho[w] that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" 529 U.S., at 484, 120 S.Ct. 1595 (quoting *Barefoot*, supra, at 893, n. 4, 103 S.Ct. 3383).

The COA determination under § 2253(c) requires an overview of the claims in the habeas petition and a general assessment of their merits. This Court is required to look to the District Court's application of AEDPA to the petitioner's constitutional claims and ask whether that resolution was debatable amongst jurists of reason. This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. *Slack* held that a COA does not require a showing that the appeal will succeed. Accordingly, a court of appeals should not decline the application for a COA merely because it believes the applicant will not demonstrate an

entitlement to relief.

The holding in *Slack* would mean very little if appellate review were denied because the prisoner did not convince the court that he would prevail. It is consistent with § 2253 that a COA will issue in some instances where there is no certainty of ultimate relief. A prisoner seeking a COA must prove "'something more than the absence of frivolity'" or the existence of mere "good faith" on his or her part. *Barefoot*, supra, at 893, 103 S.Ct. 3383. It is not required that the petitioner prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail.

As the Court stated in *Slack*, "[w]here a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." 529 U.S., at 484, 120 S.Ct. 1595.

Clearly a COA may issue from an appeal of a denial of a 2255 petition challenging a guilty plea. Circuit Courts have granted COAs in numerous appeals of the denial of 2255 petitions arising out of the context of some if not all of the issues

presented above.

The Madrid Plea Agreement Issues

The R&R concludes that even if the objection raised in the 2255 to the admission of the Madrid Plea agreement had been made at trial, the trial judge would still have admitted it, because the redaction of Knock's name somehow cures the problem. With all due respect to the Magistrate Judge, he is mixing apples and oranges; what he points to is a *Bruton* remedy; this is not a *Bruton* problem. There is nothing anywhere in the great body of jurisprudence which unanimously prohibits the admission of the guilty pleas of non-testifying parties to suggest that a *Bruton* redaction would cure the error. Not one case in any jurisdiction has ever reached such a conclusion. Knock is entitled to a COA on Grounds I.A and I. B.

The R&R does not reject Knock's claim that *Crawford* is retroactive for 2255 purposes. This is a significant concession. Instead the R&R cites to *Richardson v. Marsh*, 481 U.S. 200 (1987), for the proposition that admission of a properly redacted plea agreement of a co-defendant does not violate the confrontation clause rights of the complaining defendant. Knock suggests that *Richardson v. Marsh* coupled with the retroactivity of *Crawford* compel his success on this claim, because *Richardson v. Marsh was premised on a limiting jury instruction that the jury was presumed to have followed that the confession of the one co-defendant was not evidence of the*

guilt of the other co-defendant. That instruction was not give in Knock's case, instead the instruction as given permitted the jury to consider the plea agreement as evidence against Knock.

The Conflict Claims

In particular, Knock would draw this Court's attention to an order granting a COA issued by the Eleventh Circuit Court of Appeals April 24, 2008 in *William J. McCorkle v. United States*, Appeal No. 08-10371-D, a true and correct copy of which is hereunto annexed and by this reference made a part hereof. The *McCorkle* case involved F. Lee Bailey as trial counsel for William J. McCorkle a infomercial telemarketer charged with fraud and money laundering. As in Knock's case, there was an extensive pretrial *Garcia* hearing after which the District Judge allowed McCorkle to waive any conflict of interest that existed as a result of Bailey's involvement with McCorkle. As in Knock's case, after the trial evidence came forward that the Government had launched a criminal investigation of Bailey's possible criminal involvement with McCorkle in McCorkle's criminal activities. The Eleventh Circuit has granted a COA on five questions evolving out of this alleged conflict, including "Whether the trial court should have removed appellant's trial counsel on the basis that he may have participated in appellant's criminal activity, *even if appellant waived his right to conflict free counsel*." Although the unpublished panel decision in Knock's

initial direct appeal denied Knock's argument that this Court abused its discretion in permitting Knock to waive the conflict of interest in his case, because it found Knock invited the error, that decision does not end the consideration of this issue, because Knock alleged in his Petition that only after the *Garcia* hearing, indeed after the appeal, the Government filed a sworn affidavit in a related forfeiture matter that discloses that the Government alleged that Knock's trial counsel was implicated in the very same criminal conduct as Knock - - an allegation that went far beyond anything disclosed in Knock's *Garcia* hearing and far beyond anything Knock purported to waive. This newly discovered evidence was not part of the record at the time the Eleventh Circuit issued its unpublished decision, therefore that decision is subject to being revisited and changed based on these new facts. In addition, the *McCorkle* COA shows that the Eleventh Circuit appears ready to decide whether a conflict based on joint criminal activity between lawyer and client is subject to waiver. In either event, the COA in the *McCorkle* case is a sufficient basis for this Court to issue a COA as to Ground VII. A and C.

There is a second aspect of the conflict claim, that the *Garcia* hearing was not adequate given what we now know the Government knew at the time of the hearing but did not disclose to the Court or Knock. In *McCorkle* the Eleventh Circuit has issued a COA on exactly this same question: "Whether the trial court conducted an adequate

Garcia hearing to discern whether there was a conflict of interest resulting from trial counsel's possible participation in appellant's criminal activity." [Ground VII. B.] That is, what the Government swore in its affidavit against Kennedy is not what the Government told the Court or Knock in the *Garcia* hearing, and if the Court had had an adequate hearing, this would have been disclosed.

Concession of Guilt

Out of a duty of candor to the Court we must draw the Court's attention to *United States v. Lopez-Vanegas*, 493 F.3d 1305 (11th Cir. 2007) (which held that unless there was a United States nexus, possession of drugs outside the United States for distribution outside the United States is not a violation of 21 U.S.C. § 841 and hence can not be the object offense of 21 U.S.C. § 846). The R&R was issued after *Lopez-Vanegas*, so we can only assume that the Magistrate Judge did not see that it had any bearing on Knock's conduct, because the R&R does not rely upon or even cite *Lopez-Vanegas*. If this is so, and it must be assumed to be so given this Court's unconditional adoption of the R&R on this point, then the question remains simply whether a concession of guilt based on mistake of law can ever be a reasonable strategic choice. The R&R cites no authority for the proposition. Despite the Government's extensive briefing at trial explaining that Knock's counsel was wrong in his fundamental legal premise, the R&R concluded that somehow a lawyer's

misunderstanding of the governing law of the controlling count in the indictment somehow was not deficient performance. That is not the law and the R&R cites no authority to support this novel approach. Getting the law wrong is by definition deficient performance. Additionally the R&R errs when it looks to lack of prejudice to deny relief. Concession of guilt is in a class by itself and prejudice is presumed once counsel concedes guilt. These are questions which merit further encouragement and this Court should issue a COA on the concession of guilt issue, Ground III.

Statute of Limitations Issues

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).
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> 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.

Evidence of Foreign Importations

The R&R's primary justification of the evidence of foreign importations is that it "was useful to the defense." If this is so, one wonders why the Government devoted so much of the trial to trying to help the defense. This is hardly a serious suggestion. Instead the issue is quiet simply whether the evidence was admissible or not. It was not. The R&R cites *United States v. Ramsdale*, 61 F.3d 825 (11th Cir. 1995) for the proposition the evidence was admissible to "complete the story of the crime."

Foreseeing the possibility that the Government will belatedly attempt to turn *Lopez-Vanegas* against Knock, we would suggest that if Knock falls under *Lopez-Vanegas*, then this evidence could not be admitted; any probative value was far

outweighed by its prejudice.

Spousal Privilege Issue

The R&R acknowledges that the spousal privilege issue is "a more delicate point," because of its impact on the decision to waive the conflict of interest. There is simply no way around the fact that Knock's counsel misunderstood the law of spousal privilege. The R&R does not dispute that fact. There likewise can be no dispute that this was the advice upon which Knock based his waiver of the conflict of interest. The R&R states that the evidence would have come in either way and attempts to suggest that the prejudice was unavoidable, but that ignores that the Knock's counsel is on record as conceding that the decision to oppose the conflict motion was based on this mistaken view of the law. [See Knock's Initial Appeal Brief, Issue V argument.] The Eleventh Circuit was not deciding the *Garcia* issue from the perspective of a claim of ineffective assistance of counsel, so it is no support for the R&R's conclusion to refer to the Eleventh Circuit's decision on the waiver.

Other Matters

As to the remaining issues not expressly discussed herein, Knock will rely upon his prior pleadings.

CONCLUSION

WHEREFORE, based on the foregoing arguments and authority, Petitioner John Richard Knock respectfully submits that he has made a substantial showing of the denial of a constitutional right as to all grounds set forth above and is entitled to the issuance of a certificate of appealability as to all grounds.

Respectfully submitted,

LAW OFFICE OF
WILLIAM MALLORY KENT

s/William Mallory Kent
WILLIAM MALLORY KENT
Florida Bar No: 0260738
1932 Perry Place
Jacksonville, Florida 32207
(904) 398-8000 Telephone
(904) 348-3124 Facsimile
kent@williamkent.com

Attorney for Petitioner Knock

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 and all counsel of record by electronically filing the same with the Court's online Electronic Filing and Case Management system, this 23rd day of May, 2008.

s/William Mallory Kent
William Mallory Kent

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 08-10371-D

WILLIAM J. MCCORKLE,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA

Respondent-Appellee.

Appeal from the United States District Court for the
Middle District of Florida

ORDER:

Appellant's motion for a certificate of appealability is GRANTED on the following issues only:

(1) Whether appellant waived his right to conflict-free counsel, in light of the fact that appellant may not have been informed at the hearing held pursuant to United States v. Garcia, 517 F.2d 272 (5th Cir. 1975), of the potential consequences of proceeding to trial with an attorney who may have been involved in appellant's criminal conduct.

(2) If appellant did not waive his right to conflict-free counsel, whether trial counsel acted under a conflict of interest at trial based on his possible participation in appellant's criminal activity, and if so, whether the district court erred in finding that trial counsel was not ineffective at trial.

(3) Whether the trial court should have removed appellant's trial counsel on the basis that he may have participated in appellant's criminal activity, even if appellant waived his right to conflict-free counsel.

(4) Whether the trial court conducted an adequate Garcia hearing to discern whether there was a conflict of interest resulting from trial counsel's possible participation in appellant's criminal activity.

(5) Whether appellant's appellate counsels were ineffective for failing to argue that the Garcia hearing was insufficient.

In briefing these issues, the parties are not confined to addressing the issues in the numerical order stated here. Rather, the parties may re-order the issues as necessary.

/s/ [illegible] Lawrence Anderson
UNITED STATES CIRCUIT JUDGE