

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA

MOTION BY A PERSON IN FEDERAL CUSTODY
TO VACATE, SET ASIDE, OR CORRECT SENTENCE UNDER 28 U.S.C. § 2255

UNITED STATES DISTRICT COURT		Division	Gainesville, Florida
Name of Movant/Defendant	Prisoner No.	Case No.	
John Richard Knock	11150-017	1:94-cr-1009	
Place of Confinement (including address)			
Beaumont U.S.P., P. O. Box 26030, Beaumont, TX 77720			
UNITED STATES OF AMERICA		V. JOHN RICHARD KNOCK (name under which convicted)	

MOTION

1. Name and location of court which entered the judgment of conviction under attack: U.S. District Court, Northern District of Florida, Gainesville Division
2. Date of judgment of conviction: 1/31/01
3. Length of sentence: Life as to Cts. 1 & 2, 20 years to run concurrent on Ct. 3
4. Nature of offense involved (all counts): 21:841A, possession with intent to distribute marijuana; 21:952, conspiracy to import marijuana; and 18:1956(h), money laundering-conspiracy; criminal forfeiture 21:853

5. What was your plea? (Check one)

- (a) Not Guilty
- (b) Guilty
- (c) Nolo contendere

If you entered a guilty plea to one count or indictment, and not a guilty plea to another count or indictment, give details: _____

6. If you pleaded not guilty, what kind of trial did you have? (Check one)

- (a) Jury
- (b) Judge only

7. Did you testify at the trial? Yes No

8. Did you appeal from the judgment of conviction to the Eleventh Circuit Court of Appeal?

Yes No

9. If you did appeal, answer the following:

(a) Result: Judgment affirmed

(b) Date of result and mandate: June 6, 2003

10. Did you file a petition for rehearing?

Yes No

11. If you did file a petition for rehearing, provide the date and result of the petition: Petition for rehearing was denied July 31, 2003

12. Did you file a petition for certiorari review?

Yes No

13. If you did file a petition for certiorari review, provide the date and result of the petition: _____

Petition denied 2/23/04

14. Have you previously filed any post-conviction petitions, applications or motions, including previous § 2255 motions, with respect to this judgment in any federal court?

Yes No

15. If your answer to 14 was "yes," give the following information:

(a) (1) Name of court: _____

(2) Nature of proceeding: _____

(3) Grounds raised: _____

(4) Did you receive an evidentiary hearing on your petition, application or motion?

Yes No

(5) Result: _____

(6) Date of result: _____

(b) If you filed more than one such petition, please include the same information requested in 11(a) on a separate sheet of paper.

(c) Did you appeal, to an appellate federal court having jurisdiction, the result of action taken on your petition, application or motion?

(1) First petition, etc. Yes No

(2) Second petition, etc. Yes No

(d) If you did *not* appeal from the adverse action of any petition, application or motion, explain briefly

why you did not: _____

16. State *concisely* every ground on which you claim that you are being held in violation of the constitution, laws or treaties of the United States. Summarize *briefly* the *facts* supporting each ground. If necessary, you may attach pages stating additional grounds and *facts* supporting the same.

Caution: If you fail to set forth all grounds in this motion, you may be barred from presenting additional grounds at a later date.

A. Ground one: See Insert One for all grounds and supporting facts

Supporting FACTS (state *briefly* without citing cases or law): _____

B. Ground two: _____

Supporting FACTS (state *briefly* without citing cases or law): _____

C. Ground three: _____

Supporting FACTS (state *briefly* without citing cases or law): _____

D. Ground four: _____

Supporting FACTS (state *briefly* without citing cases or law): _____

17. As to the grounds listed in 16A, B, C, and D, explain whether any grounds were previously presented, and for those that were not previously presented, state *briefly* your reasons for not presenting them: _____

~~See~~ Memorandum of Law

18. Do you have any petition or appeal now pending in any court as to the judgment under attack?

Yes No

19. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes No

(a) If so, give name and location of court which imposed sentence to be served in the future: _____

(b) Give date and length of the above sentence: _____

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

Yes No

20. 18. What relief do you request from this Court? Vacate judgment, or conduct
evidentiary hearing, or resentence

Wherefore, movant prays that the Court grant the relief to which he or she may be entitled in this proceeding.

William M. Kent

Signature of Attorney (if any)

I declare under penalty or perjury that the foregoing is true and correct. Executed on:

2/21/05

(Date)

John Koster

Signature of Movant/Defendant

IF MAILED BY PRISONER:

I declare or state under penalty of perjury that this petition was (check one):

delivered to prison officials for mailing, or deposited in the prison's internal mail system on:

_____ (date).

Signature of Movant/Defendant

JOHN RICHARD KNOCK v. UNITED STATES
INSERT ONE
GROUND AND CONCISE STATEMENT OF SUPPORTING FACTS

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.

Knock was tried jointly with co-defendant Albert Madrid "Madrid." Madrid had pled guilty to a felony drug conspiracy charge in Canada pursuant to a written plea agreement which contained a factual basis appendix "the Madrid Plea Agreement." The Canadian charge was a subset of the conspiracy charged in the Knock indictment in this case. The facts of the Canadian case were introduced in the government's case against Knock and Madrid. The Madrid Plea Agreement was introduced in evidence by the government in Knock's trial with no pertinent limiting instruction. Madrid did not testify in the Knock trial, choosing instead to exercise his Fifth Amendment right to remain silent. Knock's trial counsel objected to the admission of the Madrid Plea Agreement solely on confrontation clause grounds. Knock's trial counsel did not file a motion to sever the trial of Knock and Madrid, nor did he move for mistrial when the Madrid Plea Agreement was introduced into evidence in Knock's trial. Knock's appellate counsel did not raise the Madrid Plea Agreement

issue in Knock's direct appeal.

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.

Knock was originally indicted March 10, 1994. The government obtained a superseding indictment against Knock on February 17, 1999. The superseding indictment substantially and materially expanded the scope of the indictment, adding over two years to the temporal scope, and adding the additional conduct that was alleged to have occurred between the original indictment in March 1994 and April 1996. This expansion of the charges in the superseding indictment caused the statute of limitations to be restarted from the date of the superseding indictment, rather than being tolled by the return of the original indictment. The Court, however, with no objection from counsel for Knock, instructed the jury that the pertinent date for Knock's statute of limitations was March 10, 1989. This was incorrect. The statute of limitations was not tolled by the original indictment after the return of the superseding indictment, therefore the correct statute of limitations was February 17, 1994. The statute of limitations was an important issue in the defense of the case, because Knock's counsel argued in his theory of defense that Knock had been a member of a United States conspiracy but that it terminated outside the scope of the statute of limitations. The five year error had a prejudicial effect on the defense of the case.

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.

Knock's counsel told the jury in his opening statement that Knock had been engaged in a Canadian only conspiracy, that is, that Knock had conspired to distribute marijuana, but had only distributed drugs and laundered money in Canada, not in the United States. After opening statement the Court issued an order *sua sponte* [Docket 609] suggesting that Knock's counsel's theory of defense was legally unsound, because 21 U.S.C. §§ 841 and 846 applied extraterritorially, therefore the Court would not be able to give jury instructions consistent with this defense. The Court asked for briefing from both parties. The government's brief agreed with the Court that §§ 841 and 846 applied extraterritorially. Knock's counsel argued in his brief that they did not. The Court did not give an instruction consistent with Knock's counsel's theory of defense, indeed, the Court instead instructed the jury that it was not a defense of withdrawal from a conspiracy to move one's drug distribution activity to a foreign country. Knock's counsel had to shift his closing argument to an argument that there had been separate conspiracies, that the United States conspiracy had terminated prior to the statute of limitations. The effect of all this was that Knock's trial counsel had conceded his guilt by conceding facts which were the functional equivalent of a guilty plea. This concession was not a reasonable strategic choice, but rather was made as the result of a misunderstanding of the controlling law, that is, the extraterritorial effect of §§ 841 and 846.

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.

The indictment alleged in count three that Knock conspired to launder drug proceeds in violation of 18 U.S.C. § 1956(h). The time frame of the conspiracy in count three was from January 1982 through April 1996. The money laundering conspiracy statute was not enacted, however, until October 28, 1992, almost eleven years after the date charged in the indictment. Evidence was presented at trial of an alleged money laundering conspiracy from 1982 onward. Similarly at sentencing the guidelines were calculated based on monetary amounts allegedly laundered from and after 1982. Knock's counsel did not object.

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 was charged in count two of the indictment with conspiracy to import marijuana into the *United States*. During the trial evidence was presented to the jury that Knock conspired to distribute marijuana in Australia, Canada, and Holland as well as in the United States. No limiting or cautionary instruction of any kind was given relative to the foreign importations. No objection was made by Knock's counsel to the introduction of this evidence of foreign importations nor to the lack of any cautionary instruction.

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

Knock's trial counsel labored under the mis-impression that Knock's spouse, Naomi Phillips, could not be compelled to testify against Knock because of the spousal privilege. She was compelled to testify against Knock under a grant of immunity and her own claim of spousal privilege was overruled due to her alleged joint criminal participation in the conspiracy. Knock's counsel relied upon this misunderstanding of the law of spousal privilege in his response to the government's efforts to

disqualify him due to his representation of Naomi Phillips and his involvement with her in the illegal disposition of a suitcase containing one million dollars worth of Deutsch Marks (which ultimately appear to have been laundered into a secret Liechtenstein bank account for the benefit of Knock's counsel). Knock's counsel also believed that his disputes with the spouse over his multi-million dollar fee would not be aired before the jury because of the spousal privilege. In these conclusions he was wrong as a matter of law. Knock's counsel appears to have overlooked the fact that only the testifying witness spouse can assert the privilege, not the non-testifying defendant spouse. Therefore, Knock's counsel's objections on this score were doomed to failure. This fundamental error likewise pervaded the direct appeal brief as well. Despite the fact that this issue was foreclosed by binding Supreme Court precedent, Knock's appellate counsel argued as if it were an issue as to which this Court had erred, and as to which the Court of Appeals could grant him relief. Instead, under binding Supreme Court authority, both Courts were required to deny Knock relief on this issue. Knock's counsel's misunderstanding of the applicable law led to a series of strategic errors that as he himself argued in the direct appeal brief, poisoned his defense. His argument that Knock was prejudiced by the Court's rulings is sound. The prejudice was real and beyond harmless. But Knock's counsel was wrong in that this Court's ruling and the Court of Appeals rulings were mandated by controlling authority contrary to Knock's position. This misunderstanding of the controlling authority undermined Knock's choice to waive the conflict of interest, undermined Knock's defense at trial and undermined his 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.

The government has set forth in detail Knock's counsel's own criminal involvement with the Knock-Duboc money laundering conspiracy in its verified complaint for the forfeiture of Knock's counsel's interest in a secret bank account Knock's counsel caused to be established and funded in Liechtenstein and other similar matters. The complaint was filed August 18, 2004 in Civil Action 04-3981, in the District Court for the District of New Jersey, in an action styled *United States v. Contents of Account Numbers 183.049.42 et al. Located at Liechtensteinsche (sic) Landesbank*. Knock's counsel has stipulated to the forfeiture of the funds in these accounts. Knock's counsel entered into a written plea agreement with the government in New Jersey in which the government asserts that it could have charged Knock's counsel with felony money laundering but has foresworn doing so in exchange for his agreement to plead guilty and be sentenced for wilful failure to file a tax return and supply information in violation of 26 U.S.C. § 7203. Knock's counsel was under investigation by the government in New Jersey for money laundering prior to, during and after Knock's trial. According to the government's allegation in the verified complaint, Knock's counsel was in effect criminally involved with the Knock conspiracy to continue to engage in money laundering criminal proceeds of the drug conspiracy. This conflict - criminal involvement of the counsel with his client in the same charge as the client faces at trial - was not disclosed to this Court or to Knock, and was not the subject of a *Garcia* hearing, nor was it waived by Knock. The conflict adversely affected and prejudiced Knock's defense for the reasons set forth in Knock's direct appeal brief.

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 *United States v. Fanfan*, and a timely *Apprendi* objection was made at the district court and preserved on direct appeal.

Knock was advised by his counsel that the applicable federal sentencing guidelines

mandated a life sentence for counts one and two and mandated a twenty year sentence for count three in the event he pled guilty. We also believe that the Magistrate Judge at first appearance and or arraignment would have advised Knock that the federal sentencing guidelines would apply to his case if he were sentenced and that the judge was bound by those guidelines (except in certain narrow circumstances not applicable to Knock). The *de facto* advice Knock received was that he was subject to a mandatory life sentence in the event he pled guilty. This crucial misinformation informed his choice to plead not guilty and go to trial. In fact, it is unconstitutional to apply the federal sentencing guidelines in a mandatory fashion.

Knock's counsel belatedly objected to the unconstitutional application of the federal sentencing guidelines - at his sentencing, which occurred post-*Apprendi* - but at that point Knock had already gone to trial and been convicted after putting the government through the burden and expense of a prolonged and complex trial, and accordingly reaped the penalty of life imprisonment at sentencing. Knock's counsel renewed the *Apprendi* objection on appeal.