IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

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THE UNITED STATES OF AMERICA,

Plaintiff-Respondent,

-against- **Case #**

SHAMAR L. BANKS,

Defendant-Petitioner
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PETITION FOR A WRIT OF HABEAS CORPUS
BY A PERSON IN FEDERALCUSTODY PURSUANT TO 28 U.S.C. § 2255

COMES NOW the Petitioner, Shamar Banks, by and through undersigned counsel, and hereby submits a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2255, because he is confined under a prison sentence which violates his Sixth Amendment right to due process and effective assistance of counsel.

JURISDICTION AND VENUE

1. Petitioner seeks relief from a Judgment of this Court entered against him on February 29, 2012 (Conner, J., No. 1:11-CR-00002, M.D. Pa.). Petitioner entered into a plea agreement June 22, 2011, in which he agreed to plead guilty to a felony information charging him with the manufacture, distribution and possession of an unspecified amount of "crack" cocaine in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2. On February 27, 2012, after a sentencing hearing, this Court sentenced Petitioner to 198 months imprisonment and three years of supervised release.

2. Petitioner is currently in the custody of the United States Bureau of Prisons at McDowell, West Virginia, under Register # 69786-067 pursuant to the aforementioned Judgment of Conviction.

3. This Petition is brought pursuant to 28 U.S.C. § 2255, et seq., and Article I, § 9, Clause 2, of the Constitution, and federal question jurisdiction pursuant to 28 U.S.C. §1331. The Declaratory Judgment Act, 28 U.S.C. §2201, §2202, authorizes declaratory relief.

4. Petitioner was sentenced by this Court. Thus, venue is proper in the United States District Court for the Middle District of Pennsylvania. Petitioner was originally represented by Lori J. Ulrich, Federal Public Defender's Office, 100 Chestnut Street, Suite 306, Harrisburg, PA 17101-2540.

5. Petitioner originally filed a Notice of Appeal in this Court on March 9, 2012, and the case transferred to the United States Court of Appeals for the Third Circuit under Docket # 12-1692. Petitioner was represented on appeal by Ronald A. Krauss, Esq., Federal Public Defender's Office, 100 Chestnut Street, Suite 306, Harrisburg, PA 17101-2540. On January 4, 2013, the Judgment was affirmed by the Court of Appeals. Thus, Petitioner's conviction is final, and this Petition is timely pursuant to the Antiterrorism and Effective Death Penalty Act. 28 U.S.C. § 2244(d)(1), *Clay v. United States*, 537 U.S. 522 (2003), *United States v. Redd*, 562 F.3d 309 (5th Cir. 2009).

6. No prior Petition seeking this relief has been filed in this Court, or any other court of competent jurisdiction.

STATEMENT OF THE FACTS[1]

7. On January 5, 2011, Petitioner ("Mr. Banks") was indicted by a Grand Jury in a three-count indictment charging Petitioner with (Count One) the intentional, knowing and unlawful manufacture, distribution and possession of a 280 grams or more of cocaine base, aka "crack" cocaine, and a quantity of cocaine hydrochloride in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2; (Count Two) the possession, use, and carrying of firearms in furtherance of and during and in relation to a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1)(A)(i) and 18 U.S.C. § 2; and (Count Three) having been previously convicted of a crime punishable by imprisonment of more than one year did knowingly possess, in and affecting commerce, firearms in violation of 18 U.S.C. § 922(g)(1) and 18 U.S.C. § 2. Mr. Banks pleaded not guilty at arraignment on January 25, 2011.

8. On June 29, 2011, a Superseding Information was filed concurrently with a plea agreement whereby Mr. Banks agreed to plead guilty to a single count of violating 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2. He agreed to waive formal indictment and a change of plea hearing was scheduled for July 20, 2011.

9. Prior to entering the plea agreement, Mr. Banks was never informed of the true nature of the use of prior state convictions to be used against him to substantially increase the proposed U.S. Sentencing Guidelines Criminal History. Further, Mr. Banks alleges he was never informed by trial counsel prior to entering the plea agreement of several substantial collateral rights he would lose as a result of pleading guilty. Finally, Mr. Banks alleges he was told by trial counsel the maximum sentence he would face as a result of a guilty plea was 10 years'

[1] Only the facts relevant to this Petition are included herein, and are gleaned directly from the record in Case # 11-CR-00002 as well as the attached affidavit of the Petitioner.

imprisonment. Had Mr. Banks had the above information, he would have not agreed to plead guilty and instead would have insisted upon proceeding to trial.

10. A change of plea hearing was conducted by Judge Christopher C. Conner on July 20, 2011. Mr. Banks responded to questioning from the Court based upon the representations from his trial counsel that if he answered "yes" at the change of plea hearing, he would face no more than 10 years' imprisonment. Mr. Banks was also acting upon the representations from his trial counsel that his prior state convictions would not affect his sentence – a maximum 10 years – on the drug charges. He pleaded guilty on July 20, 2011.

11. A sentencing hearing was scheduled before which both trial counsel for Mr. Banks and trial counsel for the United States prepared separate sentencing memoranda and filed objections and comments to the Pre-Sentence Report (PSR) prepared by probation. Unresolved at the time of sentencing was Mr. Banks' objection to a two-level increase for obstruction of justice, specifically, that he created a substantial risk of death or serious bodily injury to others in the course of fleeing from law enforcement officers. An evidentiary hearing was conducted.

The Evidentiary Hearing

Detective Scott Nadzom – City of York Police Department

12. On July 8, 2010, Detective Nadzom testified he was part of an investigation involved in a controlled buy of narcotics, specifically, crack cocaine, from Mr. Banks. (Tr. 6:23-7:4).[2] The "buy" was supposed to happen "in the area of" McKinley School. (Tr. 7:5-6). Detective Nadzom testified Mr. Banks, at the time when the controlled buy was to take place, approached in a silver car to meet an informant who was going to conduct the "buy." (*Id.*, at 9-10).

[2] References will be made to the Sentencing Hearing transcript as Tr. X:Y, where "X" is the page number of the transcript and "Y" is the page number(s).

13. Detective Nadzom testified the "buy" was going to take place at roughly 7 p.m., which, he said, on July 8, was still light out – it was a "summer evening." (Tr. 7:17-21). He testified that McKinley School, an elementary school, was located on the corner of Kurtz and Manor streets in York and that there is a playground attached to it. (Tr. 7:25-8:11). The "buy" did not take place at this location however. (Tr. 8:13-14).

14. Detective Nadzom testified Mr. Banks was traveling north on Manor Street towards Kurtz when he stopped, had a conversation with an unknown person, made a U-turn and pulled up next to the informant's vehicle, had a short conversation with the informant, pulled out in front of the informant's vehicle and then proceeded south on Manor with the informant following. (Tr. 8:24-9:11). He also testified that Mr. Banks had passed by his location once heading north and then again heading south where he said he and Mr. Banks made eye contact. (Tr. 9:16-20). He said he believed Mr. Banks recognized him as a police officer and that the "buy" was not going to happen. (*Id.*, at 22-24). He radioed other units to stop Mr. Banks. (9:25-10:1).

15. Detective Nadzom testified he observed Mr. Banks drive south on Manor, ***with the informant following***, crossed over Jackson Street, and then made a left turn onto Springettsbury, going east toward George Street. (Tr. 10:6-11). He said he observed several unmarked cars traveling behind Mr. Banks trying to make a stop. (*Id.*, at 12-16). Detective Nadzom testified ***his view was "very limited"*** because of where he was located at the time he said Mr. Banks "fled from us." (*Id.*, at 20-22). All the while, however, ***Mr. Banks was traveling within the speed limit.*** (*Id.*, at 19-20; 23-24).

16. Detective Nadzom testified he lost contact with those in pursuit. (Tr. 11:1-4). At that point, he said, he went back and ***retrieved the informant and escorted the informant back to***

our drug task force office. (*Id.*, at 6-8). Detective Nadzom did not witness any drugs being "tossed from the car window." (*Id.*, at 9-12). Despite not being involved in the pursuit past an initial point, he said he knew the route that the pursuit took before Mr. Banks "ditched the car": South on Manor, east on Springettsbury to Beaver Street, left onto Beaver, north on Beaver to Jackson, right onto Jackson, east on Jackson, left onto Cleveland, left onto Cottage Place, westbound to Springettsbury, right onto Pershing Avenue heading north to Dalton Avenue where Mr. Banks "jumped out" and fled on foot. (Tr. 11:18-12:18).

17. Detective Nadzom did not see any drugs thrown from the vehicle yet testified to the exact location: at a point near 34 West Jackson. (Tr. 12:4-6). He said the entire pursuit occurred in a "large circle" ending at a point almost where it began although admittedly did not observe any of it beyond his initial encounter and relied on what others told him. (*Id.*, 21-23). Detective Nadzom described the area generally where the pursuit took place as being a mixed residential and small business with Penn Park to the north and York College to the south. (Tr. 13:10-23).

18. Detective Nadzom testified, despite not observing the actual pursuit, "most of the streets are parked bumper to bumper" and that cars are parked on both sides of "some of the streets" along which the "pursuit" took place. (Tr. 14:14-16; 20-23). He testified Penn Park is three blocks north of McKinley Elementary where the "pursuit" started. (Tr. 16:18-21). He also said he observed people "on the street" during the time when the "chase" took place. (Tr. 17:2-7).

19. Under cross-examination, Detective Nadzom admitted the following:

a) He never saw Mr. Banks run any stop signs;

b) He never saw Mr. Banks cross into the opposite lane of traffic;

c) He never saw Mr. Banks almost hit anyone walking in the street;

d) He never saw Mr. Banks speeding.

(Tr. 17:12-22).

20. When the "buy" did not go down as scheduled, Detective Nadzom testified he was facing north on Manor Street, facing the elementary school. (Tr. 18:10-18). He said when Mr. Banks passed his vehicle heading south away from his location and the two made eye contact he "assumed" Mr. Banks recognized him as a police officer. (Tr. 19:2-4). Further, despite "assuming" Mr. Banks recognized Detective Nadzom, Mr. Banks never sped up. (*Id.*, at 8).

21. On direct examination, Detective Nadzom said his view was "very limited" at the point when the "pursuit" began but on cross-examination he testified his view was "unobstructed." (cf. Tr. 10:20-22; Tr. 19:12). He testified he was able to view Mr. Banks, with the informant following him, two to three blocks south until Mr. Banks turned onto Springettsbury. (Tr. 19:13-18). During that entire distance, Mr. Banks was not speeding. (*Id.*, at 19-22). Detective Nadzom repeated that once he lost sight of Mr. Banks, presumably with the informant still following him (Tr. 23:13-16), he "went and obtained the informant and took the informant back to the task force office." (Tr. 20:1-3).

22. Detective Nadzom admitted he never saw Mr. Banks traveling near York College, never saw Mr. Banks speeding and never saw Mr. Banks endangering anyone. (Tr. 24:5-16). He was asked about some of the businesses in the area that he had testified to previously but then admitted he never saw Mr. Banks near any of them. (Tr. 24:17-25:10). Despite testifying he never saw Mr. Banks again once he turned initially onto Springettsbury with the informant

following him, Detective Nadzom then insisted he did, in fact, see Mr. Banks on Pershing and Jackson and at Beaver and Jackson. (Tr. 25:11-13).

23. Detective Nadzom testified that his reference to Penn Park was generally that it was north of McKinley Elementary and that generally people were in the park, although he could not say specifically how many, and further that "it was a nice night and lots of people were out all over the city." (Tr. 34:23-35:3). He testified though, he never saw Mr. Banks anywhere near Penn Park. (Tr. 35:4-7).

Sergeant John Veater – City of York Police Department

24. Sgt. Veater was driving a marked police cruiser on the evening of July 8, 2010. (Tr. 36:15-24). He testified he became involved in his capacity as part of the drug task force assisting with the drug investigation. (Tr. 37:5-9). Sgt. Veater testified he was alerted to set up in the area of Lafayette and Pershing streets because the "buy" was going to take place "someplace in that area" although it "moved a couple of times" and that when the "take down" happened, Sgt. Veater's role was to be a visible police officer in uniform in marked cruiser. (*Id.*, at 13-23). He testified he "joined the pursuit" somewhere around the area of Springettsbury and Beaver streets. (Tr. 38:14-17).

25. Sgt. Veater testified he traveled north on Beaver Street, ***turned west on Jackson***, ***traveled east on Jackson briefly***, then north on Cleveland, west on Cottage, an area of only a few blocks. (Tr. 38:24-39:6). He said he was following an undercover police vehicle which had activated its lights and siren. (Tr. 39:9-12). Sgt. Veater testified that instead of continuing to follow north on Pershing, he instead continued west on Cottage, went down an alley and turned onto Dalton Avenue from Pershing where the pursuit "just happened to end up." (*Id.*, at 16-22). The vehicle was already abandoned at the time Det. Veater arrived. He testified he ***estimated***

Mr. Banks was traveling "between 40 to 50 miles per hour" based upon the fact that "I could tell how fast I was going in conjunction with how fast he was going." (Tr. 40:19-20; 24-25).

26. On cross-examination, Sgt. Veater admitted the following:

a) Mr. Banks never went into Penn Park;

b) Mr. Banks never went past Penn Park;

c) Mr. Banks never passed Min's Market Sgt. Veater testified was present in the general area;

d) Mr. Banks never passed the pizza shop Sgt. Veater testified was present in the general area.

e) Mr. Banks did not almost hit anybody and there were not even any near misses.

(Tr. 43:20-44:6; 44:21-22).

27. Sgt. Veater testified the whole "pursuit" occurred over the course of only a couple of minutes. (Tr. 45:14-15). He also said Mr. Banks was traveling away from York College at the time the lights were activated and the siren was turned on. (*Id.*, 9-16). The entire path taken during the "pursuit" was roughly eight to ten blocks, "probably close to eight blocks." (Tr. 49:18-20). He was not involved in any arrest of Mr. Banks that day and in fact had just "come across the suspect's vehicle" at the time when the "other police vehicles had already blocked him in there." (Tr. 50:1-9).

28. At the close of the testimony, the Court stated that the fact that the "pursuit" took place over the course of eight blocks at a high rate of speed, by itself, "recklessly is creating a risk of serious bodily injury given the pedestrian traffic." (Tr. 55:20-25). There was no testimony offered that there was pedestrian traffic present in this area at this time and only a general assumption of some kind of pedestrian presence given the time of day and the time of

year. Yet without explanation or direct evidence, the Court concluded there must have been pedestrian traffic and there must have been some kind of deliberate intent to create a risk of serious bodily injury. "In populated areas of the city there's been general agreement that it was a nice summer night." (Tr. 55:25-56:2).

29. The Court's erroneous conclusion ignores the plain evidence in the record that the areas where the government argued were so pedestrian-populated, and where the threat of danger to others was present, were **NOT** any of the areas where Mr. Banks allegedly traveled. Despite a lack of reliable evidence, the Court applied the obstruction enhancement. (Tr. 56:7-9).

GROUNDS OF UNCONSTITUTIONALITY OF PETITIONER'S CONVICTION AND SENTENCE

PETITIONER'S SENTENCE WAS IMPOSED IN VIOLATION OF HIS CONSTITUTIONAL RIGHT TO DUE PROCESS WHERE THERE WAS INSUFFICIENT EVIDENCE ADDUCED TO SUBSTANTIATE THAT PETITIONER'S CONDUCT WAS RECKLESS AND CREATED A SUBSTANTIAL RISK OF SERIOUS BODILY INJURY

30. Courts of Appeals must review all sentences-whether inside, just outside, or significantly outside the Guidelines range-under a deferential abuse of discretion standard. *Gall v. United States*, 552 U.S. 38, 41, 128 S.Ct. 586, 591 (2007). Regardless of whether the sentence imposed is inside or outside the Guidelines range, the appellate court must review the sentence under an abuse of discretion standard, first ensuring that the district court committed no significant procedural error, for example, selecting a sentence based on clearly erroneous facts. *Id.*, at 597.

31. Here, the Trial Court clearly erred in calculating Mr. Banks' sentence after it determined that a two-level enhancement was warranted because Petitioner acted recklessly and created a substantial risk of serious injury to pedestrians and others when he was being followed

by police over the course of several blocks. U.S.S.G. § 3C1.2. Under U.S.S.G. § 3C1.2, "if the defendant recklessly created a substantial risk of death or serious bodily injury to another person in the course of fleeing from a law enforcement officer…" the two-level enhancement is warranted. The trial court erred in misapplying the standard to the facts adduced during a hearing on this issue.

32. The trial court based its decision upon the testimony from two police officers from the City of York. One officer, Detective Scott Nadzam, testified he either had a "very limited" view or an "unobstructed" view of Mr. Banks leaving the area where the controlled buy was supposed to take place but either way never saw Mr. Banks speeding, running stops signs, traveling in the wrong lane of traffic, nearly hitting any pedestrians or anything close to creating a risk of serious bodily injury. His sole contention was that because it was possible that people all around the city may have been outside enjoying a warm summer evening, that all of them were at serious risk.

33. The other officer, Sgt. John Veater, testified he became involved at some point later in the pursuit and despite noting that the general area had several small business, Mr. Banks never passed near any of them. Again, the presumed risk of serious bodily injury was premised upon assumptions of the activity that one might expect to see on a warm summer evening rather than actually seeing that to which he was testifying. He did note that Mr. Banks appeared to go through a stop sign and based upon how fast he was traveling, estimated Mr. Banks was traveling above posted speed limits. However, he could not testify with any certainty and was at best guessing. Like his fellow officer, there was no testimony that Mr. Banks nearly hit anyone, was traveling in the opposite lane of travel, or ever came close to an area where people were actually present.

34. "Mere flight to elude arrest does not warrant an enhancement for obstruction of justice. *United States v. Porter*, 413 Fed.Appx. 526 (3d Cir. 2007). Here, mere flight without more, something akin to facts in similar cases interpreting U.S.S.G. § 3C1.2, does not warrant the enhancement and is an abuse of discretion. Here, the testimony never established the "pursuit" which took only minutes, created any risk to anyone because neither government witness testified to actually seeing pedestrians or that Mr. Banks ever traveled near areas where the officers assumed people would be congregating. There was no evidence of anything more than Mr. Banks failing to stop for a stop sign one time and at times traveling slightly higher than the posted speed limit for a brief period of time.

35. Cases interpreting the application of the U.S.S.G. § 3C1.2 enhancement suggest facts much more serious than those presented here. In *United States v. Cepedes*, 663 F.3d 685, 687 (3d Cir. 2011), a get-away driver led police on an extended high-speed chase through residential neighborhoods spanning two counties, ignoring traffic laws, traveled in the wrong direction, nearly struck innocent bystanders and collided with a parked car before being struck by a pursuing police cruiser. In *United States v. Gray*, 395 Fed.Appx. 896, 900 (3d Cir. 2010).the defendant in that case "floored" the accelerator in his car and drove directly at officers, almost running over one and barely missing a head-on collision at a high rate of speed with two surveillance vehicles.

36. In *United States v. Islas*, 279 Fed.Appx. 169,170 (3d Cir. 2008), the defendant drove his vehicle several times into a police car that had positioned itself in front of the defendant to get him to pull over, struck a police car that had pulled up behind him, drove into a business park, smashed through a fence before finally stopping on an embankment. In *United States v. Mack*, 78 Fed.Appx. 171, 182 (3d Cir. 2003), the defendant drove his car directly at a

police officer and then led authorities on a high-speed chase on the freeway. In *United States v. Frazier*, 981 F.2d 92, 96 (3d Cir. 1992), the defendant led DEA agents on a high-speed chase where the defendant swerved around vehicles that had attempted to block him and struck one of the vehicles with an agent still inside.

37. Here, none of these scenarios is present and there was absolutely no testimony suggesting anything close to any of these scenarios. At most, Mr. Banks was seen driving at the speed limit away from Detective Nadzom's position, with the informant following, until he turned onto Springettsbury. Detective Nadzom simply speculates after that point about the driving of Mr. Banks and further, suggests he went back to where he started to get the informant and took him to the police station at the same time the informant was seen driving away following Mr. Banks.

38. Sgt. Veater testified he saw Mr. Banks for a couple of minutes while he was in his car behind an unmarked car that was pursuing Mr. Banks. At no time did Mr. Banks swerve into the opposite lane of travel. At no time did Mr. Banks appear to nearly hit a pedestrian or ram his car into a police cruiser. At no time did Mr. Banks appear to be fleeing at high-speed but rather only slightly higher than the speed limit based solely on a belief that Sgt. Veater had about how fast he was going. In short, there was no testimony suggestive of Mr. Banks operating recklessly or creating any risk of danger to anyone.

39. Despite the complete lack of credible evidence to support the application of the enhancement, the trial court concluded that in its view, the length of the pursuit (about eight blocks) and the speed ("at times at speeds between 40-50 miles per hour,") that this was reckless. It was clearly error to apply the enhancement when there was insufficient support to warrant its

application. When viewed in light of other cases where the enhancement has been applied, the instant case is nothing close to warranting a two-level enhancement.

40. The trial court committed a significant procedural error in improperly calculating the sentencing guidelines using the two-level enhancement and thus rendered the sentence improper. It is respectfully submitted the sentence should be vacated and Mr. Banks re-sentenced based upon a correct calculation of the guidelines.

PETITIONER'S GUILTY PLEA WAS UNKNOWING AND INVOLUNTARY WHERE TRIAL COUNSEL MISLED PETITIONER INTO BELIEVING HE WOULD RECEIVE A FAR LESSER SENTENCE THAN THE ONE AUTHORIZED BY LAW, AND AS A RESULT, PETITIONER ALSO RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL

41. "[A] plea of guilty is more than an admission of conduct; it is a conviction. Ignorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover-up of unconstitutionality." *Boykin v. Alabama*, 395 U.S. 238, 242-243 (1969). The Supreme Court in *Boykin* held:

> A defendant who enters such a plea simultaneously waives several constitutional rights, including his privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers. For this waiver to be valid under the Due Process Clause, it must be 'an intentional relinquishment or abandonment of a known right or privilege.' *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Consequently, if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void.

Boykin, 395 U.S. at 243, *citing McCarthy v. United States*, 394 U.S. 459 (1969).

42. In determining whether a guilty plea is made knowingly, voluntarily and intelligently, a court must consider all the relevant facts and circumstances in the case, including, but not limited to, the nature and terms of the agreement and the age, experience, and background of the accused. *Iowa v. Tovar*, 541 U.S. 77, 78 (2004). A reviewing court must

examine the totality of the relevant circumstances. *Brady v. United States*, 397 U.S. 742, 749 (1970).

43. In *Brady v. United States*, 397 U.S. 753 (1970), the United States Supreme Court approved a limited constitutional standard for determining whether a guilty plea was voluntary:

> (A) plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g. bribes). *Brady* at 754, *citing Shelton v. United States*, 242 F.2d 101, 115 (5th Cir. 1957) (Tuttle, C.J., dissenting) (emphasis added).

44. "A guilty plea operates as a waiver of important rights, and is valid only if done voluntarily, knowingly, and intelligently, with sufficient awareness of the relevant circumstances and likely consequences." *Bradshaw v. Stumpf*, 545 U.S. 175, 183 (2005) *quoting Brady v. United States*, supra. The United States Supreme Court has held repeatedly that a trial court has the duty to advise a criminal defendant who pleads guilty of the direct consequences of his plea. *United States v. Ruiz*, 536 U.S. 622, 629 (2002); *Jells v. Ohio*, 498 U.S. 1111 (1991); *Bradshaw, supra*; *Brady, supra, Boykin, supra, Henderson v. Morgan*, 426 U.S. 637 (1976); *Santobello v. New York*, 404 U.S. 257 (1971); *McMann v. Richardson*, 397 U.S. 759 (1970); *Lane v. Williams*, 455 U.S. 624 (1982) (assuming parole to be a direct consequence of a felony conviction).

45. Here, Petitioner was not advised of the full and complete consequence of his prior criminal history as it applied to his potential sentence calculation. Further, Petitioner was not advised prior to entering the plea agreement that a guilty plea would trigger serious collateral consequences implicating substantial individual liberties. As Petitioner learned at the sentencing hearing, this was incorrect.

46. Under these circumstances, it cannot be said that Petitioner's guilty plea was knowing and voluntary. He was misadvised about the direct and collateral consequences of his guilty plea and was misinformed about the nature and application of his past state convictions in assessing a potential sentence. This clearly-erroneous advice and the Petitioner's resultant misunderstanding rendered his guilty plea unknowing and involuntary and as a result he received ineffective assistance of counsel. As a consequence, this Court should grant the instant Petition.

47. The United States guarantees each defendant in a criminal prosecution the right to the effective assistance of counsel. U.S. Const., Amend. VI. The fundamental right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive Due Process of Law in an adversarial system of justice. *United States v. Cronic*, 466 U.S. 648, 658 (1984).

48. The United States Supreme Court has held that "[t]he benchmark of judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial [court] cannot be relied on having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984). Under the *Strickland* standard, ineffective assistance of counsel is made out when the defendant shows that (1) trial counsel's performance was deficient, i.e., that he or she made errors so egregious that they failed to function as the "counsel guaranteed the defendant by the Sixth Amendment," and (2) the deficient performance prejudiced the defendant enough to deprive him of due process of law. *Id.*, at 687.

49. In the context of a guilty plea, the second prong of the *Strickland* standard focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process. *Hill v. Lockhart*, 474 U.S. 52, 58 (1985). In order to satisfy this prong, a "defendant

must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.*, at 59.

50. A court deciding a claim of ineffective assistance of counsel must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. "The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." *Strickland*, 466 U.S. at 690.

51. The United States Supreme Court has held that failure on the part of counsel to provide correct legal advice to an accused may form the basis of a claim of ineffective assistance of counsel, in the context of the particular circumstances of each case. *United States v. Broce*, 488 U.S. 563, 574 (1989). To prevail, a defendant must satisfy a three-pronged test: a plea of guilty must be (1) made voluntarily, (2) it must be made after proper advice from competent counsel, and (3) it must be made with a full understanding of the direct consequences of the conviction resulting from the plea. *Bradshaw v. Stumpf*, 545 U.S. 175, 183 (2005).

52. "One of the most precious applications of the Sixth Amendment may well be in affording counsel to advise a defendant concerning whether [s]he should enter a plea of guilty." *Ramirez v. United States*, 260 Fed.Appx. 185, 187 (11th Cir. 2007), *quoting Reed v. United States*, 354 F.2d 227, 229 (5th Cir. 1965). "For a guilty plea to represent an informed choice so that it is constitutionally knowing and voluntary, [c]ounsel must be familiar with the facts and the law in order to advise the defendant of the options available." *Finch v. Vaughn*, 67 F.3d 909, 916 (11th Cir. 1995).

53. In a long line of cases, courts have regularly found that trial counsel's erroneous advice regarding sentencing exposure constitutes ineffective assistance of counsel, both in the context of trial and especially in the context of plea bargains.[3]

54. Here, the Petitioner was not advised of the specific direct and collateral consequences of a plea of guilty and further. Petitioner was not told that his prior state court convictions, many for misdemeanors resulting in limited jail time same for a single felony conviction more than a decade before the instant matter took place, would all count against him and substantially raise his Criminal History points at the time the guidelines sentence was calculated. Petitioner was not advised that prior to entering his guilty plea, that there would be substantial collateral consequences affecting his individual liberties. Had he known all of this prior to entering a guilty plea, he would have insisted on proceeding to trial.

55. This was unquestionably deficient performance by counsel, as the case law clearly establishes. Further, this directly resulted in significant prejudice to the Petitioner. Instead of receiving a sentence lower than the 20 years he was advised would result from his guilty plea, (in this case, the Guidelines sentence range of 121-151 months) Petitioner was sentenced to 240 months imprisonment – substantially more than the Guidelines sentence, and more than what he was told by his attorney he would receive.

56. Because the Petitioner received ineffective assistance of counsel at the most critical stage of his case, this Court should grant the instant Petition.

[3] *Boria v. Keane*, 99 F.3d 492, 496-97 (2d Cir. 1996); *United States v. Grammas*, 376 F.3d 433 (5th Cir. 2004); *Teague v. Scott*, 60 F.3d 1167, 1171 (5th Cir. 1995); *United States v. Ridgeway*, 321 F.3d 512, 514 (5th Cir. 2003); *United States v. Herrera*, 412 F.3d 577 (5th Cir. 2005).

CONCLUSION AND RELIEF REQUESTED

57. For the reasons set forth above, this Court should grant the petition herein in its entirety.

WHEREFORE, Petitioner prays that this Court:

(A) Issue a Writ of Habeas Corpus ordering that the Petitioner be released from his confinement upon a personal recognizance bond; or in the alternative,

(B) Issue a Writ of Habeas Corpus ordering that the Petitioner be released from his confinement unless the judgment of conviction and sentence are vacated and he be restored to pre-pleading status; or in the alternative;

(C) Issue a Writ of Habeas Corpus ordering that the Petitioner be released from his confinement unless the judgment of conviction and sentence are vacated and modified to impose an aggregate term of imprisonment of 120 months imprisonment in the United States Bureau of Prisons, plus a period of Supervised Release of five years, and

(D) For such other and further relief as this Court may deem just, proper and equitable.

Dated: Winter Park, Florida
December 27, 2013

Respectfully Submitted,

/s/Mark K. McCulloch, Esq.
Mark K. McCulloch, Esq.
BROWNSTONE, P.A.
Attorneys for Defendant
201 North New York Avenue, Suite 200
Winter Park, Florida 32789
(o) 407-388-1900
(f) 407-622-1511
markm@brownstonelaw.com
PA Bar ID # 210047

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of December, 2013, I served a copy of the foregoing upon the parties listed below:

Clerk of the Court
United States District Court
Middle District of Pennsylvania
VIA ECF

United States Attorney's Office
Middle District of Pennsylvania
VIA ECF

/s/Mark K. McCulloch, Esq.
Mark K. McCulloch, Esq.