

Chris,

Hello! Hope you are doing ok. Jan is doing ok considering. I try to do things for her as often as I can. She is a very wonderfully smart lady and such a fighter. Without her so many people here would never have fought their cases. Hopefully soon I'll have alot of free time and can help her sometime even if it's just making her coffee.

I've been meaning to send this stuff I've just been busy. So hopefully you can get it on a website, then people can see the corruption at work. If there is anything you ever want or need me to do for you or Jan please don't hesitate to ask. I'm just a letter away. If you need me to do something from you to her sometime let me know and I'll do my best. When you have it online tell Jan which website so I can send friends + family there. Thank you for your support, I know it has to be hard on you, hang in there. We're going to win!

over →

My family's address is below  
you may need it in the future.

Mom: Jewell Martin  
71 Martin Drive  
Corbin Ky 40701  
(606) 528-2316

My brother Larry Martin  
and my daughter Chenda Morris  
can be reached here also.

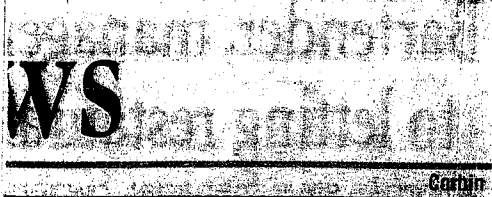
Thank you again

Melinda  
AKA Mindi

Chris,

This ex-trooper entered Seagoville Tx FCI on Mar 3 he is scheduled to be released Jan. Wish Bubba could see these clippin's, na

NEWS JOURNAL - AUGUST 20, 2007



Corbin

NEWS IN BRIEF

Former KSP Detective pleads guilty to violating informant's civil rights

A former Kentucky State Police Detective admitted he violated a confidential informant's civil rights when he forced her against her will, then tried to convince a witness to abort a trial.

John O'Bannon, 33, a former KSP Detective in London, could face up to a year in prison following his plea in United States District Court in Lexington. He pleaded guilty to a federal information charge, a common practice in federal court where someone accused of a crime can plead guilty before a formal indictment.

Allegedly, the witness came to O'Bannon's Laurel County home in 2005 to discuss a case. He grabbed her and kissed her against her will, then later asked a witness to abort the indictment to a grand jury. The suggested penalty for the civil rights violation is 10 years. He could get an additional year in prison for witness tampering.

KSP investigators launch their own probe into the case, before turning it over to the FBI. O'Bannon resigned from his post on July 19. He is scheduled to be sentenced at 9:30 a.m. Nov. 16 in Lexington.

Corbin attorney David Hoskins is representing O'Bannon in the case.

CITY REGION

Ex-trooper pleads guilty to charges in kissing incident

By Beth Hargrove  
A former Kentucky State Police Detective admitted he violated a confidential informant's civil rights when he forced her against her will, then tried to convince a witness to abort a trial.

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mon, a one-time worker in Clay County, but federal prosecutors could not be reached for comment. It is unclear whether O'Bannon's case stemmed from an investigation into corruption of several high-ranking Manchester City Council members.

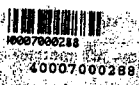
Manchester Mayor Paul White, who recently pleaded guilty to a criminal charge relating to the paving of private driveway with city resources, was also accused of convincing a drug dealer to burn down a building that was blocking the construction of a new city building in 1999.

O'Bannon is scheduled to be sentenced Nov. 16. He could face a maximum of 10 years, but Hoskins said his client had no criminal history and it is unlikely that he will receive the maximum sentence.

O'Bannon was released on his own recognizance.

Monday, August 20, 2007 • London, Kentucky

ECHO



Former detective admits to crime

O'Bannon pleads guilty to violating informant's civil rights

DALE ALTON JOHNSON  
NEWS EDITOR

A former Kentucky State Police detective told a federal judge Friday he grabbed and forced a confidential informant into a car, then later tried to convince a colleague to abort a trial.

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SEE DETECTIVE PAGE 12

DETECTIVE  
A former Kentucky State Police detective told a federal judge Friday he grabbed and forced a confidential informant into a car, then later tried to convince a colleague to abort a trial.

501 Capital Circle, NE  
Tallahassee, FL 32301  
June 18 ,2008

Chris Milson  
15 Choctaw Trail  
Elkland, MO 65644

Dear Chris,

Enclsd is my \$2255. It is in regards to law enforcement misconduct by Jason O'Bannon, a police officer who was later convicted and sentenced for improper conduct with witnesses or witness tampering. It was suggested I put my brief online for public viewing purposes. Therefore, I give you full permission to publish the brief on the internet or to use in any manner in which you see fit.

Thank you for your help.

Sincerely,



Melinda Morris  
#08760-032  
FCI Tallahassee

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF KENTUCKY

MELINDA MORRIS,

Petitioner,

v.

Case No: 6:07-cv-280-KKC

Crim. No: 6:03-cr-00035-KKC

UNITED STATES OF AMERICA,

Respondent.

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MEMORANDUM OF LAW IN SUPPORT OF MOTION TO VACATE, SET  
ASIDE, OR CORRECT SENTENCE BY A PERSON IN FEDERAL CUSTODY  
PURSUANT TO 28 U.S.C. §2255

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COMES NOW THE PETITIONER, Melinda Morris, pro se, pursuant to 28 U.S.C. §2255, and files this Memorandum of Law in support of her Motion to Vacate and Set Aside her Sentence in Criminal Case No: 6:03-cr-00035-KKC.

As a matter of introduction, the Petitioner (hereinafter "Morris"), respectfully submits to the district court that the events which transpired in the instant case constitute a denial of her right to effective assistance of counsel as guaranteed by the Sixth Amendment to the U.S. Constitution. In addition, Morris's rights under the Fifth and Sixth Amendments guaranteed her the right to notice in an indictment and to be informed of the nature and cause of the accusation. Finally, Article III to the U.S. Constitution guarantees the presence of an impartial adjudicator. These errors were not merely procedural, instead they substantially infringed upon Morris's Constitutional right to due process of law. At a minimum, Morris requests a hearing to be held on these issues.

Per the Supreme Court in Haines v. Kerner, 404 U.S. 519, pro se pleadings are to be construed and held to a less stringent standard than formal pleadings drafted by lawyers; if the Court can reasonably read pleadings to state a valid claim on which litigant could prevail, it should do so despite failure to cite proper legal authority, confusing legal theories, poor syntax, and sentence structure, or litigant's unfamiliarity with pleading requirements.

Morris respectfully urges this Honorable Court to grant all and the most liberal considerations with respect to her 28 U.S.C. §2255 Brief in Support of her Motion. Morris is not an attorney, and is proceeding pro se, to safeguard her Constitutional rights and in the best interests of justice.

For it is the Sixth Circuit which has ruled, "A central tenet of our republic--a characteristic that separates us from totalitarian regimes throughout the world--is that the government and private citizens resolve disputes on an equal playing field in the courts. When citizens face the government in the federal courts, the job of the judge is to apply the law, not to bolster the government's case." See Beaty v. United States, 937 F. 2d 288 (6th Cir., 1991).

#### STATEMENT OF JURISDICTION

Federal law provides an avenue for those whose sentences have been lengthened unconstitutionally. Title 28 U.S.C. §2255 is a statute that provides a remedy for redress of federal constitutional violations in a federal court. "A prisoner in custody under sentence of a court established by an Act of

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF KENTUCKY

MELINDA MORRIS

Petitioner,

v.

Case No: 6:07-cv-280-KKC  
Crim. No: 6:03-cr-00035-KKC

UNITED STATES OF AMERICA

Respondent.

---

MOTION FOR LEAVE TO FILE INSTANTER ENLARGED  
MEMORANDUM OF LAW IN SUPPORT OF 28 U.S.C.  
§2255

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COMES NOW, the Petitioner, MELINDA MORRIS, Pro se, to hereby and respectfully request this Honorable Court to grant her Motion for Leave to File Instanter Enlarged Memorandum of Law in Support of 28 U.S.C. §2255.

Petitioner requests the Court to exercise leniency in the interpretation of the complex Constitutional and statutory issues presented herein. Petitioner brings her claims without the formal training of legal drafting as an attorney. Accordingly, she seeks for "liberal construction" of the pleading not to have the motion scrutinized for the technical excellence that practicing attorneys are held to. See Haines v. Kerner, 404 U.S. 519, 92 S. Ct. 594 (1972).

In support of her Motion, Petitioner avers: Petitioner enters this Court in good faith, with issues that are relevant to her case which exceed the court's page limitation imposed

by the court's local rules. Petitioner makes her claim that given the numerous and complex issues involved in her motion, it is impossible to stay within the limitations of the page limit rule.

To deny her right to be heard would deny Petitioner's right for redress of grievances, as guaranteed by the First Amendment Right included in the U.S. Constitution.

Therefore, the Petitioner respectfully urges this Honorable Court to grant her Motion for Leave to File Instanter Enlarged Memorandum of Law in Support of 28 U.S.C. §2255.

Respectfully Submitted,

Date: 30 Nov, 2007



Melinda Morris, Pro Se  
#08760-032  
Federal Correctional Institution  
501 Capital Circle, NE  
Tallahassee, Florida 32301

Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitutional or laws of the United States...may move the Court which imposed the sentence to vacate, set aside, or correct the sentence..." per 28 U.S.C. § 2255. Morris believes her best opportunity to obtain fair and substantial justice regarding her sentence is through this petition, as the Federal Courts have historically served as a safety net for those who have had their constitutional rights violated.

#### STATEMENT OF ISSUES

- I. INEFFECTIVE ASSISTANCE OF COUNSEL.
- II. PROSECUTORIAL MISCONDUCT.
- III. ABUSE OF JURISDICTION & DOUBLE JEOPARDY.
- IV. SENTENCE THAT WAS MISCALCULATED, UNREASONABLE, AND ILLEGAL.

#### STATEMENT OF FACTS

On May 21, 2001, Morris was arrested and charged with trafficking in a controlled substance, later specified as methamphetamine, by the Whitley County Circuit Court, State of Kentucky, in Docket NO. 6:02-CK-0081-02. By the time of sentencing in the case on December 8, 2003, Morris had served approximately 14 months of time on it. At the advice of counsel, she pled guilty in July, 2003, as Morris understood that she would receive a sentence of time served and probation. Instead at sentencing on December 8, 2003, she received a sentence of 5 years.

On May 22, 2003, the federal government entered the case, using the same conduct as the state case as the basis for their charges, by filing an indictment for Morris and two co-defendants

William Faulkner and Randy Fox, charging 13 counts under 21 U.S.C. § 846 for conspiracy to manufacture over 50 grams and to distribute over 500 grams of methamphetamine. On June 26, 2003, a superseding indictment was entered charging 15 counts and adding three defendants, Justin Lundy, Troy Ramsey and Brandy Lawson. Arraignment was held on July 10, 2003, and attorney Hunter Payne was appointed as defense counsel to Morris. She pled not guilty. A Motion to Continue was filed on July 16, 2003, with counsel filing a Motion to Withdraw on July 22, 2003. The motion was granted on July 25, 2003, and attorney Samuel Castle was appointed as counsel. On July 30, 2003. Gordon is appointed August 18, 2003.

All of the defendants were residents of Kentucky. According to Kentucky State Police Uniform Offense Report records, "There is no physical evidence in this case" (See Exh. A). All alleged conduct was committed inside the state of Kentucky.

On December 15, 2003, Morris entered into a Plea Agreement for Counts 1 and 2, under 21 U.S.C. § 841(a)(1) and § 846. A Presentence Report (hereinafter "PSR") was prepared in which the base offense level was calculated to be 32, as further based on the estimated quantity of 75.81 grams of actual methamphetamine Kentucky State Police chemists theorized could be produced. Three levels were added, as included in the Plea Agreement, pursuant to U.S.S.G. § 2D1.1(b)(5)(B), as the offense "involved the manufacture of methamphetamine which created a substantial risk of harm to human life." Included in the PSR, but not included in the indictment or the Plea Agreement, were an additional two points because of the presence of a firearm, for an adjusted offense level of 37. Three points were subtracted for the acceptance of

responsibility for a total offense level of 34. The Criminal History Level was determined in the PSR to be a Category III based on a number of misdemeanors, mostly constituting traffic violations, totaling 6, which were reduced to 4 under §4A1.1(c), having no effect on the category. The sentencing range, therefore, on a level 34, Category III, was 188-235 months.

On April 29, 2004, at the sentencing hearing, the court noted that there was one objection filed with respect to the PSR. The objection, in part, concerned a gun enhancement over a gun which Morris was unaware was present, and as the result, denied to be part of "relevant conduct". Objections to the PSR were overruled, because AUSA Smith represented to the court that Morris had previously pled to the state offense which had alleged there was a gun present. No evidence to support this claim was presented by AUSA Smith. Morris did not plead guilty to a gun offense in the state charge. The court sentenced Morris based on sentencing guidelines to 188 months, but reduced the sentence to 185 months and twelve days, crediting her with the four months and 18 days she had already served on the state charge. She was also sentenced to five years of supervised probation. Morris had been serving her respective sentence since December 8, 2003.

On May 12, 2004, Morris, through counsel, filed a Notice to Appeal. Morris won the appeal, with her sentence ordered to be remanded for resentencing consistent with Booker.

On August 10, 2006, Morris was resentenced by the district court. At the resentencing hearing, objections were again made by counsel regarding the gun enhancement. Morris was resentenced

to 174 months under Booker to what appeared to be a reduction of 14 months, until it was later clarified by the court on the record to be calculated from the date she was originally sentenced, which was April 29, 2004, making it a reduction of only 11 months. The district court again refused to remove the gun enhancement.

The sentence is now being collaterally attacked pursuant to 28 U.S.C. §2255. The motion under §2255 was filed on a timely basis, within the 12 month period allowed from the date of the resentencing. This Memorandum of Law and Arguments are being filed within the 90 day extension permitted by the district court of November 30, 2007.

#### ARGUMENTS

In order to succeed in a §2255 Motion, the Petitioner must show that the adjudication of a claim in federal court resulted in a sentence that was imposed in violation of the Constitution of laws of the United States, or that the court was without jurisdiction to impose such a sentence. The Constitution, as the framework from which all Federal law springs, must not be violated as applied to Morris.

#### I. PETITIONER'S SIXTH AMENDMENT RIGHT TO EFFECTIVE COUNSEL WAS DENIED LEADING TO AN UNKNOWING PLEA AND UNLAWFUL SENTENCE

As an initial matter, Morris notes that she did not appeal this claim, because, generally, an appellate court does not consider ineffective assistance of counsel claims on direct appeal. Massaro v. United States, 538 U.S. 500, 504, 155 L Ed 2d 714, 123 S. Ct. 1690 (2003), has ruled that "[i]n light of the way our system has developed, in most cases a motion brought under

[28 U.S.C.] §2255 is preferable to direct appeal for deciding claims of ineffective counsel. Morris believes the only issue raised on her behalf upon appeal was in regards to Booker, as she was resentenced in consideration of Booker. She made repeated requests to counsel during the preparation of this §2255 for a copy of the Brief filed at the Sixth Circuit Court of Appeals and the resulting Opinion, but was ignored, never receiving a copy of either filing. Further, the case number from the appeal was never referenced on the district court docket as is done in other district courts throughout the United States.

The Sixth Amendment to the United States Constitution guarantees that criminal defendants are entitled to the assistance of counsel in presenting their defense. The Supreme Court has mandated, "The right to counsel is a fundamental right of criminal defendants; it assures the fairness, and thus the legitimacy, of our adversary process." See Kimmelman v. Morrison, 477 U.S. 365, 374 (1986); see also U.S. Const. Amend. VI. Furthermore, the Court has recognized that "the right to counsel is the right to effective assistance of counsel." See McMann v. Richardson, 397 U.S. 759, 771 (1970)(emphasis added).

To succeed on a claim of ineffective assistance of counsel, a defendant must show that his "counsel's conduct so undermined the proper function of the adversarial process that the trial cannot be relied on as having produced a just result." See Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2055, 2063 (1984). The Strickland Court went on to hold that in order for a defendant to prevail on an ineffective assistance of counsel

claim, he must satisfy a two-prong test. Id. A defendant should demonstrate that the representation he received "fell below an objective standard of reasonableness" and "a reasonable probability that but for counsel's unprofessional errors, the results of the proceedings would have been different." Strickland, 466 U.S. at 688, 694.

A court reviewing a claim of ineffective assistance must determine whether a reasonable probability exists that, but for counsel's unprofessional errors, the results of the proceedings would have been different or whether the result was fundamentally unfair or unreliable. Id. (citing Lockhart v. Fretwell, 113 S. Ct. 838 (1993)). Ultimately, the Strickland test requires courts to focus upon whether counsel's performance was sufficient to ensure the fundamental fairness of the proceeding. Id. However, the prejudice that must be shown need not be anything more than something as small as one additional day in jail. See Glover v. United States, 531 U.S. 198 (2001).

"It is the client's right to expect that his lawyer will use every skill, expend every energy, and tap every legitimate resource in the exercise of independent professional judgment on behalf of the client and in undertaking representation of the client's interests." See Frazer v. United States, 18 F. 3d 778, 785 (9th Cir., 1994).

In the context of guilty pleas, the U.S. Supreme Court announced that counsel must give objectively reasonable advice before the presumption of effectiveness will be applied. See Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366 (1985). Ineffective

assistance of counsel at the plea stage of a proceeding will render the plea involuntary, and hence invalid. Id. at 56. The Supreme Court has held that the prejudice prong in guilty plea cases focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process. Id. at 59. In other words, in order to satisfy the "prejudice" requirement, the Petitioner must show that a reasonable probability exists, but that for counsel's errors, he would not have taken the course of action that was embarked upon. Id. Additionally, the ABA Standards Relating to the Administration of Criminal Justice provides that, "it is unprofessional conduct for the lawyer to understate or overstate the risks, hazards, or prospects of the case to exert undue influence on the accused's decision as to his or her plea." Standard 4-5.1(c)(1979). "Although Strickland dealt with a claim of ineffective assistance in a capital sentencing proceeding, the same two-part standard has been held to apply to ineffective assistance claims arising out of the plea process." See Tahamtani v. Lankford, 846 F. 2d 712, 714 (11th Cir., 1988)(citing Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985)).

In the instant case, Morris suffered from "musical chairs" in regards to the assignment of defense counsel, with one defense counsel after another seeking to be terminated was replaced with yet another attorney. After Morris met with defense attorney Hunter Payne at his office and having begun the process of establishing an attorney/client relationship, she was approached by Mr. Payne and informed that he was withdrawing as counsel due to a "conflict of interest". When Morris asked if the "conflict"

was due to another co-defendant, she was told "no". Morris was going through a complicated pregnancy at an advanced age. Her pregnancy was causing an unavoidable roller coaster of emotions and instability. London, the town in which Morris was indicted, is a small town, where everyone knows each other. Morris's ex-husband is from London and has been employed by the National Guard full-time for almost 30 years. His brother was the chemist for the state police crime lab. When Morris was going through a custody battle with her ex-husband, the first judge, the Honorable Carnahan, withdrew from the case due to a "conflict of interest" because he had been the judge presiding on the divorce. Steve Cessna, the attorney that Morris had hired for the custody battle, had accepted a retainer from her, heard her side of the story, even appearing in the docket as counsel of record, until the day before the hearing when he withdrew. Cessna kept the retainer. The case was postponed, with Morris obtaining new counsel, Sam Begley. When the date for the reset hearing arrived, Morris appeared in court, at which time Steve Cessna was on the bench as the presiding judge. Cessna motioned for Morris to approach the bench at which time she was advised that she had already lost custody as the hearing had already been held and she missed the date. As the result, Morris has good reason to view any attorney with suspicion given the politics and social dynamics in the area.

In the instant case, the same as with the first defense counsel appointed, the second attorney appointed, Sam Castle, withdrew due to a "conflict of interest". This occurred during Morris's initial consultation with Castle. On August 18, 2003,

the court appointed the third defense counsel, Derek Gordon. This attorney remained with Morris through her appeal, however, the docket indicates that Gordon made no request for discovery, unlike the defense attorneys for all of her co-defendants. (Refer to discovery requests for: Lawson, R. 33, 34, 35; Lundy, R. 59, 60, 61; Faulkner, R. 67; Fox, R. 71, 73; Ramsey, R. 77). Most of the discovery process had been completed by the other attorneys prior to the time that Gordon was even appointed as Morris's counsel. Further, plea negotiations had already begun and deals were being made. Gordon merely placed a plea agreement in front of Morris and told her to sign it. Gordon conducted no investigation whatsoever prior to inducing Morris to sign the plea agreement.

In unique circumstances, where there is the actual breakdown of the adversarial process, a court may presume counsel's ineffectiveness without resorting to the two-prong test set forth in Strickland. In United States v. Cronin, 466 U.S. 648 (1984); Kimmelman v. Morrison, 477 U.S. 385, 106 S. Ct. 2574, the Supreme Court held that in addition to counsel's failure to conduct his own investigation, there was no effort made to investigate the government's case, and this falls below the minimum standard of competent representation. The Court noted that the adversarial testing process generally will not function unless the defense has done some investigation into the prosecution's case and into various defense strategies. Preparation consists of more than showing up and giving a good performance, if the truth-seeking process is to play some role in the criminal justice system. Defense attorneys must explore the truth, so that, if there is

exculpatory evidence in favor of their client, they can present it.

Failure to investigate the facts is unconscionable and falls below the level of performance required by the Sixth Amendment. See Evitts v. Lucey, 469 U.S. 387, 394, 104 S. Ct. 830, 835; Phillips v. Mills, 1999 U.S. Lexis 20628 (6th Cir., 1999).

In the instant case, when Morris first met with Gordon, she was very apprehensive. She was expecting her child within the month, facing a federal felony charge, and did not even have a reliable lawyer three months after the indictment was entered. At her first meeting after his appointment on August 18, 2003, Gordon asked Morris if she could give the government information. If so, she would be entitled to a downward departure. Morris had gone through a drug rehabilitation program (refer to PSR) and had started her life over. Morris had not been around any criminal activity since leaving the Layne House (rehab) in August, 2002. As the result, Morris had no information to provide to Gordon. Gordon indicated that she was the first client he had ever had that had not received a downward departure. As Morris was the last one to obtain defense counsel, she could not have provided any "new" information to that of the other co-defendants before her. Morris was made to feel that if she couldn't provide information, she could expect no help from Gordon.

Counsel has "the overarching duty to advocate the defendant's cause...to consult with the defendant on important developments" and to "make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland, 466 U.S. 668, 104 S. Ct. 2052, 2064-74.

Whenever Morris would call Gordon, she would be told that he was out or in a meeting and that he would return her call, which he never did.

Morris was incarcerated on December 8, 2003, for her state conviction. Morris spent one night in the Whitley County Jail and was transferred to the Clay County Detention Center (CCDC) the next day. Gordon visited Morris at CCDC, bringing the Plea Agreement with him. Morris was expecting Gordon to go over the Plea Agreement with her, but he said he was in a hurry. Morris quickly read the agreement, but questioned Gordon as to the amount of time that would be imposed. Gordon specifically advised Morris that the agreement with the prosecutor was for 10 years, and that when the PSR was done, an additional 2 years would be added for her criminal history of misdemeanors for a total of 12 years. Based on this representation, Morris signed the Plea Agreement. Morris submits that she should have been entitled to believe defense counsel's representations made to induce her to sign the Plea Agreement.

"We believe that when an attorney makes a significant representation of fact to his client, such as of a promise by the Assistant United States Attorney and the terms of that promise, the client is entitled to believe him. If this assumption cannot be indulged, the negotiations sanctioned under Rule 11 will be seriously impeded. There is accordingly a duty on attorneys to make sure whenever participating in plea bargaining proceedings, which are under the close scrutiny of the court, that any information they convey to their client is accurate and complete

and that they understand what the applicable law and rules are. Failure to adhere to professional standards in this regard is no minor imperfection, and in our view constitutes grounds for questioning an attorney's continued fitness to represent clients in the federal courts." See McAleney v. United States, 539 F. 2d 282, 286-287 (2nd Cir., 1976).

Morris was suffering from post partum depression when she signed the Plea Agreement and had recently been removed from everything she held dear. She left an aging mother of 80 years old and a three-month old baby. When Morris asked Gordon as to why there was not a set number of years contained in the Plea Agreement, she was told the government never puts that in a plea agreement.

Plea agreements should be entered into voluntarily and intelligently in order to satisfy due process. A Plea Agreement should not be sustained if it rests on a guilty plea that is the result of coercion. When deception is used to make the situation appear hopeless, this can cause coercion. A lawyer should review all important provisions with his client before proceeding to an agreement. Jail records would verify that there was only approximately 15 minutes of visitation between Gordon and Morris. There is a duty on the attorney to make sure, whenever participating in a plea bargaining proceeding, that any information he conveys to the client is accurate and complete and that he/she understands what applicable law and rules are; and failure to adhere to professional standards in that regard constitutes grounds for questioning attorney's continued fitness to represent

clients in Federal Court (See Federal Rules of Criminal Procedure, Rule 11, 11(d), 18 U.S.C.A.).

"Defendant is entitled to counsel whose undivided loyalties lie with his client." See United States v. Ellison, 798 F. 2d 1102 (7th Cir., 1986).

Motions for continuance had been repeatedly requested by the various defense attorneys and granted by the court. The timing of the rearraignment, as driven by defense counsel, was suspect in that it immediately followed Morris's sentencing on state charges on December 8, 2003, which were based on the same conduct during the same timeframe.

In reference to the Plea Agreement, defense counsel was incompetent. There was no nexus to interstate commerce to support a federal criminal charge. Further, the charges, being duplicative of the state case, were clearly a violation of double jeopardy. Any functioning or competent defense counsel should have readily recognized these fatal defects to the federal government's case. Instead, Morris suffered from defense counsel that had to be contacted by the court when he failed to appear at the rearraignment on December 15, 2003 at 9:30 a.m. (TR 3, R. 188). The Clerk of Court advised that Gordon would be able to make it into court around 11:15 a.m. (TR 33, R. 188). Gordon blamed his non-appearance on some kind of "misunderstanding" when court was resumed at 11:30 a.m. (TR 34, R. 188).

The Sixth Circuit has held that the Double Jeopardy Clause protects against a second prosecution for the same offense after conviction or acquittal, and against multiple punishments for the

same offense. See Palazzolo v. Gorcyca, 244 F. 3d 512 (6th Cir., 2001). It is one matter for the federal government to pick up criminal charges from the state which cannot be proven as has become routine practice in recent years; it is quite another to prosecute the same offense again after the state has successfully prosecuted it and sentenced on it, only to a week later have the prisoner rearraigned on federal charges against the same conduct, all with the aid of defense counsel! Such behavior on behalf of defense counsel is not only ineffective, but incompetent and further smacks of the type of self-dealing and personal "conflicts of interest" which occurred in the Morris custody battle to unjustly deprive Mrs. Morris of her right to be heard whatsoever so that her ex-husband might be granted custody of her child without due process. Gordon's representation of Morris can be said to have furnished a "net negative" to the defense.

In Matthews v. Arbramajutys, 319 F. 3d 780 (6th Cir., 2003), it was found where defense counsel presented no available alibi witnesses or favorable admissible evidence, his performance was deficient to the point of furnishing a "net negative" to the defense. Such a demonstration satisfies the Strickland test as it relates to professional competence.

In other words, in the instant case, as it was a violation of double jeopardy and it also lacked federal jurisdiction, Morris was prejudiced by a sentence that was over 10 years more than the state sentence and a sentence which should have never been imposed as it is an unconstitutional and therefore illegal sentence.

Other evidence of defense counsel's ineffectiveness were in regards to the fact he made no move to question or object to any of the contents in the Plea Agreement. The drug quantity was merely estimated, as no "actual methamphetamine" was ever found by law enforcement on Morris. Counsel also made no move to object to the 3 level enhancement for a "substantial risk of harm to human life". There was no evidence ever presented by the prosecution to support such an enhancement, and in the absence of any such evidence, other federal district courts do not routinely add such an enhancement. This enhancement further served to negate any beneficial effect the 3 levels granted for acceptance of responsibility might have accorded Morris, considering it saved the government the expense of a trial. This enhancement maliciously added 43 months to Morris's sentence (Level 32, Category III at 151-188 months vs Level 29, Category III, at 108-135 months).

According to Arredondo v. United States, 178 F. 3d 778 (6th Cir., 1999), sentencing courts are required to err on the side of caution when calculating drug quantities. Morris was deprived of this protection by non-functioning defense counsel.

Gordon was also ineffective in regards to the PSR process. During the interview, Morris needed the advice of counsel and turned to confide in him, but he was asleep. Morris was very embarrassed. U.S. Probation Officer, Lisa Chapman, acted confused and embarrassed as well. The PSR interview was conducted at the Kentucky Correctional Institute for Women on February 2, 2004 (see Exh. B). This interview was done in the general visiting area where there are cameras. Gordon's actions would have been

on tape.

Prior to sentencing on April 29, 2004, Morris was informed by Gordon that the results of the PSR were in and that she had been enhanced three more years due to a gun. Morris indicated there was no legitimate basis for such an enhancement as she had been unaware of any gun, and Gordon said it would be o.k. as he was going to object to it at sentencing.

At the sentencing hearing on April 29, 2004, the court notes there is one objection filed to the PSR in regards to:

"whether or not the presence of a gun appears to be part of the relevant conduct related to this offense."

(Court at TR 3, R. 176).

Gordon argues that under USSG 2D1(b),

"that in order for the two-point enhancement to count against her the government would have to establish by the preponderance of the evidence that the defendant actually or constructively possessed it and that the possession was during the commission of the offense, which I don't believe has been done"

(Gordon at TR 3, R. 176).

Gordon clarifies that in regards to the state charge,

"May 21st, 2001, was part of the conspiracy. She was charged in state court, for which she's serving a five-year sentence now on that particular incident. No mention of a gun. Not charged with a gun. As matter of fact, her first notice of any weapon in that case was when she received the pre-sentence investigation report, which is when I first became aware of it. "

(Gordon at TR 3, R. 176).

Gordon further clarifies the facts,

"She didn't know the gun was there, number one. Number two is, there's been no notice of this particular gun. Granted, the government is not prohibited to prosecute in this court because double jeopardy would not apply. However, there's got to be some kind of indication that there's going to be a gun. This indictment, Judge, is a -- has, oh, gosh, 15

counts, 15 separate counts, and not in one of those counts is that particular incident mentioned."

(Gordon at TR 4, R. 176).

It is at this point that Morris would submit that this stipulation on the record by defense counsel regarding "double jeopardy would not apply" was most likely deliberate so that he might aid the prosecution in maintaining the jurisdiction necessary to proceed to sentencing, an unconscionable act of betrayal to his charge. It is one matter to be incompetent, it is considerably worse to know better, yet act deliberately disloyal.

The Supreme Court has held that reversal is mandated if prejudice is proven on attorney-client relationship. See United States v. Morrison, 449 U.S. 361, 66 L. Ed. 2d 564, 101 S. Ct. 665 (1981).

Gordon describes the circumstances surrounding the gun:

"And there was -- apparently, this gun, Judge, was underneath a couch which was apparently in this room. But she had no indication of it, no knowledge of it, and she was not charged with it."

(Gordon at TR 8, R. 176).

AUSA Stephen Smith rebuts Gordon's argument, falsely claiming on the record that Morris had "three days prior to her coming in here" to plead guilty on December 15, 2003, "entered a plea down in Whitley Circuit Court to this offense...[that] she possessed a .38-caliber handgun" (TR 9, R. 176).

Gordon attempts to correct AUSA Smith on the record:

"She was sentenced three days before she entered a plea in this case, but the plea had been some period before that."

(Gordon at TR 13).

"But there was absolutely no mention of a gun in state court."

We weren't provided anything concerning this gun. And to now bring up this incident and assess two points when she's already serving a five-year sentence I think is a bit much, especially in the fact that we haven't -- we haven't gotten any notice of it until we got the PSI." "And from what I understand, I'm not even sure the gun is even -- is even available."

(Gordon at TR 14).

The judge holds that §1B1.3 requires the court to look at all relevant conduct and erroneously determines based on AUSA Smith's fraud upon the court that the defendant "had pled to an offense which alleges that there was a gun present" (Court at TR 10, R. 176). The court further clarifies that according to USSG §2D1.1, "it's the defendant's burden to show that it was clearly improbable that it was connected to the drug offense" (TR 10, R. 176). AUSA Smith's misconduct improperly shifted the burden to Morris to show the weapon was not associated with the drug activity. See United States v. Hill, 79 F. 3d 1477, 1485 (6th Cir.), cert. denied, 519 U.S. 585 (1996).

In addition, United States v. Lang, 333 F. 3d 678, 682 (6th Cir., 2003), has held that if a defendant objects to a material fact in the PSR but offers no evidence beyond a bare denial, the district court may properly rely on the facts found in the PSR.

This issue could have been easily resolved had Gordon brought the evidence to the court's attention that the state conviction was not based on a gun charge against Morris and that she had not pled guilty to a gun charge in it. Incredibly, Gordon does not even bring this evidence to court at the resentencing of Morris over a year later on August 10, 2006. Gordon continues to object to the gun enhancement but provides no evidence (TR 2-3, 8/10/06

hearing). Even defendants are expected to know the law; certainly a criminal defense attorney should be aware of the caselaw in his own circuit!

Morris was improperly prejudiced by a federal prosecution which should have never been maintained had she had functioning defense counsel due to a lack of jurisdiction and double jeopardy. She was improperly prejudiced with enhancements in a Plea Agreement that unfairly increased her sentence. Then she was slammed for the third time with a gun enhancement, which has only been maintained to date by prosecutorial misconduct and collusion by defense counsel, causing her sentence to be unjustly increased by another 37 months (Level 34, Category III at 188-235 months vs. Level 32, Category III. at 151-188 months).

Morris acknowledges that she stated during her rearraignment that she understood the punishment to be "not less than 10 years" (TR 43, R. 188). Although the judge held a plea hearing, this is far from dispositive of the issue. That is because the Supreme Court opinions in Machibroda v. United States, 368 U.S. 487, 825 S. Ct. 510, 7 L. Ed 2d 773 (1962) and Fontaine v. United States, 411 U.S. 2113, 93 S. Ct. 1461, 36 L. Ed. 2d 169 (1973) indisputably teach that the barrier of that hearing and the plea or sentencing proceeding record, although imposing, is not invariably insurmountable. Id.; see also Moore v. Michigan, 355 U.S. 155, 78 S. Ct. 191, 2 L. Ed. 2d 167 (1957); Herman v. Claudy, 350 U.S. 116, 76 S. Ct. 223, 100 L. Ed. 126 (1956); Taylor v. United States, 193 F. 2d 411 (10th Cir., 1952) (However regular the proceedings at which a defendant signed a waiver of indictment, declined

assistance of counsel, and pleaded guilty might appear from the transcript, it still might be the case that the defendant did not make an intelligent and understanding waiver of his constitutional rights).

Clearly, counsel's ineffectiveness led to Morris entering an unknowing and involuntary plea. A guilty plea must be made knowingly, voluntarily, and intelligently. See Boykin v. Alabama, 395 U.S. 238 (1969). In order to plead voluntarily, a defendant must know the direct consequences of his plea, including the actual value of any commitments made to him. See Mabry v. Johnson, 104 S. Ct. 2543, 2547 (1984).

In the instant case, Morris's plea was not an intelligent choice among alternative courses of action. Morris did not derive a single benefit from entering the plea, as she would have faced the same statutory sentence had she proceeded to trial and been found guilty. She would have, however, had the benefit of forcing the prosecution to provide evidence that she had indeed possessed the gun that added over 3 years to her sentence, or that they could prove federal jurisdiction. Instead, based upon counsel's false promises regarding the agreement with the prosecutor as to sentence length and his incompetence and even collusion in failing to provide the simple evidence to have rebutted the enhancement, combined with Morris's lack of knowledge of the true consequences of pleading guilty, she entered a guilty plea. Had counsel provided effective assistance, Morris would not have entered a plea in this case. As such, counsel's assistance was constitutionally infirm, leading to an unknowing, unintelligent, and

invalid plea.

As Morris's Sixth Amendment right to effective assistance of counsel was violated, she submits her plea must be vacated and this matter remanded for hearings consistent with the findings of this court and the constitutional principles of fair play and substantial justice.

## II. PROSECUTORIAL MISCONDUCT.

Kentucky State Police Detective Jason O'Bannon was assigned to the multi-task agency called UNITE. It was a task force that included state police, ATF, DEA, county sheriffs and other authorities. O'Bannon's role was as an undercover narcotics agent. He used his childhood friends and acquaintances to facilitate his position as a "narc". Specifically, in the instant case, O'Bannon became embroiled in investigation of methamphetamine trafficking by utilizing his past and current social contacts, networking with the "good ole boys" who were deeply entrenched in the law enforcement social structure of Clay, Whitley, and Laurel Counties, Kentucky.

The blurring of lines between professional work ethics and old family allegiances led to the abuse of authority in which sexual misconduct was committed against Morris. The cultural environment of this area of Kentucky has a long history of double standards and cover-ups, sexual favors and impropriety have flourished within all ranks, departments, and agencies. It has enjoyed the unspoken approval as an unstated fringe benefit of a law enforcement investigator's job. The written law prohibits explicitly this type of sexual behavior, but the "blue wall"

of law enforcement protects those that openly take advantage of women for sexual favors in return for some partial immunity from prosecution.

On the other side of the same coin, those women who turned down O'Bannon's sexual advancements were retaliated against with prosecution for alleged drug crimes. Conspiracy drug cases would be easily padded and the deck stacked to include another female or a minor role participant. In the instant case, the threats for non-cooperation became reality for Morris.

Det. O'Bannon was raised in Laurel County, Kentucky, and attended high school at Laurel County High School in London, Kentucky. At age 17, he would stand across the street with Faye and Lindsay Mardis's two sons and watch Morris in her front yard at 405 Whitley Road in London, Kentucky in the years of 1987-89 as she got ready to ride her motorcycle to work every day. O'Bannon had stalked her as a teenager, and 3 years later he encountered her again when Morris was dating State Police Trooper Gary Martin and State Police Trooper Rick Cloyd. O'Bannon became jealous when Morris dated his cohorts but spurned his overtures.

This history of jealousy became apparent to Morris the day O'Bannon interrogated her at the Laurel County Detention Center (hereinafter "LCDC") in the spring of 2002 as his confessions that day were overwhelming. Morris was hit with blatant sexual innuendos and frank salaciousness that was topped by accusations. O'Bannon's manners were intrusive and frankly violated her civil rights. During his interrogation of Morris, he asked her about a mutual acquaintance named Marcella. Marcella had been an employee

of Faye Mardis and she sang in Morris's wedding. O'Bannon had not seen Marcella in a few years and did not know anything about her, but that did not stop him from informing Morris that Marcella had given him his first "blow job". Morris was repulsed by this repugnant behavior and informed O'Bannon that she was not interested in his sex life, however, he replied, "I'm interested in yours, especially since you like police officers." O'Bannon then bragged that he knew "all about her" dating two of his associates, Gary Martin and Rick Cloyd. When Morris rebuffed O'Bannon sexual advances, she was threatened with prosecution. When Morris then asked for a lawyer to be present, she was told she did not need a lawyer, she just needed to "cooperate."

In the summer of 2002, Morris was again confronted by O'Bannon's sexually deviant behavior. Morris had a court date and was transported to court and questioned by O'Bannon. Kyle Kersey, defense counsel, and the Whitley County prosecutor were both present. At one point, O'Bannon and Morris were left alone together and again he made sexual comments to her. His exact words were, "you really do have very large boobs" while leering at her chest. Morris was upset by his comment and asked to be taken to the courtroom.

In August, 2002, O'Bannon visits Morris on her mother's farm. Morris had moved in with her mother, Jewell Martin, after returning from the Layne House for rehabilitation. Morris was living a productive and normal life helping her mother with her businesses and farming. Morris had put her past behind her and was reestablishing family ties. O'Bannon continued to pursue

Morris, stopping by her mother's farm on numerous occasions. One such occasion, Morris was home and spoke with O'Bannon outside. He had another man with him that he introduced as an FBI agent. No identification was shown. Morris had spoken with her attorney, Bernard Moses, prior to this encounter about O'Bannon's continuing harassment, including that it was of a sexual nature. Moses had told Morris to tell O'Bannon to call him if O'Bannon wanted to talk with her. Morris informed O'Bannon she had nothing to say to him unless her attorney, Mr. Moses, were present, and that he was in violation of her Fourth, Fifth, and Sixth Amendment rights. O'Bannon gave Morris his cell phone number and told her to call him anytime if she changed her mind, giving her the code number of "666" for identification purposes.

The final encounter with O'Bannon was on December 15, 2003. Morris was transported to the Federal Court Building in London, Kentucky, from the Clay County Detention Center where she had been serving her state sentence. Morris was scheduled to appear in court to sign her plea agreement, however, at the scheduled time, her lawyer was not present, causing Morris to have to wait until he arrived to go to court. Afterwards, Morris was told by O'Bannon that he would be transporting her back to Clay County Detention Center. Morris's mother was present with her baby to see her leave. O'Bannon did not handcuff her and she rode in the front seat of an unmarked car. (See Exh. C). He even walked away from her several times. During the ride, O'Bannon asked Morris who the father of her baby was, and if she had slept with any of her co-defendants. Morris told him it wasn't any of his

business who she had slept with, but he countered with, "yes, it is." O'Bannon stated that everything about her is his business and that, "I hold your life in my hands." He then asked Morris to "show me your boobs", and "then I can help you". Morris was extremely upset. She had just left from holding her 3 month old baby, was suffering from post-partum syndrome, and now she had to be tormented again by this sex pervert, O'Bannon.

During incarceration at LCDC, Morris was placed in the same cell as various paid informants. Shelly Williams was an informant for the Laurel County Sheriff's Department and O'Bannon. Williams was placed in the same cell as Morris. Williams was later subpoenaed by the prosecutor to testify against Morris, Fox and Faulkner. Williams is Brandy Lawson's first cousin. Williams and Lawson were both coerced by O'Bannon, with Williams promised freedom and a reduction of charges for Lawson for sexual favors. This conduct was used to induce Morris to make statements out of counsel's presence, which was a violation of Morris's constitutional rights. See United States v. Henry, 447 U.S. 264, 65 L Ed 2d 115, 100 S. Ct. 2183 (1980). Even worse, much of what the two women stated consisted of outright perjury. For example, Lawson never once witnessed Morris engaged in any drug activity, yet she testified that she had done so.

Morris reported O'Bannon's misconduct to her state defense counsel, Mr. Moses. She has been prejudiced and injured by this officer's harassment and retaliation with harsh sentencing on charges which were not even federal in nature. When Morris approached O'Bannon with his improprieties, he laughed and said,

"so what". When Morris told others, she always received the same response, "What can you do, he's the police."

Morris's family and friends, who were all aware of O'Bannon's sexual misconduct, sent her newspaper clippings to FCI Tallahassee regarding his arraignment on criminal information on formal charges brought by the U.S. Attorney for "intentionally forcing sexual acts upon a confidential informant -- and witness tampering" (See Exh. D), precisely the type of criminal behavior to which Morris was repeatedly exposed and over which she was so damaged.

The Supreme Court has ruled that, "The prosecutor's potential conflict of interest increases in magnitude in direct proportion to the seriousness of the charges of police wrongdoing." See Newton v. Rumery, 480 U.S. 386, 414. The Newton Court further held that, "The Government may not prosecute for the purposes of deterring people from exercising their right to protest official misconduct and petition for redress of grievances." Id. at 420.

The Sixth Circuit has held in United States v. Allen, 954 F 2d 1160 (6th Cir., 1992), that the prosecutor's decision in determining which case to prosecute cannot be based on defendant's race, sex, religion, or exercise of statutory or constitutional rights.

While Morris has no direct evidence to establish that the prosecutor in the federal case was personally aware of O'Bannon's sexual misconduct against her, a substantial argument can nevertheless be made that O'Bannon influenced him to proceed against her, taking a far harsher position against her than those co-

defendants he favored, such as Lawson, due to her "cooperation" with his deviant behavior.

Misconduct by investigating law enforcement agents is indistinguishable from misconduct by prosecuting attorneys. See United States v. Lorefice, 192 F 3d 647 (7th Cir., 1999).

There is also the issue that AUSA Smith misrepresented the fact to the court that Morris had pled guilty on the state charge to the gun, which resulted in an additional 3 years of prison. Further, it was unethical to have signed the Plea Agreement on December 15, 2003, knowing the gun would be later added in the PSR to enhance the sentence. AUSA Smith even misrepresents the facts by attesting on the record at sentencing, "there was a large quantity of methamphetamine" in the room where the (TR 11, R. 176). There was in fact NO actual methamphetamine whatsoever found in the room. Smith even contends that, "We have not, again, had a factual dispute here" (TR 13, R. 176), which is also not true.

"For a prosecutor to convey, or even to permit a false impression, invades the area of due process." See Miller v. Pate, 386 U.S. 1 (1987).

ABA Standards, 3d Ed, 1993, pg. 855, have stated that a prosecutor should not institute, cause to be instituted, or permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction. AUSA Smith not only did not have admissible evidence to support his gun enhancement, the evidence would have proven the gun enhancement did not apply as he represented to the court. Such behavior

by a prosecutor is unethical and requires remedial action to be taken by the court.

Harmless error does not apply once a court finds a violation of Brady, See United States v. Frost, 125 F. 3d 382-83 (6th Cir. 1997). A defendant need not demonstrate by a preponderance of the evidence that disclosure of the suppressed evidence would have resulted in the defendant's acquittal. See Kyles v. Whitley, 514 U.S. 419 (1995).

While a prosecutor is clearly authorized to strike hard blows in an earnest and vigorous prosecution, he or she is not at liberty to strike foul ones. See Boyle v. Million, 201 F. 3d 711 (6th Cir., 2000); Berger v. United States, 295 U.S. 76, 88, 79 L. Ed 1314, 55 S. Ct. 629 (1935).

The Sixth Circuit has ruled that 1) Criminal prosecution which would not have been initiated but for vindictiveness is constitutionally prohibited, and 2) The remedy for prosecutorial vindictiveness is dismissal of the charges or other appropriate remedies. See Bragan v. Poindexter, 349 F. 3d 476 (6th Cir., 2001).

When combined with the lack of any tie to interstate commerce and the violation of the constitutional prohibition against double jeopardy, the likelihood that federal criminal charges were brought based on the vindictiveness of Det. O'Bannon influencing AUSA Smith to proceed against Morris is substantial enough to establish cause under the law of the circuit. No woman should be forced to choose between having sex with an undesirable or prison, particularly at the hands of "law

enforcement".

### III. FEDERAL JURISDICTION WAS LACKING TO PURSUE THE CASE.

The indictment in the instant case was fatally defective because it failed to charge an offense with an interstate commerce nexus. In addition, there was no interstate commerce nexus available in the instant case upon which to found federal criminal jurisdiction. As the result, the indictment must be dismissed and Morris released from federal custody.

Based on Article I, Section 8, Clause 3 of the United States Constitution, the indictment fails to charge an essential element of the offense as the "nexus to interstate and/or foreign commerce". The Sixth Amendment guarantees every defendant the right to be informed of the Government's accusation against him. See Russell v. United States, 369 U.S. 749, 761, 82 S. Ct. 1038, 1445, 8 L. Ed 2d 240 (1962). An indictment is sufficient to protect this right if it "first contains the elements of the offense charged and fairly informs a defendant of the offense which he must defend, and second, enables him to plea an acquittal in bar of future prosecutions for the same offense." See Hamling v. United States, 418 U.S. 87, 117, 94 S. Ct. 2887, 2907, 41 L. Ed 2d 590 (1970).

Failure to charge an offense and failure to show jurisdiction of the court are defenses which may be raised at any time. See Rule 12(b) Fed. R. Crim. Proc.; Government of Virgin Islands v. Pemberton, 813 F. 2d 626 (3rd Cir., 1987).

The charge that interstate commerce is somehow affected is critical, since the federal government's jurisdiction of this

crime rests only on that inference and should have been properly presented to the Grand Jury. See United States v. Hooker, 841 F. 2d 1225, 1232 (4th Cir., 1988).

The conviction was reversed where the bank's lack of membership in the Federal Reserve System precluded the government from establishing element of offense outlined in indictment in United States v. Stoddard, 875 F. 2d 1233 (6th Cir., 1989). The Sixth Circuit held that the "district court's jurisdiction in a criminal proceeding is generally established by the indictment." Id. at 1236.

Jurisdiction cannot be waived and cannot be conferred upon federal court by consent, inaction or stipulation. See California v. LaRue, 409 U.S. 109, 112, 93 S. Ct. 390, 34 L. Ed 2d 342 (1972).

In United States v. Lopez, 514 U.S. 549 (1995), the Supreme Court Held that "Congress had no general right to punish murder committed within any of the States...and that it was clear that Congress cannot punish felonies generally...The court's only qualification was that Congress could enact such laws for places where it enjoyed plenary powers--for instance, over the District of Columbia. Thus, whatever effect ordinary murders, or robbery, or gun possession might have on interstate commerce (or on any other subject of federal concern) was irrelevant to the question of congressional power." As the result of Lopez "the constitutionality of assertions of federal jurisdiction over what are essentially local crimes must be closely scrutinized."

The defendant's motion to dismiss was granted in United

States v. Paredes, 950 F Supp. 584, 586-89 (S.D.N.Y., 1986), in which it was ruled, once the existence of jurisdiction is questioned, the burden of establishing it always rests on the party asserting jurisdiction. See also 2A Moore's Federal Practice at 12-50.

In the instant case, there was no currency, mail, out of state phone calls or cellular phone calls, no travel out of the State of Kentucky, no defendants who resided outside of the State of Kentucky. In essence, there was no nexus to interstate commerce providing no means for the federal government to constitutionally assert jurisdiction. In reality, the U.S. Constitution only authorizes two "federal" crimes, those being treason and counterfeiting. All other crimes are matter of state jurisdiction, which means that all so-called federal drug crimes are unconstitutional even if they have some nexus to interstate commerce, which the instant case lacks.

In speaking on the authority of the court, it is noted that, "no authority need to be cited for the proposition that, when a court lacks jurisdiction, any judgment rendered by it is void and unenforceable, and without any force or effect whatever." See Hooker v. Boles, 346 F 2d 285, 286 (1965). When rules providing for relief from void judgments is applicable, relief is not discretionary matter, but is mandatory. See Orner v. Shalala, 30 F 3d 1307 (Colo. 1994). See also Fed. Rules of Crim. Procedure 12(h)(3), "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."

The district court, therefore, in the instant case, has a nondiscretionary duty to vacate the void judgment against Morris and release her immediately.

Compounding the magnitude of Constitutional error in this case is the violation of double jeopardy. The Double Jeopardy Clause guarantees that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb". United States Amendment V. As the Sixth Circuit noted in United States v. Barrett, 933 F 2d 355, 360 (6th Cir., 1991), there are three components to this guarantee: (1). protection against a second prosecution for the same offense after acquittal; (2) protection against a second prosecution for the same offense after conviction; and (3). protection against multiple punishments for the same offense.

While the federal government has in recent years routinely engaged in the disturbing policy of prosecuting state cases in which the state lacked enough evidence to proceed or were of questionable merit, (See United States v. Kendrick, 853 F 2d 492 (6th Cir., 1988), to engage in prosecution of the same conduct in the same time frame after the state has already convicted the individual of the same conduct cannot be anything other than unconstitutional. Jeopardy is said to "attach" once a jury is sworn at trial, therefore, a federal prosecution following a state's dismissal or unpursued criminal charges against an accused would not be a violation of jeopardy. In the instant case, however, Morris was convicted of the charges and sentenced before the federal government engaged in the

rearraignment of her on federal charges on December 15, 2003. Such a prosecution on the same acts in the same timeframe, particularly in the absence of any nexus to interstate commerce, is doubly unconstitutional.

Federal courts are courts of limited jurisdiction, deriving their power solely from Article III of the U.S. Constitution. To act contrary to its authorizing document cannot be sustained.

All laws, rules and practices which are repugnant to the Constitution are null and void. See Marbury v. Madison, 5 U.S. (2 Cranch) 137, 180.

"Where rights secured by the Constitution are involved, there can be no rule making or legislation, which would abrogate them." See Miranda v. Arizona, 384 U.S. 436, 16 L Ed 2d 694, 86 S. Ct. 1602 (1966).

#### IV. THE SENTENCE WAS MISCALCUALTED, UNREASONABLE AND ILLEGAL

The sentence ordered for Morris, as based upon AUSA Smith's misrepresentations to the court caused it to be miscalcualted, unreasonable and illegal.

The Supreme Court in Mabry, 467 U.S. 504 (1984) ruled, "We began by acknowledging that the condictionns for a valid plea presuppose fairness in securing agreement between an accused and a prosecutor."

In Santobello v. New York, 404 U.S. 257, 298 (1971), the Supreme Court first addressed the issue where a plea agreement is broken. The Court ruled that the ultimate relief to be accorded a defendant is properly left to the discretion of the trial court. The "core concept" enunciated in Santobello was

the existance of the Constitutional right of the defendant to be treated with fairness.

The prosecutor engaged in bad faith throughout the instant case. To even have brought the charges was to disobey his sworn oath to uphold the U.S. Constitution as previously discussed. Violations of the oath of office are punishable under Title 18 U.S.C. §1621 for Perjury of Oath of Office, which carries a five year felony prison sentence and a \$2,000 fine.

Everything about the prosecution and sentencing of Morris appears to have been orchestrated in order to manufacture a maximum sentence. The PSR admits that the Whitley County case was not assessed any points for criminal history under USSG §1B1.3, which refers to §3D1.1.2(d), thus tactly admitting a violation of double jeopardy (Refer to Addendum to PSR). Morris, however, was hit with the mandatory minimum sentencing provision under 21 U.S.C. §841 for those defendants who have had one prior conviction of a felony drug offense of 10 years. To have stacked the federal prosecution on top of the state prosecution, violating Morris's right to a speedy trial in order to be able to have the state conviction in place in order to "justify" a 10 year minimum sentence, when such charging authority also violates the prohibition against double jeopardy defeats the mandate in Berger against striking "foul blows".

The Sixth Circuit has ruled that where defendant violates 21 U.S.C. §841(a) more than once, for example, possessing less than 50 grams of cocaine base on each occasion, sentencing provisions of §841(b) do not apply, for there is no single

violation involving "50 grams or more" of cocaine base, even if the sum total of cocaine base involved all together, over multiple violations, amounts to more than 50 grams; accordingly district court erred in sentencing defendant to life imprisonment pursuant to §841(b)(1)(A), where district found that conspiracy involved only 23 grams of cocaine base. See United States v. Winston, 37 F 3d 235 (6th Cir., 1994). In the instant case, a Level 30 carries a sentence of 121-151 months in a Category III Criminal History. This precise issue has been the subject of numerous cases in the Sixth Circuit for long years. See also United States v. Rettelle, 165 F 3d 489 (6th Cir., 1999); United States v. Sandlin, 313 F 3d 351 (6th Cir., 2002). While the defendant in the Winston case took his charges to trial, the defendant in the Sandlin case agreed to a plea bargain. The Plea Agreement was rendered "ambiguous" by the Sixth Circuit because neither the indictment nor the plea agreement contained any factual basis that could support a finding that Sandlin had manufactured the fifty grams in a single instance, as required to support a mandatory minimum 10 year term. The Sandlin Court ruled the district court had erred, Sandlin's plea agreement was made invalid and his sentence vacated. See Sandlin, 313 F 3d at 354.

The other indication that Morris's sentence was unreasonably harsh is that the U.S.Sentencing Commission Special Post Booker Coding Project, prepared as of January 5, 2006, containing comparisons as published in the Federal Register, indicates that the average sentence for Drug Trafficking under §2D1.1 is 83 months with the median sentence at 60 months (See Exh. E). When this

public data, as compiled from all federal courts on over 50,000 federal cases, is considered in the context of the fact that the evidence in Morris's case indicates that, "There is no physical evidence in this case" (See Exh. A), the unreasonableness of the sentence comes into clear focus. There is also the issue that when the official court documents are reviewed in this case, the vindictiveness of Detective O'Bannon can be clearly established. In Exhibit A is contained the papers regarding #33-04-0085, stating Detective Jason O'Bannon as the officer making the report in which no quantity of methamphetamine is noted on the form, however, O'Bannon states Morris is charged with "manufacturing over 5 grams of methamphetamine" and co-defendant Randy Fox is charged with the "attempt to manufacture over 5 grams of methamphetamine". The matter of vindictiveness in this case comes into play in regards to the prohibition in 18 U.S.C. §3553(a)(6) regarding "unwarranted sentencing disparities". Detective O'Bannon's promise of a harsh prison sentence if his victim resisted his sexual advances is obvious in this case. O'Bannon's own official paperwork indicates he has "no evidence". Morris rebuffs O'Bannon and receives 188 months compared to Brandy Lawson, who does not and as the result, receives a sentence of 84 months, as compared to the national average of 83 months in Exhibit E.

One of the mandates of 18 U.S.C. §3553 is for the sentence to promote respect for the law. Certainly, the behavior of law enforcement in the instant case does not merit a harsher sentence for Morris than that of Lawson.

In regards to the gun enhancement, the Supreme Court has

ruled in Bailey v. United States, 516 U.S. 137 (1995) that if the gun is not disclosed or mentioned by offender, then the gun is not actively employed and is not "used" within the meaning of the statute. According to United States v. Mills, 29 F 3d 545, 546 (10th Cir., 1994), the government may show constructive possession with circumstantial evidence; dominion, control and knowledge, in most cases, may be inferred if defendant had exclusive possession of premises where firearm was found; however, joint occupancy alone cannot sustain such inference; in cases of joint occupancy, government must present evidence to show some connection or nexus between defendant and the fire arm. United States v. Beverly, 750 F 2d 34, 37 (6th Cir., 1984), has ruled that constructive possession was not established where gun with defendant's feet during execution of search warrant of another's residence. United States v. Stevens, 851 F 2d 140, 143 (6th Cir., 1988), has ruled that "Convicted defendants, including those who plead guilty, have a due process right to a fair sentencing procedure which includes the right to be sentenced on the basis of accurate information. A sentence must be set aside where the defendant can demonstrate that false information formed part of the basis for the sentence." AUSA Smith misrepresented to the court that Morris had pled guilty in the state case to possession of a gun. This gun had supposedly been found in a couch in a motel room. There is no mention of a gun in Detective O'Bannon's paperwork. Morris did not plead guilty to any gun in the state case. The court used AUSA Smith's misrepresentations on the record to sentence her on the gun enhancement under the guise that

this "fact" had been admitted by the defendant when this is not true. The gun enhancement, therefore, cannot stand, and the sentence must be reduced accordingly.

In essence, Morris was innocent of any gun charge or enhancement. United States v. Michelsen, 141 F 3d 867, 782 n. 3 (8th Cir.), cert. denied, 525 U.S. 942 (1998), has ruled that a §2255 challenge to illegal sentence cannot be waived; once who is acutally innocent of a crime may always challenge an illegal sentence.

United States v. Woods, 986 F 2d 669 (3rd Cir., 1993), cert. denied, 510 U.S. 826, 114 S. Ct. 90, 126 L Ed 58 (1993), has ruled that it is wholly unacceptable to suggest that, because a defendant was involved in a drug distribution conspiracy, no miscarriage of justice occurred in imprisoning him for a period significantly longer than was appropriate under the law. It is unacceptable because injustices befall the guilty as well as the innocent, for justice consists not only of convicting the guilty, but also of assigning them a lawful and just punishment.

Blakely v. Washington, 542 U.S. 296, 303-304 (2004), has ruled that the Sixth Amendment prohibits imposition of a sentence above the legally prescribed maximum based on a fact or facts neither admitted by the defendant nor found by a jury beyond reasonable doubt. The relevant "statutory maximum" the Court clarified, "is not the maximum sentence a judge may impose after finding additional findings."

Morris was resentenced on 8/10/06 under Booker, the progeny of Apprendi and Blakely. She received a reduction of 10 months

on a 184 month sentence (reduced from 188 for 4 months already served), a reduction which fell far short of the mandates of the Supreme Court that "judge found" facts were in essence unconstitutional. While defense counsel was incompetent in not providing the evidence that Morris had not pled guilty to a gun in the state case, the court did have a hand in it by indicating, "No evidence would be required to be presented at this time" (TR 15, R. 176). The district court has no legitimate business taking the government's word without question ruling against evidence in light of the mandate under Article III to be impartial. Per United States v. Tilton, 714 F 2d 642, 644 (6th Cir., 1983), a "trial judge remains under a duty...to act at all times with a view towards soliciting the truth."

There is also the issue that the criminal history category of III placed on Morris were misdemeanors, consisting primarily of traffic violations serving to overrepresent her "criminal" past. The Criminal History Rules have been recently changed on November 1, 2007, through Amendment 12, a guideline amendment that may apply retroactively to previously sentenced defendants under 18 U.S.C. §3582(c)(2) by the time this §2255 petition is heard.

Amendment 12 addresses the use of misdemeanor and petty offenses in determining a defendant's criminal history score, when they are counted in §4A1.2(c)(1) and when they are not counted in §4A1.2(c)(2). Based on a study, the Commissioner responded to concerns that (1) some misdemeanors and petty offenses counted under the guidelines involve conduct that is not serious

enough to warrant increased punishment upon sentencing for a subsequent offense; and (2) the presence of a prior misdemeanor or petty offense in a rare case can affect the sentence in the instant offense in a way that is greatly disproportionate to the seriousness of the prior offense (such as when such a prior offense alone disqualifies a defendant from safety valve eligibility); and (2) jurisdictional differences in defining misdemeanor and petty offenses which can result in inconsistency in application of criminal history points for substantially similar conduct. The result made the Commission to make three modifications to §4A1.2(c)(1) and (2). First, the Amendment moves from §4A1.2(c)(1) to §4A1.2(c)(2) the Fish and Game violations and local ordinance violations. Secondly, the Amendment changes the probation criteria as follows:

"...Offense listed at §4A1.2(c)(1) will be counted only if (A) the sentence was a term of probation of more than one year or a term of imprisonment of at least thirty days (3); (B) the prior offense was similar to the instant offense." [emphasis added].

The Commissioner states that those offenses generally do not represent conducts criminalized under state laws and they frequently receive minor sentences for them. The Commissioner determined that prior misdemeanor and petty offenses that received such a relatively minor default sentence should not be counted for criminal history purposes.

Based on the amendment/modification being made retroactively applicable to previously sentenced defendants, Morris requests that her Criminal History Category be reduced accordingly. The Booker Supreme Court case decision which abolished the mandatory

sentencing guidelines apply to Morris's motion for this sentence reduction, thus empowering the court to consider the §3553(a) factors, calculate a new guideline range, and resentence Morris accordingly.

In United States v. Hicks, 472 F 3d 1167 (9th Cir., 2007), it was held that where, as here, a defendant filed a motion to reduce his sentence pursuant to 18 U.S.C. §3582(c)(2), which permits a district court to resentence a defendant whose sentencing range has been lowered by the Sentencing Commission pursuant to 18 U.S.C. §994(o), the Guidelines must be applied in an advisory manner. According to the Ninth Circuit's analysis, "a mandatory system is no longer an open choice", as the result of the Supreme Court's decision in United States v. Booker, 543 U.S. at 263. As the result, this court has the discretion, pursuant to the now advisory Guidelines, to consider the factors set forth in §3553(a), and calculate a new Guideline range and issue a new sentence accordingly.

As the result, Morris would then further be eligible for the application of the "safety valve" provision in 18 U.S.C. §3553(f). See also USSG §5C1.2. She is a first-time, non-violent drug offender, permitting the sentencing court to go below the otherwise applicable statutory mandatory minimum in certain cases. See also United States v. Clark, 110 F 3d 15, 17 (6th Cir., 1997). If the defendant meets all the criteria for sentencing under the safety valve, and has a base offense of 26 or greater, the base offense level is reduced by two levels. See USSG §2D1.1(a)(4).

## CONCLUSION

Morris is aware that cause and prejudice must be exhibited in order to defeat the premise that a claim should have been raised on appeal, other than that of jurisdiction, which is always cognizable, however, Morris was not allowed any input into her appeal and was never permitted to see a copy of the brief in order to learn what issue or issues may have been raised on appeal. Therefore, Morris has ample cause to bring all of the aforementioned issues in her Memorandum of Brief to her Motion under §2255. See Bousely v. United States, 523 U.S. 614, 118 S. Ct. 1604, 1611, 140 L Ed 2d 828 (1998).

Morris contends that she is entitled to an evidentiary hearing on these issues. In order to be granted an evidentiary hearing, a habeas corpus petition must allege sufficient facts which, if true, would support the conclusion of law advanced. See Townsend v. Sain, 372 U.S. 293, 312, 83 S. Ct. 745, 756, 9 L Ed 2d 770, 785 (1963). A petition for habeas corpus requires a hearing unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief. See Chandler v. United States, 218 F 3d 1305, 1330 (11th Cir., 2000).


Morris has set forth facts in her petition that entitle her to relief. Therefore, at a minimum, the court should order an evidentiary hearing in this matter.

Morris also respectfully moves this Honorable Court to vacate her convictions and sentencing and dismiss the indictment and release her, based on prosecutorial misconduct, selective

and vindictive prosecution, double jeopardy, a lack of probable cause due to "no evidence", ineffective and incompetent counsel wrongfully advising her to plead guilty, and a lack of jurisdiction under the limitations set forth in the U.S. Constitution to which this court owes its existence and allegiance. Alternatively, Morris requests the Court to vacate, set aside, or correct her sentencing as requested in this Brief. Morris also requests the Court to grant her any other relief to which she may be entitled in this matter.

Respectfully Submitted,

Date: Nov 30, 2007

  
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VERIFICATION

I, Melinda Morris, do hereby declare under penalty of perjury that the facts stated in the foregoing motion are true and correct to the best of my knowledge.

  
Melinda Morris

Exhibit

A