No. 21-

IN THE

Supreme Court of the United States

JASPER KNABB,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Where 28 U.S.C. § 2255 requires a prompt hearing unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, was it error to deny any hearing on the following issue:

Whether, as petitioner asserted in an uncontested declaration, he would have rejected a plea deal and gone to trial if he had known that the judge would sentence him to 21 years and 1 month but where, before he accepted the plea deal and pleaded guilty, defense counsel predicted that if he pleaded guilty petitioner "would likely do only months of time," and where the plea agreement stated an agreed-upon guideline range of 63 to 78 months (level 26).

RELATED PROCEEDINGS

- *United States of America v. Knabb,* No. 11-CR-00009-JSW-2, U.S. District Court for the Northern District of California. Judgment entered June 7, 2012.

- *United States of America v. Knabb*, No. 19-16097, U.S. Court of Appeals for the Ninth Circuit. Judgment entered August 19, 2021.

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Petitioner Jasper Knabb respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals is reported at *United States v. Knabb*, No. 19-16097, 2021 WL 3674481 (9th Cir. Aug. 19, 2021) (provided as App. A at 1a–13a, *infra*). The opinion of the district court is reported at *United States v. Knabb*, No. 11-cr-00009-JSW-2, 2020 WL 5630264 (N.D. Cal. Sept. 21, 2020) (provided as App. B at 14a–32a, *infra*).

JURISDICTION

The judgment of the court of appeals was entered on August 19, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The jurisdiction of the Court of Appeals below was conferred by 28 U.S.C. § 1291 because appeal to that Court was from a final order and judgment of the district court denying a motion to vacate Knabb's judgment under 28 U.S.C. § 2255, which in turned conferred jurisdiction on the district court to issue the order denying that motion.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant statute is 28 U.S.C. §§ 2255(a) and (b) which read:

> **(a)** A prisoner in custody under sentence of a court established by Act of Congress claiming the

> right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> **(b)** Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.

STATEMENT OF THE CASE

The Charges, Knabb's Guilty Plea, and Sentence

This case arises from the financial demise of Pegasus Wireless Company ("Pegasus"). Knabb had been the president of the company and his conduct was blamed for its demise, or at least in the precipitous fall in its stock price. Both Knabb and a coconspirator were charged with securities violations enumerated above. Ultimately Knabb was sentenced to 21 years and 1 month in federal custody. The events leading up to that horribly long sentence are what result in Knabb's §2255 motion filed below (based on ineffective assistance of counsel), his appeal of the decision to deny an evidentiary hearing, and to this petition.

After being charged, and after consultation with his first attorney of record, Knabb decided to plead guilty based on that attorney's recommendation, rosy prediction, and assurance (discussed below). He did so under a written plea agreement that specified a Sentencing Guideline calculation of level 26, which provided a sentencing range of 63 to 78 months. Plea Agreement, *United States v. Knabb*, No. 19-16097, 2021 WL 3674481 (9th Cir. Aug. 19, 2021), ECF Nos. 105-1, 105.[1]

All the assurances from his counsel led Knabb to believe that he would receive a low sentence. The prosecutor asked for, and obtained from Knabb, a waiver of the statute of limitations relating to the securities charges being investigated. This waiver stated that it would allow Knabb "an opportunity to engage in discussions with the United States about an amicable resolution of this matter." *See* Statute of Limitations Tolling Agreement, dated November 10, 2017, ECF No. 90-2 at 29–30. Knabb thereafter met with the prosecutors and investigating agents on at least five occasions to discuss all matters about which they questioned him. ECF No. 90-1 at 4. After each meeting, Attorney Bruno told him: "Don't worry, I got this, everything is going as planned. I promise you, *I will walk you out of this*." ECF No. 90-1 at 7 (emphasis added).

Thereafter Knabb agreed to plead guilty and did so on an Information filed to set up that guilty plea. He did so based on advice of counsel that the applicable Guideline level on his plea would result in an adjusted offense level

1. References to ECF hereafter are to the record on appeal below. These PACER references can be made available to the Court on request.

of 26, a sentencing range of between 63 and 78 months, and with the added feature that Knabb's counsel would be allowed to argue for even a lesser sentence. That counsel told him that he would likely get only "months" in custody. That plea agreement was entered. In that plea agreement, the government and defense agreed to the Guideline level calculated as follows:

a. Base Offense Level, U.S.S.G. § 2B1.1(a) 7

b. Specific offense characteristics:

c. Amount of Gain: U.S.S.G. § 2B1.1(b)(1)(L) 22
($20 million - $50 million)

d. Acceptance of Responsibility:

If I [Knabb] meet the requirements of U.S.S.G. § 3E1.1, I may be entitled to a three level reduction for acceptance of responsibility. . . -3

e. Adjusted offense level: 26

Plea Agreement, ECF No. 105-1.

With a level 26 and a Criminal History Category of I, the applicable Guideline range was 63 to 78 months. Based on these calculations, the "government agree[d] to recommend the Guidelines calculations set out above" *Id.* at 9. While the government's recommendation was thus limited, the plea agreement acknowledged that Knabb's counsel could argue for a sentence even below that sentencing range. *Id*. at 8. There was not, either in the Plea Agreement or during the change of plea hearing even a hint that additional Guideline enhancements were even possible. Transcript of

Plea Hearing, ECF No. 59. Accordingly, Knabb entered his plea with the understanding that his likely exposure was as stated above, or less.

Knabb's lawyer had specifically advised him that the maximum sentence would be in the range of 63 to 78 months.[2] He also told Knabb that he could very likely receive a *lesser* sentence. Indeed, Knabb's substitute lawyers, who came in after Knabb entered his guilty plea but attended the sentencing hearing, pursued the lesser-sentence path as Knabb's initial counsel had predicted would be available. Accordingly, in Knabb's sentencing Memorandum submitted by the new counsel, they told the district court:

> Mr. Knabb . . . agrees that his total offense level is 26, that his Criminal History Category is I, and that the applicable Guidelines range is 63 to 78 months. As explained more fully below, Mr. Knabb does not agree with the probation officer's recommendation that he be sentenced to 63 months in prison. Mitigating circumstances support a sentence below the applicable Guidelines range.

Knabb Initial Sentencing Memo, ECF No. 53. That sentencing Memorandum makes clear that all expectations were for a sentencing within or below the agreed-upon guideline range.

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2. At the plea hearing this Court specifically found that Knabb had entered his guilty plea "with the advice of his attorney." Transcript of Plea Hearing, ECF No. 59 at 25. The plea agreement also confirms that attorney Bruno had advised Knabb about it and that Knabb "understands all the terms of this [plea] Agreement." Plea Agreement, ECF No. 105-1 at 11.

With both sets of his defense lawyers and the prosecutor agreeing on the above-stated Guideline range of 63 to 78 months, and Knabb's first lawyer, Mr. Bruno, recommending that plea agreement to Knabb before he entered it, Knabb had every right to rely upon that range as having been correctly determined. To a layperson like Knabb, the plea agreement, while not binding on the court, informed him of what was likely to be the maximum sentence, since his lawyer had negotiated it and advised him to sign it after telling him that he might receive less or even, as quoted above, a "walk."

More importantly, the district court correctly told Knabb at his change of plea hearing, before he changed his plea based on that agreement, that this plea agreement was "a very important document." Transcript of Plea Hearing, ECF No. 59 at 11. The District Court went on to highlight the importance of the agreement's Guideline calculation:

> You also agree that the Sentencing Guideline offense level will be calculated in such a way that your adjusted offense level will be 26, and that's what you have agreed is the proper calculation.

Id. at 13.[3] Clearly this 26-level adjusted offense level was advised by Knabb's counsel to have been the maximum. The district court specifically found that Knabb had entered his guilty plea "with the advice of his attorney"

3. At the plea hearing, the District Court found that that the guidelines stated in the plea agreement were "the proper calculation." This surely confirmed to Knabb his lawyer's advice that this was the calculation.

and that Knabb and attorney Bruno "talked about how the guidelines might apply" to the case. Transcript of Plea Hearing, *Id.* at 25, 18. The plea agreement also confirms that Knabb's first attorney, the one recommending the guilty plea and representing Knabb at his change of plea, had advised Knabb and he "understands all the terms of this [plea] Agreement." Plea Agreement, ECF No. 105-1 at 10.

Based upon the above-stated plea agreement, advice of counsel, and colloquy with the District Court, Knabb entered his guilty plea at a hearing held on July 28, 2011. ECF No. 30.

After that guilty plea was entered, a sentencing hearing on that guilty plea was conducted on March 8, 2012. Transcript of First Sentencing Hearing, ECF No. 57. However, sentencing did not go forward at this first sentencing hearing because the district court informed counsel of its grave misgivings about the Guideline calculation stated in the plea agreement. As the district court told the parties, "I don't care if it was negotiated – you can negotiate whatever you want, but I am not bound by it . . . I have to get it right" *Id.* at 13.

Specifically, the court informed counsel of what it believed their plea agreement had missed, including enhancements for obstruction of justice (*id.* at 11); the number of victims (*id.* at 9, 11); sophisticated scheme (*id.* at 10); and whether Knabb was an "organizer" (*see* App. B at 17a, *infra*). Because of this failure, the District Court declared that "the case – it's a mess at this point." *Id.* at 13. The District Court also indicated to counsel that, in relation to the Guidelines, "I don't have the facts and I

don't have the law", and "I order Probation to get to the bottom of this" *Id.* at 12.[4]

Another sentencing hearing was held on June 7, 2012. ECF No. 71. At this sentencing hearing, the court adopted the two enhancements the District Court told counsel at the first sentencing hearing that he was going to add, and, because these added an additional 8 levels, the court sentenced Knabb to a term of 253 months imprisonment: 21 years plus one month. As the court explained:

> On June 7, 2012, the parties appeared before the Court for sentencing . . . The Court determined the base offense level was 7 and applied a 22-point adjustment based on the amount of gain. (*Id.* at 78:11-79:8.) The Court also determined that the 4-point adjustments based on Knabb's role in the offense and his position as an officer of public company applied. It declined to apply adjustments based on the number of victims or for obstruction of justice. (*Id.* at 79:9-94:7.) The Court applied a 3-point downward adjustment for acceptance of responsibility, which resulted in an adjusted offense level of 34. (*Id.* at 94:8-102:19.) With a CHC of I and an offense level 34, the applicable Guidelines range

4. Because of how badly the initial Guideline calculations missed the mark, it took the Probation office not just one, but three PSRs to get the Guidelines stated in a way that it could stand by them. This unusual problem lays at the feet of the lawyers providing information to Probation. By the time that the actual sentencing took place on June 7, 2012, the case was proceeding under "the second amended presentence report." Transcript of Second Sentencing Hearing, ECF No. 77 at 77.

> was 151 to 188 months. The Court imposed an upward variance based on the factors set forth in 18 U.S.C. section 3553(a), and it sentenced Knabb to a term of 253 months imprisonment.

ECF No. 135 at 4–5. This sentence exceeded the maximum sentence under the plea agreement by a full 15 years.

Knabb's Motion to Vacate that Sentence

Knabb subsequently moved to vacate the sentence based on ineffective assistance of counsel. ECF No. 127. He asserted two grounds:

(1) that Attorney Bruno, in telling Knabb to accept the plea offer, while also maintaining that his actual sentence could be lower than the one the prosecutor would recommend under that agreement, grossly mischaracterized the likely sentence by abjectly miscalculating the applicable guidelines; this error caused prejudice in the form of a sentence 15 years higher than absolute maximum Attorney Bruno had predicted, and caused prejudice because Knabb never would have taken the plea offer had he been properly advised; and

(2) that the attorneys who replaced the Attorney Bruno were ineffective because they did not honor Knabb's request to withdraw his plea after he asked them to do so, despite there being grounds for a withdrawal; their reasons for not doing so were incorrect, and the result was prejudice to Knabb in the form of a sentence 15 years higher than the maximum one agreed upon.

Only the issue of the ineffectiveness of the advice of first counsel is being challenged here and the refusal of both courts below to order an evidentiary hearing given the content of Knabb's §2255 motion.[5]

Knabb's §2255 motion below explained the gross mischaracterization that Knabb's counsel gave regarding the sentence he would receive. Knabb also offered an extensive recitation of evidence which he contends could quite possibly have prevented a jury from finding him guilty on the charges beyond a reasonable doubt. ECF No. 127 at 17–22. This evidence, Knabb explained, would have led Knabb to go to trial had he received proper advice which would have put him on notice that, under a plea and with the properly calculated guideline range, he faced a term of imprisonment very near the maximum statutorily allowable sentence anyway. Knabb's actual sentence was 21 years, 1 month; the maximum sentence would have been 25 years. He also unreservedly stated in his declaration that he would have gone to trial had he known that his sentence was going to be 21 years and 1 month whereas his counsel told him he would serve only "months." The government presented no contrary evidence.

The District Court's Opinion Denying Knabb's Section 2255 Motion

The district court's opinion denied Knabb's motion, stating:

> The Court recognizes that its calculation of the Guidelines and the sentence it imposed differ

5. The second ground was raised on appeal before the Ninth Circuit but is not at issue on this petition.

> significantly from the Guidelines calculation set forth in the Plea Agreement. However, the Court concludes that Knabb has not met his burden to show that during the plea negotiations Bruno "grossly mischaracterized" the likely outcome.

App. B at 28a–29a, *infra*.

As to the denial of the evidentiary hearing requested by Knabb on whether Knabb would have pleaded guilty had he known of the true sentence, the District Court noted:

> In his most recent declaration, Knabb states that he previously "stated that Mr. Bruno had told me that I would likely receive a sentence of months if I pleaded." (12/8/17 Decl., ¶ 2; *see id.* ¶ 5.) In the 7/15/13 Declaration, Knabb attested that Bruno led him to believe he would receive "a sentence of probation or a few months (less than one year) for a misdemeanor failure to supervise" his codefendant. (7/15/13 Decl. at p. 6.)

App. B at 26a, *infra*. Without any hearing the district found that Knabb's assertions were "palpably incredible" and denied Knabb's motion to vacate his plea. *Id.* at 27a.

On appeal, the Ninth Circuit affirmed, with one judge dissenting. The majority agreed with the District Court's denial of a hearing:

> Because Defendant's motion and the record conclusively show that he was not entitled to relief on his ineffective assistance claims, the district court did not abuse its discretion in refusing to hold a hearing. *See* 28 U.S.C. § 2255(b).

App. A at 5a, *infra*. The dissent saw it quite differently:

> Knabb has "alleged specific facts which, if true, would entitle him to relief"—that Bruno drastically underestimated the sentence he would receive and that Elliott and Goldrosen failed to move to withdraw his plea after counsel was requested to do so and after it was clear the sentence would be much longer than Knabb had been told . . . And, "the petition, files, and record of the case cannot conclusively show that he is entitled to no relief" because the claims involve extra-record events.

App. A at 12a, *infra* (citations omitted).

The dissent also noted that the "majority does not dispute that the agreed-upon sentence in the plea agreement grossly mischaracterized the likely outcome," and dissented because it determined that there should have been an evidentiary hearing on whether that gross mischaracterization would have prompted Knabb not to plead guilty had he known how badly his lawyer had misadvised him.[6] *Id.* The dissent stated as follows:

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6. Both the majority and the dissent agreed that a gross mischaracterization of the sentence allows the defendant to show

> When a prisoner files a § 2255 motion, the district court *must* grant an evidentiary hearing '[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief.'" *United States v. Chacon-Palomares*, 208 F.3d 1157, 1159 (9th Cir. 2000) (quoting 28 U.S.C. § 2255) (emphasis added). Knabb alleges ineffective assistance by his first attorney, Christopher Bruno, for advising him to enter into a plea agreement whose projected sentence, undoubtedly, was a "gross mischaracterization of the likely outcome" in the case. *Iaea v. Sunn*, 800 F.2d 861, 865 (9th Cir. 1986). He also alleges ineffective assistance by replacement counsel, Kirk Elliott and Mark Goldrosen, who advised him not to withdraw his guilty plea. The majority rejects Knabb's allegation regarding Bruno on the ground that he failed to demonstrate prejudice . . . However, Knabb's allegations raise important fact-bound questions regarding the effectiveness of counsel that cannot be resolved on this record.

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that he would have pleaded not guilty had he known the true sentence rather than as mischaracterized by the lawyer in advance of the plea change. *See Hill v. Lockhart*, 474 U.S. 52, 59 (1985) (cited by the majority, see App. A at 3a, *infra*); *see also*, *Lafler v. Cooper*, 566 U.S. 156, 163 (2012) (cited by the dissent, see App. A at 9a, *infra*). But, the majority held that no hearing was necessary on whether Knabb would have pleaded guilty had he known the true sentence, despite Knabb's uncontested, sworn assertions that he would not have pleaded guilty had he known his true sentence, and affirmed the District Court's ruling, finding that the District Court did not err in finding those assertions "palpably incredible." *See* App. A at 6a, *infra*.

> I therefore would reverse and remand because, at the very least, the matter deserves and needs an evidentiary hearing to resolve the serious factual issues raised by Knabb.

App. A at 7a, *infra*.

REASONS FOR GRANTING CERTIORARI

The Rulings Below Were Plainly Incorrect and Conflict with Other Circuits

There is no question that a hearing on a §2255 motion is required unless the files and record "conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255(b). Thus, the decisions below were incorrect. Those decisions also contradict the clear rulings in other circuits, setting §2255 movants in the Ninth Circuit apart from those similarly situated in other circuits. For example:

> A district court, however, must grant an evidentiary hearing if the petitioner "alleges facts that, if proven, would entitle him to relief." *Id.* (citation and internal quotation marks omitted); *Stoia v. United States*, 22 F.3d 766, 768 (7th Cir. 1994) . . . When reviewing the denial of a federal prisoner's § 2255 petition, we review the district court's legal conclusions *de novo*, its factual findings for clear error, and its decision to forgo holding an evidentiary hearing for abuse of discretion. *Osagiede v. United States*, 543 F.3d 399, 408 (7th Cir. 2008). Because an error of law is, by definition, an abuse of discretion, *United States v. Beltran*,

> 457 F.3d 702 (7th Cir. 2006), any error of law in dismissing Martin's petition without an evidentiary hearing would constitute an abuse of discretion.

Martin v. United States, 789 F.3d 703, 706 (7th Cir. 2015).

> In the specific context presented here, the second prong of the [*Strickland*] test requires Sawyer to show that "there is a reasonable probability that the plea offer would have been presented to the court, the court would have accepted it, and that the conviction or sentence or both would have been less severe than the judgment imposed." *Foster v. United States*, 735 F.3d 561, 566 (7th Cir. 2013) (citing *Lafler v. Cooper*, 566 U.S. 156, 163–64 (2012)).

Sawyer v. United States, 874 F.3d 276, 279 (7th Cir. 2017).

> In order "[t]o prove prejudice for an ineffective assistance of counsel claim in the context of a guilty plea, the habeas petitioner 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." *Bond v. Dretke*, 384 F.3d 166, 167–68 (5th Cir. 2004) (citing *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)) (internal quotation marks omitted) . . . The record contains a declaration by Cavitt under penalty of perjury that he would have insisted on pleading guilty conditionally or would not have pleaded guilty if his counsel had informed him of the viability of a suppression

> motion. Indeed, after viewing the video [which gave rise to his Fourth Amendment claims] himself, Cavitt, without delay, fired [his allegedly ineffective trial counsel] and, at his own expense, hired another attorney in the hopes of successfully withdrawing his plea prior to sentencing. In light of [his allegedly ineffective counsel's] refusal to view the video with Cavitt prior to entry of the plea, and our determination upon viewing the video that Cavitt's Fourth Amendment claim had an appreciable chance of success, we conclude that the claimed ineffectiveness was related to the voluntariness of the plea and that there is insufficient record evidence at this juncture to establish that Cavitt's claims of ineffective assistance of counsel are without merit.
>
> The ultimate question before us is whether the district court's failure to hold an evidentiary hearing was an abuse of discretion. *See United States v. Edwards*, 442 F.3d 258, 264 (5th Cir. 2006) . . . To establish abuse of discretion, a petitioner must present "independent indicia of the likely merit of [his] allegations." *Edwards*, 442 F.3d at 264. Once such independent evidence is presented, "[a] motion brough under 28 U.S.C. § 2255 can be denied without a hearing only if the motion, files, and records of the case conclusively show that the prisoner is entitled to no relief." *United States v. Bartholomew*, 974 F.2d 39, 41 (5th Cir. 1992).

United States v. Cavitt, 550 F.3d 430, 441–42 (5th Cir. 2008)

> §2255(b) instructs district courts: "[u]nless the [2255] motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall . . . grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto." Ordinarily, when reviewing the denial of a §2255 motion, "we review for clear error the district court's factual findings, and we review legal conclusions de novo." *United States v. Mora*, 293 F.3d 1213, 1216 (10th Cir. 2002). However, when a district court refuses to grant an evidentiary hearing and denies a §2255 motion, our review proceeds in two steps [*United States v. Weeks*, 653 F.3d 1188, 1200 (10th Cir. 2011)]. First, we ask whether the defendant's allegations, if proved, would entitle him to relief, *id.*, an inquiry we conduct de novo, *United States v. Rushin*, 642 F.3d 1299, 1302 (10th Cir. 2011). If so, we then determine whether the denial of the evidentiary hearing constituted an abuse of discretion. *Weeks*, 653 F.3d at 1200.

United States v. Herring, 935 F.3d 1102, 1107 (10th Cir. 2019) (holding that Herring alleged sufficient facts that the district court abused its discretion by failing to hold an evidentiary hearing because record did not conclusively show that he was entitled to no relief).

If ever a hearing was needed on the issues involved, Knabb's case is it. The predicted sentence was "months." The Guideline range agreed by the prosecution and the defense had a maximum sentence of 78 months (i.e., six-

and-a-half years). These Guidelines were specifically discussed with the Court before Knabb changed his plea to guilty. Yet his actual sentence was 21 years, 1 month, and the maximum sentence had he gone to trial was not much longer: 25 years. As Knabb explained in his declaration, he would not have pleaded guilty had he known the true sentence. Rather, Knabb relied on the clear misstatements of his attorney to accept the much lower sentence he was told he would receive, despite having reason to believe he might prevail at trial. He also explained that those reasons did not deter him from pleading guilty, given the predicted sentence. Knabb asserted that he would have taken the risk of a trial penalty if he had known his true sentence because of how little difference there was between the true sentence and the maximum possible.

The Issue Here Is of Substantial Importance

If the district court can reject all Knabb's assertions—none of them contradicted—as "palpably incredible" and thus deny the hearing, and the appellate court can hold that this "palpably incredible" finding was not an abuse of discretion despite Knabb's showing, then §2255's language compelling a hearing unless it is "conclusively [shown] that the prisoner is entitled to no relief," can simply be read out of the statute by any judge on any occasion. Of course, had the courts below held that §2255 does not require a hearing at all, that would certainly be reviewable as it ignores the language of the statute. The errors of law below are more offensive to the statute than an outright defiance of the command that hearings be held, because Knabb made a showing on the record that there were factual matters to pursue. The actions of the District Court and Court of Appeals, if left undisturbed, would

allow judges to disregard the plain language of §2255, which compels evidentiary hearings in all but the most frivolous of cases, and would sanction the nullification of the clear intent of that statute to afford prisoners a day in court to test their sentences under the Constitution and the law.

Given the egregious circumstances here, this Court should grant review, reaffirm the mandate in §2255 for the necessary presumption in favor of evidentiary hearings, and, by a ruling that the statutory circumstances which mandate a hearing were more than met in this case, establish guardrails against the use of findings of "palpable incredulity" to completely erode the hearing requirement.

The hearing requirement in §2255 must be preserved against such erosions. Section 2255 motions almost always arise where, as here, factual matters outside the record at the trial are at issue. Only a hearing can resolve those factual issues unless there is "conclusively" nothing factual to be decided. Read fairly, and as the courts have consistently done, failing to hold a hearing is the exception to §2255, based on the statute's use of the word "conclusively." Allowing, as the Ninth Circuit did in this case, such disregard of the true scope of the hearing requirement, in spite of the sworn statements filed in Knabb's §2255 motion, eliminates the hearing requirement and it should be reviewed as such.

Section 2255 is the modern incantation of what was the "Great Writ." It is the last refuge for prisoners to seek review of whether their sentences were imposed in violation of federal constitutional or statutory law. Its

requirements should be honored, and not disregarded as they were by the sentencing and appellate courts below.

CONCLUSION

This Court should grant Certiorari in this case.

Respectfully submitted,

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APPENDIX

APPENDIX A — MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, DATED AUGUST 19, 2021

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 19-16097

D.C. Nos.
11-CR-00009-JSW,
15-CV-01251-JSW

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JASPER KNABB,

Defendant-Appellant.

Appeal from the United States District Court for
the Northern District of California.
Jeffrey S. White, District Judge, Presiding

Argued and Submitted July 7, 2021,
San Francisco, California

Appendix A

MEMORANDUM[*]

Before: TASHIMA and GRABER, Circuit Judges, and VRATIL,[**] District Judge. Dissent by Judge TASHIMA.

Defendant Jasper Knabb pleaded guilty to conspiracy to commit securities fraud in violation of 18 U.S.C. § 1349, securities fraud in violation of 18 U.S.C. § 1348 and falsifying books, records and accounts in violation of 15 U.S.C. §§ 78m(b)(2)(A), 78m(b)(5) and 78ff. Defendant appeals the district court's denial of his motion to vacate his sentence under 28 U.S.C. § 2255, asserting that his first counsel provided ineffective assistance during plea negotiations and that replacement counsel failed to file a motion to withdraw his guilty plea before sentencing. We have jurisdiction under 28 U.S.C. §§ 1291 and 2253.

Reviewing de novo the district court's denial of a § 2255 motion, *United States v. Olsen*, 704 F.3d 1172, 1178 (9th Cir. 2013), and reviewing for abuse of discretion its denial of an evidentiary hearing, *id.*, we affirm.

1. As to the claim that counsel did not correctly advise Defendant of the probable sentence, we address only the prejudice prong. *See Rios v. Rocha*, 299 F.3d 796, 805 (9th Cir. 2002) ("Failure to satisfy either prong" of the test from *Strickland v. Washington*, 466 U.S. 668, 104

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Kathryn H. Vratil, United States District Judge for the District of Kansas, sitting by designation.

S. Ct. 2052, 80 L. Ed. 2d 674 (1984), "obviates the need to consider the other"). Defendant has not alleged facts that would show a reasonable probability that, absent the purported advice, "he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985).

Defendant alleged that "had he known that the guilty plea would cause his imprisonment for 21 years, he would have taken the risk of trial . . . since the maximum statutory penalty [was] 25 years." Here, prejudice is not assessed by the disparity between the predicted and actual sentences. Instead, the question of prejudice is whether Defendant would have pleaded guilty or insisted on going to trial if counsel had correctly advised him of the *possibility* that his guilty plea could result in a sentence of 21 years after enhancements and an upward variance. Defendant's course of conduct after his guilty plea belies any claim that if initial counsel had correctly advised him of his potential sentencing exposure, he would have insisted on going to trial. At the first sentencing hearing, the district court warned that several sentencing enhancements not mentioned in the plea agreement might apply and that it needed more time to assess the matter. The Probation Officer then issued an amended presentence investigation report that applied a four-level enhancement for Defendant's role in the offense, U.S.S.G. § 3B1.1(a), and a four-level enhancement for officers and directors of publicly traded companies who violate securities law, U.S.S.G. § 2B1.1(b)(18)(A).[1] The Probation

1. The current Guidelines Manual recodifies this provision at § 2B1.1(b)(20)(A).

Officer recommended a sentence of 210 months, which was the low end of the calculated guideline range of 210 to 262 months (21 years and 10 months).

Defendant then asked his replacement lawyers to withdraw his guilty plea. They recommended that he not do so, and Defendant makes no allegation that he rejected that advice or otherwise pursued his request to file a motion to withdraw, either through his replacement lawyers of record or additional counsel that he had retained. Likewise, at sentencing during allocution, Defendant did not suggest that prior counsel had misled him about his sentencing exposure and he did not express any desire to withdraw his plea and proceed to trial. In other words, even after learning that his original counsel had grossly misstated his exposure under the Guidelines, Defendant chose *not* to request that the district court allow him to withdraw his plea and proceed to trial. Accordingly, he cannot establish prejudice on his claim that during plea negotiations, counsel did not correctly advise him about his sentencing exposure.

2. As to the claim that counsel should have filed a motion to withdraw the plea before sentencing, we address only whether counsel's performance was deficient. The district court correctly determined that Defendant did not meet his burden on this prong. After Defendant asked his replacement attorneys to file a motion to withdraw the plea, they explained that despite the district court's comments that the agreed guideline range seemed incorrect and low, (1) the government agreed to abide by the plea agreement, (2) withdrawing the plea could result

in a harsher sentence, (3) withdrawing the plea could result in additional charges and (4) based on the United States Attorney's representation, withdrawing the plea would result in a trial. In addition to the obvious risks of withdrawing the plea and going to trial or pleading guilty without an agreement, counsel had a reasonable basis to argue at sentencing that consistent with the plea agreement, the government's consent and the sentence imposed on a co-defendant, the court should apply the agreed guideline range of 63 to 78 months or—if a higher range applied—that the district court should vary downward. Therefore, counsel's advice about the risks of withdrawing from the plea falls within the "wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689.

In any event, Defendant has not cited record evidence that counsel "refused" to file a motion to withdraw the plea. Counsel simply advised Defendant that they thought the risks of filing the motion outweighed the benefits. They also informed him of the procedures and deadline for filing such a motion. Defendant has not alleged that after receiving such advice, he insisted that counsel file the motion. In fact, the record does not show that Defendant responded to this advice. Also, Defendant does not explain why he did not pursue the motion with substitute counsel, whom he had recently hired. Likewise, the record does not reveal that, at sentencing or otherwise, Defendant ever alerted the court that he wanted to withdraw his plea. Defendant may regret his gamble to proceed with sentencing, but that regret provides no grounds for relief. In sum, Defendant has not alleged sufficient facts to establish that counsel's performance was deficient.

3. Because Defendant's motion and the record conclusively show that he was not entitled to relief on his ineffective assistance claims, the district court did not abuse its discretion in refusing to hold a hearing. *See* 28 U.S.C. § 2255(b) ("Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall . . . grant a prompt hearing.").

AFFIRMED.

Appendix A

TASHIMA, Circuit Judge, dissenting:

"When a prisoner files a § 2255 motion, the district court *must* grant an evidentiary hearing '[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief.'" *United States v. Chacon-Palomares*, 208 F.3d 1157, 1159 (9th Cir. 2000) (quoting 28 U.S.C. § 2255) (emphasis added). Knabb alleges ineffective assistance by his first attorney, Christopher Bruno, for advising him to enter into a plea agreement whose projected sentence, undoubtedly, was a "gross mischaracterization of the likely outcome" in the case. *Iaea v. Sunn*, 800 F.2d 861, 865 (9th Cir. 1986). He also alleges ineffective assistance by replacement counsel, Kirk Elliott and Mark Goldrosen, who advised him not to withdraw his guilty plea. The majority rejects Knabb's allegation regarding Bruno on the ground that he failed to demonstrate prejudice and regarding Elliott and Goldrosen on the ground that their advice was not deficient. However, Knabb's allegations raise important fact-bound questions regarding the effectiveness of counsel that cannot be resolved on this record. I therefore would reverse and remand because, at the very least, the matter deserves and needs an evidentiary hearing to resolve the serious factual issues raised by Knabb.

The majority does not dispute that the agreed-upon sentence in the plea agreement grossly mischaracterized the likely outcome. In the plea agreement, the government agreed to recommend an adjusted offense level of 26, with a Guidelines exposure of 63 to 78 months. According to Knabb's declarations submitted in support of his § 2255

motion, his attorney advised him to accept the agreement, assuring him that he "would likely do only months of time."

However, at the first sentencing hearing, where Knabb was represented by Elliott and Goldrosen, the district court made it clear that it disagreed with the offense level agreed upon by the parties. The court raised several enhancements it believed were applicable, including enhancements for being an organizer, the number of victims, and obstruction of justice; it ordered a supplemental Presentence Report (PSR) and supplemental briefing by the parties. The supplemental PSR recommended an offense level of 39, thirteen levels higher than in the plea agreement, which resulted in a Guidelines range of 262 to 300 months.

In light of the district court's indication that it disagreed with the sentencing range set forth in the plea agreement and that other enhancements applied, Knabb asked Elliott and Goldrosen to withdraw his plea. They responded that they were hired only to represent him at sentencing, not to file a motion to withdraw the plea, and advised him not to withdraw the plea. The court sentenced Knabb to a term of 253 months' imprisonment.

Given that the plea agreement recommended a sentence between 63 and 78 months and that Knabb was sentenced to 253 months, it is difficult to understand the district court's conclusion that Knabb failed to show that Bruno grossly mischaracterized the likely sentence. The majority concludes that, although Bruno's advice about the sentence may have been deficient, there was no prejudice

because Knabb was correctly informed by the district court of his potential sentencing exposure and decided to plead guilty anyway. The majority's "no prejudice" characterization, however, is not the controlling issue. The relevant question under our case law is whether Knabb would have pled guilty *if* he had been properly advised by his *attorneys*. *See Lafler v. Cooper*, 566 U.S. 156, 163, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012) (explaining that to show prejudice, "a defendant must 'show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different,'" and that, "[i]n the context of pleas a defendant must show the outcome of the plea process would have been different *with competent advice*" (quoting *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984))) (emphasis added); *Iaea*, 800 F.2d at 865 ("To satisfy the prejudice component in the context of a guilty plea, the 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'" (quoting *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985))) (emphasis added). It was Knabb's counsel's duty, not the district court's duty, to advise Knabb whether or not to plead guilty.

Our precedent establishes that counsel's "gross mischaracterization of the likely outcome" may constitute ineffective assistance. *Iaea*, 800 F.2d at 865. Contrary to the majoriy's assertion, that the defendant may have been properly informed by the court does not mean there is no prejudice. *See, e.g., United States v. Manzo*, 675 F.3d

1204, 1208-10 (9th Cir. 2012) (reversing denial of § 2255 motion and remanding for "prejudice analysis of whether if correctly advised" of the effects of grouping on the offense level and on acceptance of responsibility, the defendant would have pled guilty, even though the PSR had informed him of the proper sentencing range).

In *Manzo*, the PSR clearly informed the defendant of the applicability of a grouping provision that yielded an offense level of 38, not the level of 34 agreed to by the parties in the plea agreement. The defendant's attorney filed objections to the PSR but did not advise him to seek to withdraw from the plea agreement in light of the agreement's failure to take into account the grouping provision. After the higher sentence indicated by the PSR was imposed, the defendant filed a § 2255 motion, arguing that "his attorney gave him ineffective assistance of counsel by not anticipating that the offenses would be grouped for sentencing, and by not advising [him] to withdraw from the plea agreement once it was clear that the offenses would be grouped for sentencing." *Id.* at 1209. We reversed the district court's denial of the motion. *Id.* at 1210.

Thus, the PSR in *Manzo* informed the defendant of the proper calculation of the sentence. Nonetheless, the issue was whether the *attorney* gave ineffective assistance by failing to advise the defendant to withdraw from the plea agreement after it was obvious the sentence in the plea agreement was not accurate. Similarly, Knabb was informed of the potential maximum sentence by the court, but this is not the same as receiving advice from counsel about whether or not to enter into the plea

agreement. As in *Manzo*, Knabb argues that his counsel was ineffective for failing to anticipate the applicability of several enhancements that clearly applied and by not advising him to withdraw from the plea agreement after the district court and the supplemental PSR made it clear that the calculation of the sentence in the plea agreement was grpss;y inaccurate.

Bruno should have at least advised Knabb that the court most likely would apply the four-level enhancement under U.S.S.G. § 2B1.1(b)(18)(A) because the offense obviously involved a violation of the securities laws and Knabb was an officer or director of a publicly-traded company. In fact, because of the clear applicability of this enhancement, it should have been apparent not only to Bruno that the plea agreement grossly underestimated the likely sentence, but also to Elliott and Goldrosen. Elliott and Goldrosen further had the benefit of the supplemental PSR and the district court's obvious disagreement with the sentence recommended in the plea agreement.[1] I therefore disagree

1. I further note that Elliott's initial response was that he and Goldrosen were not hired to file a motion to withdraw, but only to represent Knabb at sentencing. However, "[a]n attorney owes a professional duty of care to every person with whom that attorney has an attorney-client relationship." *Streit v. Covington & Crowe*, 82 Cal. App. 4th 441, 98 Cal. Rptr. 2d 193, 197 (Ct. App. 2000). The attorney in *Streit* made only a special appearance — how much more so is a criminal defense attorney required to act in a client's best interests, even if the circumstances indicate that the nature of the representation has changed. In fact, the California Rules of Court, which provide rules for limited-scope representation in civil cases, provide no similar rules in criminal cases. *See* Cal. Rules of Court, rules 3.35-3.37.

with the majority that counsel's advice not to withdraw from the plea agreement was not deficient.

"A claim must be 'so palpably incredible or patently frivolous as to warrant summary dismissal' in order to justify the refusal of an evidentiary hearing." *United States v. Howard*, 381 F.3d 873, 877 (9th Cir. 2004) (quoting *United States v. Leonti*, 326 F.3d 1111, 1116 (9th Cir.2003)). Knabb has "allege[d] specific facts which, if true, would entitle him to relief" — that Bruno drastically underestimated the sentence he would receive and that Elliott and Goldrosen failed to move to withdraw his plea after counsel was requested to do so and after it was clear the sentence would be much longer than Knabb had been told. *Id.* And, "the petition, files and record of the case cannot conclusively show that he is entitled to no relief" because the claims involve extra-record events. *Id.; see also Manzo*, 675 F.3d at 1210 (reversing the denial of § 2255 motion and remanding where the record did not "contain the historical views of defense counsel" or of the defendant on "whether if correctly advised [the defendant] would have pleaded guilty anyway and declined the chance to withdraw his plea and go to trial"). I therefore conclude that the district court's failure to hold an evidentiary hearing constituted an abuse of discretion. *See Chacon-Palomares*, 208 F.3d at 1158-60 (concluding that the district court erred in denying a § 2255 motion without an evidentiary hearing where the defendant, who received a 108-month sentence, argued that his lawyer was ineffective because he induced him to reject a plea offer by incorrectly informing him that he faced a maximum sentence of six months); *Chacon v. Wood*, 36 F.3d 1459,

1464-65 (9th Cir. 1994) (remanding for evidentiary hearing where § 2254 petitioner alleged that "he was presented with a gross mischaracterization of the likely outcome — he alleges that he was told that he would serve only three months in jail if he pleaded guilty, but he has been forced to serve ten years imprisonment," and that, "absent this erroneous advice, he would not have pleaded guilty"), *superseded by statute on other grounds as stated in Hall v. City of Los Angeles*, 697 F.3d 1059, 1070 (9th Cir. 2012).

For the foregoing reasons, I would remand for an evidentiary hearing. I respectfully dissent.

APPENDIX B — ORDER DENYING MOTION IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, DATED MARCH 29, 2019

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Case No. 11-cr-00009-JSW-2

UNITED STATES OF AMERICA,

Plaintiff,

v.

JASPER KNABB,

Defendant.

ORDER DENYING MOTION TO VACATE SENTENCE PURSUANT TO 28 U.S.C. § 2255 AND GRANTING CERTIFICATE OF APPEALABILITY

Re: Dkt. Nos. 90, 127

Now before the Court for consideration is motion to vacate, pursuant to 28 U.S.C. section 2255, filed by Jasper Knabb ("Knabb"). Knabb filed his original motion acting *pro se* on March 16, 2015. On July 14, 2017, counsel appeared on Knabb's behalf and, with the Court's permission, the parties filed supplemental briefs. The Court has considered the parties' papers, relevant legal authority, and the record in this case, and the Court HEREBY DENIES the motion to vacate and GRANTS a certificate of appealability.

Appendix B

BACKGROUND

On January 10, 2011, the Government charged Knabb with one count of conspiracy to commit securities fraud, in violation of 18 U.S.C. section 1349, one count of securities fraud, in violation of 18 U.S.C. section 1348, and one count of falsifying books, records, and accounts, in violation of 15 U.S.C. sections 78m(b)(2)(A), 78m(b)(5), and 78ff. (Dkt. No. 1, Information.)

On July 28, 2011, Knabb entered a guilty plea to all three counts, pursuant to Federal Rule of Criminal Procedure 11(c)(1)(A) and 11(c)(1)(B). At that time, he was represented by Christopher Bruno and Philip J. Kaplan. (Dkt. No. 27, Plea Agreement.) The Plea Agreement expressly stated the statutory maximum term for each offense: 25 years on Counts 1 and 2; and 20 years on County 3. (*Id.* ¶ 1.) The Plea Agreement also contained a lengthy recitation of the facts underlying the securities fraud scheme, and Knabb agreed those facts were true. (Plea Agreement, ¶¶ 2.a-2.u.) The parties set forth their agreement on how to calculate Knabb's offense level under the United States Sentencing Guidelines (the "Guidelines"). The parties agreed that the base offense level was 7, that a 22-point upward adjustment, based on the amount of gain, was applicable, and that Knabb was entitled to a 3-point downward adjustment for acceptance of responsibility. Based on those calculations, Knabb's adjusted offense level was 26. (*Id.* ¶ 7.)

Knabb agreed that "the Court is not bound by the Sentencing Calculations above, the Court may conclude that a higher guideline range applies to me, and if it does, I will not be entitled, nor will I ask, to withdraw

my guilty pleas." (*Id.*, ¶ 7; *see also id.* ¶ 6.) Knabb also agreed "not to file any collateral attack on my convictions or sentence, including a petition under 28 U.S.C. § 2255 …, at any time in the future after I am sentenced, *except* for a claim that my constitutional right to the effective assistance of counsel was violated" (Plea Agreement, ¶ 5 (emphasis added).)

After Knabb entered his guilty plea, but before the Probation Officer finalized a presentence investigation report ("PSR") and before sentencing, Mr. Bruno and Mr. Kaplan filed a motion to withdraw, which the Court granted. James Roberts and Kirk Elliott of the law firm of Robins & Elliot appeared on Knabb's behalf. (Dkt. Nos. 44-46.) The Court granted two stipulations to continue the sentencing hearing and, on February 22, 2012, Mark Goldrosen also entered an appearance on Knabb's behalf.

The Probation Officer submitted a PSR on February 17, 2012, using the November 2011 Guidelines manual.[1] The Probation Officer concurred with the parties' Guidelines calculations set forth in the Plea Agreement and determined that Knabb's Criminal History Category ("CHC") was I. Based on offense level 26 and CHC I, the applicable Guidelines range was 63 to 78 months. The Probation Officer recommended a sentence of 63 months.

On March 8, 2012, the Probation Officer provided the Court and the parties with a memorandum in which it advised the Court that it had received new information

1. All references to the Guidelines are from the 2011 Manual.

from a "concerned citizen" about Knabb's assets and his wife's business, which pertained to sales of items on eBay. That day, the parties appeared before the Court for sentencing. The Court addressed the new information provided by the Probation Officer. It also stated that it was not certain the Guidelines calculation was correct and expressed its opinion that additional adjustments to the offense level might apply. In particular, the Court raised the issue of whether an adjustment based on the number of victims was applicable, which was based on the Court's review of victim impact statements submitted in advance of sentencing. The Court also raised the issue of whether Knabb could be considered an organizer or leader under Guidelines Section 3B1.1. (*See* Dkt. No. 57, Transcript of Proceedings on March 8, 2012 ("3/8/12 Tr.") at 5:17-8:25, 10:1-11:5.)

Knabb's counsel noted that they had not been involved in negotiating his plea agreement and "assumed that those issues had been hashed out. … [A]pparently they had been thought of, and there had been agreement between the parties that those issues did not apply." (*Id.* at 9:5-9.) Counsel also noted that the Court had not applied an adjustment based on the number of victims when it sentenced Knabb's co-defendant, which led him to believe the Court would not apply it in Knabb's case. (*Id.* at 9:10-19.) The Court deferred sentencing and ordered the parties to submit supplemental briefing, and it requested a supplemental PSR. The Court also requested further investigation into the allegations about the eBay sales. (*Id.* at 11:6-12-16:7.)

Appendix B

On April 5, 2012, the Probation Officer submitted an amended PSR. The Probation Officer determined that the base offense level was 7 and recommended that the Court apply the following upward adjustments: 22-points based on Knabb's gain; 4 points based on Knabb's position as an officer or director of a publicly traded company, pursuant to 2B1.1(b)(18)(a); and 4 points based on his role in the offense, pursuant to 3B1.1(a). The Probation Officer also declined to apply the 3-point downward adjustment for acceptance of responsibility. As a result, Knabb's adjusted offense level was 37. With a CHC of 1 and an offense level of 37, the Guidelines range was 210 to 262 months on Counts 1 and 2 and 210 to 240 months on Count 3. The Probation Officer recommended a sentence of 210 months on all counts, to be served concurrently.

On May 23, 2012, the Probation Officer submitted a second amended PSR, in which she calculated the base offense level as 7. The Probation Officer once again recommended that the Court apply the following upward adjustments: 22 points based on the amount of gain; 4 points based on Knabb's position as an officer or director of a publicly traded company; 4 points based on his role in the offense. The Probation Officer also recommended a 2-point upward adjustment for obstruction of justice, pursuant to Section 3C1.1, which based on information Knabb provided during the presentence investigation process. The Probation Officer also declined to apply the adjustment for acceptance of responsibility. Based on the application of these adjustments, Knabb's adjusted offense level increased to 39. With a CHC of 1 and an offense level of 39, the Guidelines range was 262 to 300 months on

Counts 1 and 2 and 240 months on Count 3. The Probation Officer recommended a total sentence of 281 months.

The Government and Knabb objected to application of the adjustment for Knabb's role in the offense. Knabb also objected to the adjustment based on his position in a public company, because his co-defendant did not receive that adjustment. Knabb also objected to the fact that he did not receive an adjustment for his acceptance of responsibility and objected to the Probation Officer's determination that there were no factors that would warrant a sentence outside the Guidelines range. The parties submitted supplemental sentencing memoranda setting forth their positions on the adjustments addressed in the Second Amended PSR. (*See* Dkt. Nos. 58, 60-63, 68.)

On June 7, 2012, the parties appeared before the Court for sentencing, and it permitted Knabb to put on evidence relating to the obstruction of justice adjustment. (*See* Dkt. No. 17, Transcript of Proceedings June 7, 2012 ("6/7/12 Tr.") at 31:20-76:19.) The Court determined the base offense level was 7 and applied a 22-point adjustment based on the amount of gain. (*Id.* at 78:11-79:8.) The Court also determined that the 4-point adjustments based on Knabb's role in the offense and his position as an officer of public company applied. It declined to apply adjustments based on the number of victims or for obstruction of justice. (*Id.* at 79:9-94:7.) The Court applied a 3-point downward adjustment for acceptance of responsibility, which resulted in an adjusted offense level of 34. (*Id.* at 94:8-102:19.) With a CHC of I and an offense level 34, the applicable Guidelines range was 151 to 188 months. The

Court imposed an upward variance based on the factors set forth in 18 U.S.C. section 3553(a), and it sentenced Knabb to a term of 253 months imprisonment: 253 months on Counts 1 and 2; and 240 months on Count 3, with all terms to run concurrently. (*Id.* at 108:15-115:6; *see also* Docket Nos. 69, 71.)

On June 21, 2012, Knabb appealed his conviction. On December 30, 2013, the United States Court of Appeals for the Ninth Circuit determined that he waived his right to appeal his conviction and sentence and found no arguable issue about the validity of that waiver. The Ninth Circuit declined to address Mr. Knabb's claim of ineffective assistance of counsel and dismissed the appeal. (*See* Dkt. No. 84.)

On March 16, 2015, Knabb, acting *pro se*, moved to vacate his conviction and sentence. Knabb raised four claims: (1) his original counsel, Christopher Bruno, was ineffective during plea negotiations; (2) the Court conducted an inadequate plea colloquy under Federal Rule of Criminal Procedure 11; (3) he is "actually innocent" of all charges; and (4) the Court imposed an unreasonable sentence. Although he did not raise it as a separate claim, Knabb also appeared to argue that substitute counsel were ineffective because they did not file a motion to withdraw his guilty plea.

On July 14, 2017, after the original motion was fully briefed, new counsel entered an appearance on Knabb's behalf. The Court issued an Order directing that counsel advise the Court whether he would seek leave to

supplement Knabb's *pro se* briefs. Counsel filed a status report, in which he advised the Court that he would not proceed on the existing briefing and would move to file a supplemental brief. Based on the lack of opposition from the Government, the Court granted Knabb's motion to file a supplemental brief, and it set a further briefing schedule. (Dkt. Nos. 117-122.)

In his supplemental brief, Knabb withdrew his second, third and fourth claims for relief.[2] Accordingly, the claims at issue are: (1) whether original counsel was ineffective during plea negotiations; and (2) whether substitute counsel were ineffective for failing to move to withdraw his guilty plea.

The Court will address additional facts as necessary in the analysis.

ANALYSIS

A. Standard of Review.

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States,

2. In his supplemental brief, Knabb states that he is not pursuing a stand-alone claim for actual innocence. Instead, he relies on the evidence he submitted in support of that claim to show why he would have chosen to go to trial and why it would have been fair and just to grant a motion to withdraw his guilty plea.

> or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Section 2255 expressly provides, in pertinent part, that a district court shall grant an evidentiary hearing "unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." *Id.* § 2255(b). An evidentiary hearing usually is required "if the motion states a claim based on matters outside the record or events outside the courtroom." *United States v. Burrows*, 872 F.2d 915, 917 (9th Cir. 1989). However, denial without a hearing is appropriate whenever the record affirmatively manifests the factual or legal invalidity of the petitioner's claims. *Baumann v. United States*, 692 F.2d 565, 571 (9th Cir. 1982).

To justify an evidentiary hearing, the petitioner may not rely on "[m]ere conclusory statements." *Baumann*, 692 F.2d at 571 (citing *Wagner v. United States*, 418 F.2d 618, 621 (9th Cir. 1969)). However, "the petitioner need not detail his evidence, but must only make specific factual allegations which, if true, would entitle him to relief." *Id.* Thus, a court may deny a Section 2255 motion without a hearing if "viewing the petition against the record, its allegations do not state a claim for relief or are so palpably incredible or so patently frivolous as to warrant summary dismissal." *Id.*

Appendix B

For reasons discussed in the analysis, the Court concludes an evidentiary hearing on Knabb's claims are not warranted.

B. The Court Denies the Motion.

1. Applicable Standard for Claims Based on Ineffective Assistance of Counsel.

The Sixth Amendment right to counsel guarantees not only assistance, but effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). In *Strickland*, the Supreme Court established a two-pronged test that Knabb must satisfy to prevail on these claims. First, Knabb must establish that, under prevailing professional norms, counsel's performance fell below an "objective standard of reasonableness." *Id.* at 687-88. Second, Knabb must show prejudice. *Id.* at 693. "Surmounting *Strickland's* high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010).

To meet his burden on the first prong, Knabb must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." *Strickland*, 466 U.S. at 687. The relevant inquiry is not what counsel could have done, but rather whether the choices made by counsel were reasonable. *See Babbit v. Calderon*, 151 F.3d 1170, 1173 (9th Cir. 1998). To meet his burden on the second prong, Knabb must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*,

466 U.S. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceedings. *Id.* "The ultimate question to be answered is whether counsel's errors 'so upset the adversarial balance between the defense and prosecution that the trial was rendered unfair and the verdict rendered suspect.'" *Jones v. Wood*, 114 F.3d 1002, 1010 (9th Cir. 1997) (quoting *Nix v. Whiteside*, 475 U.S. 157, 175 (1986)). The Court, however, need not consider one component, either the incompetence or prejudice prong, if there is an insufficient showing of the other. *Strickland*, 466 U.S. at 697.

The Court's scrutiny of counsel's performance must be highly deferential, and it must indulge a strong presumption that Counsel's conduct falls within the wide range of reasonable professional assistance. *Id.* at 689. In general, an attorney's tactics at trial are entitled to deference, and the fact that a criminal defendant and his or her trial attorney may have differences of opinion with regards to trial tactics does not by itself constitute ineffective assistance. *See United States v. Mayo*, 646 F.2d 369, 375 (9th Cir. 1981). Tactical decisions deserve deference when (1) counsel bases his or her trial conduct on strategic considerations, (2) counsel makes an informed decision based upon investigation, and (3) the decision appears reasonable under the circumstances. *Sanders v. Ratelle*, 21 F.3d 1446, 1456 (9th Cir. 1994).[3]

3. The Government argues the Court should enforce Knabb's waiver of his right to file a motion to vacate. (*See* Dkt. No. 104, Answer at 19:11-21:25; Dkt. No. 128, Gov. Supp. Br. at 3 n.1.) Knabb agreed not to file a motion to vacate, unless it was based on "a claim that my constitutional right to the effective assistance of counsel was

2. Claim 1: Ineffective Assistance During Plea Negotiations.

Knabb argues that Bruno was ineffective during plea negotiations because he failed to recognize that the adjustments pursuant to 2B1.1(b) and 3B1.1(A) could be applicable and would have increased his potential exposure. The right to effective assistance of counsel "extends to the plea-bargaining process." *Lafler v. Cooper*, 566 U.S. 156, 162 (2012). In order to prevail on this claim, Knabb must satisfy the usual *Strickland* standard. In this context, to satisfy the second prong, Knabb 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." *Hill v. Lockhart*, 474 U.S. 52, 59 (1986).

In order to show that Bruno's performance was deficient, Knabb must do more than show "a mere inaccurate prediction" of the outcome. *Iaea v. Sunn,* 800 F.2d 861, 865 (9th Cir. 1986). If Knabb was induced to plead guilty because Bruno presented a "gross mischaracterization of the likely outcome," that would satisfy the first prong of the *Strickland* analysis. *Iaea*, 800 F.2d at 865; *accord Chacon v. Wood*, 36 F.3d 1459, 1464 (9th Cir. 1994). In the *Iaea* case, the defendant's attorney advised him that he was subject to a minimum sentencing scheme, that there was almost no chance that he would receive an extended or life sentence, and that he

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violated." (Plea Agreement, ¶ 5.) Although Knabb's original motion included claims that fell outside the scope of that waiver, the claims in his supplemental brief do not.

could only receive such a deal if he entered a guilty plea. Counsel also threatened to withdraw from the case when the defendant did not appear receptive to the agreement. *Id.* at 863. In fact, the sentencing scheme by its terms did not apply to the defendant, and the court imposed lengthy sentences on him. The Ninth Circuit determined that "the gross mischaracterization of the likely outcome presented in this case, combined with the erroneous advice on the possible effects of going to trial" fell below an objective standard of reasonableness. *Id.*

The Government argues Knabb did not submit a sworn declaration about Bruno's advice during the plea-bargaining process. Knabb submitted a declaration with his reply challenging this assertion. (Dkt. No. 130-1, Declaration of Jasper Knabb dated December 8, 2017 ("12/8/17 Knabb Decl.").) Knabb attests that he did submit a declaration with his original petition. (Docket No. 90-2, Ex. K ("Declaration of Jasper Knabb dated July 5, 2013 ("7/5/13 Knabb Decl.").) In his most recent declaration, Knabb states that he previously "stated that Mr. Bruno had told me that I would likely receive a sentence of months if I pleaded." (12/8/17 Decl., ¶ 2; *see id.* ¶ 5.) In the 7/15/13 Declaration, Knabb attested that Bruno led him to believe he would receive "a sentence of probation or a few months (less than one year) for a misdemeanor failure to supervise" his codefendant. (7/15/13 Decl. at p. 6.)

The Court conducted a thorough plea colloquy with Knabb. (Dkt. No. 59, July 28, 2011 Transcript of Proceedings ("7/28/11 Tr.").) "[J]udges may use their own notes and recollections of the plea hearing and sentencing

process to supplement the record." *United States v. Shah*, 878 F.2d 1156, 1159 (9th Cir. 1989). The Court had the opportunity to observe Knabb during that hearing and throughout the sentencing process. The statements made during his plea colloquy were made under oath and "carry a strong presumption of verity." *Blackledge v. Allison*, 431 U.S. 63, 74 (1977). They stand in stark contrast to the statements in each of his declarations about his understanding of the sentence that Bruno allegedly told him he would receive. To the extent Knabb now attests that Bruno affirmatively represented he would only receive "months" in prison for a misdemeanor the Court finds such statements palpably incredible.

Knabb has not presented any further evidence about what advice Bruno may have given him about the Guidelines or how they were to be calculated, including any advice about the application of the upward adjustments at issue in this case. *Compare United States v. Wilson*, No. 08-cr-0114 TLN DAD P, 2015 WL 3466989, at *7-*8 (E.D. Cal. June 1, 2015) (concluding "out of an abundance of caution" evidentiary hearing warranted where defendant put forth transcripts of conversations with counsel and declarations from family members regarding promises made during plea negotiation). Knabb argues that it should have been "obvious" to Bruno that these upward adjustments would have been applicable, citing to the fact that the Court did not permit oral argument during the sentencing hearing on those adjustments. The Court is not persuaded.

The Probation Officer also initially agreed with the parties' Guidelines calculation. At the time Knabb entered

his plea, his co-defendant also had entered a guilty plea, in which the parties did not include a 4-point upward adjustment based on his status as an officer of public company, and substitute counsel argued that the Court should not apply that adjustment because it had not applied it in his co-defendant's case. Finally, both Knabb's counsel and the Government forcefully argued against application of the adjustment for Knabb's role in the offense. The Court does not find the facts here similar to the facts at issue in *Iaea*. Although the Court rejected the arguments about the applicability of the adjustments, that does not mean it would have been obvious to counsel during plea negotiations that the Court would apply those upward adjustments notwithstanding the parties' agreed upon calculation of the sentencing guidelines.

Moreover, during the plea colloquy, the Court advised Knabb that it was not bound by the Guidelines calculation in the plea agreement and that it could impose a higher sentence, and that it would not know the proper guidelines range until it received a presentence investigation report. Knabb stated that he understood that to be the case. (7/28/11 Tr. at 13:20-14:8, 19:3-12.) In his most recent declaration, Knabb suggests that he did not have time to consider and understand the agreement. (12/7/17 Knabb Decl., ¶ 7.) Again, those statements contradict the statements made under oath and on the record during the plea colloquy. Further, Knabb acknowledges that the Court told him "it could sentence [him] to longer or shorter than what the plea agreement said." (12/8/17 Decl., ¶ 8.)

The Court recognizes that its calculation of the Guidelines and the sentence it imposed differ significantly

from the Guidelines calculation set forth in the Plea Agreement. However, the Court concludes that Knabb has not met his burden to show that during the plea negotiations Bruno "grossly mischaracterized" the likely outcome.

Accordingly, the Court concludes Knabb has not met his burden on the first prong of the *Strickland* test and, the Court DENIES Knabb relief on Claim 1.

3. Claim 2: Ineffective Assistance Based on the Failure to File A Motion to Withdraw Knabb's Guilty Plea.

In his second claim, Knabb argues that substitute counsel were ineffective because they failed to move to withdraw his guilty plea before he was sentenced. Knabb argues that after the first sentencing hearing, it should have been obvious to substitute counsel that the Court would not be imposing a sentence based on the Guidelines calculations set forth in the Plea Agreement. Once again, to prevail, Knabb must show that substitute counsel's performance was deficient and that he suffered prejudice.

In general, "[a] tactical decision by counsel with which the defendant disagrees cannot form the basis of a claim of ineffective assistance of counsel." *Guam v. Santos*, 741 F.2d 1167, 1169 (9th Cir. 1984). In support of this claim, Knabb submits a letter from substitute counsel, which states that they "researched the issue of withdrawing your plea and the effect of such a withdrawal," and advised Knabb of their reasons why they believed it would not be advisable. (Dkt. No. 127-1, Knabb Supp. Br. Ex. A at

1-2.) Substitute counsel noted that the Plea Agreement prohibited Knabb from moving to withdraw, which is supported by its terms. (Plea Agreement, ¶¶ 9, 12.) Substitute counsel also advised that if Knabb moved to withdraw and proceed to trial, the U.S. attorney advised that the government would re-open the investigation, which could lead to the filing of additional charges and that also might also lead to a harsher sentence. (*Id.* at 2.) This letter shows that substitute counsel did not simply ignore the request and advised Knabb of the deadline to get such a motion on file, assuming he wished to proceed.[4]

Moreover, to show prejudice, he must show that had substitute counsel filed the motion, it is reasonable that the Court would have granted it as meritorious, and had the motion been granted, it is reasonable that there would have been an outcome more favorable to him. *See Wilson v. Henry*, 185 F.3d 986, 990 (9th Cir. 1999). The Court recognizes that the standard for granting a motion to withdraw a guilty plea prior to sentence is to be "applied liberally." *United States v. Davis*, 428 F.3d 802, 805 (9th Cir. 2005) (quoting Fed. R. Crim. P. 11(d)(2)(B)). Under that standard, the Court may exercise its discretion to grant the motion if the defendant shows "a fair and just reason" for doing so, including an inadequate plea colloquy, "newly discovered evidence, intervening circumstances, or *any other reason for withdrawing the plea that did not exist when the defendant entered his plea*." *Id.* (quoting *United States v. Ortega-Ascanio,* 376 F.3d 879,

4. Knabb did not file a motion, either through counsel or acting *pro se*. He also did not file a motion to substitute new counsel. Instead, he proceeded to sentencing.

883 (9th Cir. 2004) (emphasis added)). Although the "fear of receiving a harsh sentence, standing alone," *Shah*, 878 F.2d at 1162, would not be sufficient to meet that standard, "a defendant may demonstrate a fair and just reason for plea withdrawal by showing that his counsel's gross mischaracterization plausibly *could* have motivated his decision to plead guilty." *Davis*, 428 F.3d at 808 (emphasis in original).

As discussed above, the Court concludes that Knabb has not met his burden to show that Bruno grossly mischaracterized the likely sentence he could have received. Further, even if the Court had exercised its discretion to grant a motion to withdraw the guilty plea, taking into consideration Knabb's arguments about the evidence that purportedly shows he was "actually innocent" of these charges, the Court concludes that Knabb has not met his burden to show the outcome would have been more favorable to him, *i.e.* that he would have been acquitted or would have received a lesser sentence had he gone to trial.[5]

Accordingly, the Court DENIES Knabb relief on Claim 2.

C. The Court Grants A Certificate of Appealability.

Rule 11(a) of the Rules Governing Section 2255 Proceedings requires a district court to rule on whether

5. Again, Knabb's assertions stand in stark contrast to his sworn statements during the plea colloquy that the facts set forth in the plea agreement were true.

the petitioner is entitled to a certificate of appealability in the same order in which the petition is denied. The Court concludes that Knabb has met his burden to show that a reasonable jurist would find the denial of his claims debatable. *See Slack v. McDaniel*, 529 U.S. 473, 383 (2000). Consequently, the Court finds a certificate of appealability on the motion is warranted.

CONCLUSION

For the foregoing reasons, the Court DENIES Knabb's motion to vacate and GRANTS Knabb a certificate of appealability. The Court shall enter a separate judgment on this motion, and the Clerk shall close the related civil file *Jasper Knabb v. United States*, No. 15-cv-01251-JSW.

IT IS SO ORDERED.

Dated: March 29, 2019

/s/ Jeffrey S. White
JEFFREY S. WHITE
United States District Judge