UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO: 18-80179-CR-COHN

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ANTHONY MICHAEL D'AMICO,

Defendant.
_____/

MOTION TO WITHDRAW PLEA

COMES NOW the Defendant, ANTHONY D'AMICO, by and through his undersigned counsel, pursuant to Fed. R. Crim. P. 11(d)(2)(B), and moves this Court for the entry of an order permitting him to withdraw his guilty plea and resetting this matter for trial and in support thereof states as follows:

Statement of the Case and Proceedings to Date

The Defendant was initially Indicted on September 7, 2018 for the offenses of counts 1-5, wire fraud, in violation of 18 U.S.C. § 1343 and counts 6-7: money laundering, in violation of 18 U.S.C. § 1957. [DE 3]. The Defendant was arrested on October 2, 2018 [DE 7] and a personal surety bond was set on October 9, 2018. [DE 11]. The Defendant subsequently retained attorney Michelle Suskauer as his permanent counsel in the case. [DE 12].

The Defendant would incorporate and adopt his "Letter for the Review of Judge Cohn", filed on May 23, 2019, [DE 43] (Exhibit A) as it sets forth the facts relevant to the interactions

between Ms. Suskauer and the Defendant as well as the interactions between John Garcia, a disbarred lawyer[1] whom Ms. Suskauer had recommended and suggested the Defendant retain. At the time that the Defendant retained Mr. Garcia, he was unaware of his status as a disbarred lawyer. The Defendant received legal advice directly from Mr. Garcia relevant to his case upon which he made critical decisions, including the entering of a guilty plea before the Court. Continuing up to and during the change of plea hearing, the Defendant still believed Mr. Garcia to be an attorney. The Court actually made reference to Mr. Garcia as if he was an attorney during the hearing on at least five different occasions. Mr. Garcia sat at the defense table alongside the Defendant. Attached is a copy of the change of plea hearing, dated February 14, 2019. (Exhibit B). (Change of Plea Hrg. Tr. pgs. 2, 4, 5, 6 and 14). Mr. Garcia nor attorney Brian Raymond, who was covering the hearing for Ms. Suskauer ever corrected the Court with regard to Mr. Garcia status as an attorney.

The Defendant would also attach and incorporate into this motion a copy of the hearing transcript of Defense Counsel's Motion to Withdraw, held on May 29, 2019 before this Court. [DE 49]. (Exhibit C) During that hearing Ms. Suskauer acknowledged that she recommended that the Defendant retain Mr. Garcia and identified him as a "federal court specialist". (Motion to Withdraw Hrg. Tr. pgs. 6-7). Ms. Suskauer acknowledged during the hearing that Mr. Garcia would meet with the Defendant privately. (Motion to Withdraw Hrg. Tr. p. 8). Ms. Suskauer also

[1] John Anthony Garcia, who was originally admitted to practice law in Florida on April 21, 1988 was permanently disbarred on March 20, 2014 and not eligible to practice law in Florida. Reference: Florida Bar Website, Member Profile.

acknowledged during the hearing that Mr. Garcia accompanied the Defendant, alone, to the U.S. Probation Office for his PSI interview. (Motion to Withdraw Hrg. Tr. p. 8).

While the Defendant has already attached five emails directly between him and Mr. Garcia in his letter to the court, there are over 100 emails between the Defendant and Mr. Garcia and over 400 back and forth text messages with Mr. Garcia. The Defendant also has phone records showing over 50 telephone calls with Mr. Garcia. These emails and text messages show that Mr. Garcia handled a significant portion of the representation directly with the Defendant, including advising him on the federal sentencing guidelines, the plea agreement [DE 23], stipulated factual proffer agreement [DE 24] and the objections to the pre-sentence investigation report [DE 35]. Mr. Garcia was more than that of a paralegal. The Defendant believed Mr. Garcia to be an attorney. While the Defendant has referenced the number of emails, text messages and phone calls with Mr. Garcia, he is not attaching them as exhibits as they contain confidential privileged communications which should not be viewed by the government or the Court while the case is still pending. If the Court must know the type of communications between the Defendant and Mr. Garcia, (e.g. legal or otherwise), it is suggested that another Judge or Magistrate view the communications ex-parte, under seal and provide to the court; not the substance of the communications, but a finding that the communications pertain to legal matters relevant to the case.

Thes emails and text messages establish that the communications between Mr. Garcia and the Defendant were of a legal nature and did in fact provide legal advice. This advice was

further communicated by Mr. Garcia in subsequent conversations right up to the time of the change of plea hearing which he was present during.

Additionally, emails directly between the Defendant and Mr. Garcia also establish that the Defendant never fully reviewed his discovery prior to entering his guilty plea, specifically the electronic discovery that was contained on discs. The Defendant had communicated with Mr. Garcia directly on at least (2) two occasions subsequent to the change of plea requesting to finally review these materials. The context of the emails indicate that the Defendant did not review all of the discovery in his case.

Finally, emails involving the Defendant show that the written objections to the presentence investigation report were filed without his final review and corrections being included, despite communications directly with Mr. Garcia. The Defendant had only directly communicated with Mr. Garcia with regard to the PSI objections.

The Defendant did not know that John Garcia was disbarred by the Florida Bar until sometime before his scheduled sentencing hearing date which was May 29, 2019. [DE 42]. Once he learned of this fact and realized the representations made by Mr. Garcia were not correct, he filed his letter for review and brought this matter to the court's attention. The Defendant maintains that Mr. Garcia, whom he believed to be an attorney, was his main point of contact during the case and Ms. Suskauer was simply out of the loop.

Memorandum of Law

Rule 11 of the Federal Rules of Criminal Procedure provides that a defendant may withdraw his guilty plea before sentence is imposed if "the defendant can show a fair and just

reason for requesting the withdrawal." *Fed. R. Crim. P. 11(d)(2)(B)*. This circuit has held that a "defendant clearly has the burden on a motion to withdraw a guilty plea." *United States vs. Izqueirdo, 448 F.3d 1269, 1276 (11th Cir. 2006)(citing United States vs. Buckles, 843 F.2d 469, 471 (11th Cir. 1988)* However, in determining whether the defendant has met his burden, the district court may consider the totality of the circumstances surrounding the plea. *United States vs. Brehm, 442 F.3d 1291, 1298 (11th Cir. 2006).*

In determining if the defendant has met his burden under the aforementioned rule and after conducting the appropriate inquiry, this court must consider "(1) whether the close assistance of counsel was available; (2) whether the plea was knowing and voluntary; (3) whether judicial resources would be conserved; and (4) whether the government would be prejudiced if the defendant were allowed to withdraw his plea." *See United States vs. Buckles, 843 F.2d at 472 (11th Cir. 1988).*

It is the position of the Defendant that he did not receive the close assistance of counsel who he initially hired and retained to handle his case. While unbeknownst to the Defendant, the person that was recommended to him as a federal court specialist for him to hire and whom he had substantial direct contact with was disbarred by the Florida Bar. The direct contact the Defendant had with Mr. Garcia dealt with critical aspects of the case. This direct contact purportedly violates the Rules Regulating the Florida Bar dealing with disbarred attorneys. *See R. Regulating Fla. Bar 3-6.1(d).* Employment of Certain Attorneys or Former Attorneys. Ms. Suskauer appeared to be unaware of the rules involving utilizing disbarred attorneys and the quarterly reporting requirements. (Motion to Withdraw Hrg. Tr. p. 17).

It is further the position of the Defendant that he received advice and guidance directly from Mr. Garcia in entering his guilty plea without having been able to review discovery materials and despite the fact that he did not agree with the facts set forth in the stipulated factual proffer but was advised that it would somehow benefit him. The guilty plea was therefore not knowingly and voluntarily entered into with the close assistance of counsel.

In the third prong the court must consider whether judicial resources would be conserved. Since the Defendant has privately retained the undersigned and the pubic appointment of new counsel will not be necessary there is no added expense to the judiciary. The Defendant has been released on bond and no additional resources or expenditures would be necessary to allow him to withdraw his plea. The allegations made by this Defendant are not frivolous as they are corroborated by electronic communications and in part by Ms. Suskauer's own responses with regard to her use of Mr. Garcia in the Defendant's case.

Finally, while the facts and issues of the case may be somewhat complex and require time for defense counsel to properly prepare, the government has certified that the case would take only take 3 - 4 days for the parties to try. Therefore, there can be no prejudice demonstrated by the government by setting aside the plea and allowing the Defendant to proceed to trial. It would appear that the same witnesses that would be testifying at a sentencing hearing would be called during the trial.

While the Defendant has no absolute right to withdraw his guilty plea, *see United States vs. Medlock, 12 F.3d 185, 187 (11th Cir. 1994)*, the defendant has demonstrated a sufficient basis along with a fair and just reason for requesting the withdrawal of his plea. The facts and

circumstances involving Mr. Garcia's direct involvement with the Defendant are problematic since disbarred lawyers are not permitted to have direct contact with clients. *See R. Regulating Fla. Bar 3-6.1(d)*. It would appear that Mr. Garcia's role was more than that of a paralegal. Moving to withdraw your plea after realizing the person you believed to be an attorney isn't, is not something that happens very often in this district or elsewhere. This situation is quite unique, rendering this case outside the "heartland of cases" in which the issue of withdrawing a guilty plea often arises.

In summation, based upon the examination of the allegations made during the motion to withdraw hearing, the Court saw fit to refer this matter to the Florida Bar for investigation. (Motion to Withdraw Hrg. Tr. p. 17) Such a decision only gives this Court more reason to grant the instant motion.

Therefore, this motion should be granted and the matter reset on this court's trial calendar.

Respectfully submitted by,

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/S/ Jonathan S. Friedman
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 14, 2019, the undersigned attorney electronically filed the foregoing document with the Clerk of the Court, AUSA, United States Attorney Office-Southern District of Florida, and other counsel of record, if any, using CM/ECF and has served same via U.S. Mail to those counsel(s) or individuals, if any, who are not authorized to receive electronically Notice of Electronic Filing.

/S/ Jonathan S. Friedman_____
JONATHAN S. FRIEDMAN, ESQ.