IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

United States Courts
Southern District of Texas
FILED
JAN 2 1 2005
Michael N. Milby, Clerk

UNITED STATES OF AMERICA, Plaintiff,	§	
vs.	§	CR. NO. H-03-221-S-01
KARLA PATRICIA **CHAVEZ**-JOYA Defendant.	§	

OPPOSITION TO MOTION TO WITHDRAW PLEA OF GUILTY

TO THE HONORABLE JUDGE OF SAID COURT:

The United States of America (hereinafter, "the government") files this motion in response to Karla Patricia **Chavez**-Joya's ("Chavez") Motion to Withdraw Plea of Guilty. In support thereof, the government would show the court the following:

I.

FACTUAL SUMMARY

A. The Trailer and Its Contents

On May 14, 2003, Immigration and Customs Enforcement agents and Victoria County Sheriff's Office deputies discovered an abandoned trailer in Victoria, Texas. In and around the trailer, authorities discovered seventeen deceased smuggled aliens and fifty-seven surviving aliens. Two of these surviving aliens perished a short time later as the direct result of conditions inside that trailer. Fifty-five aliens survived the

ordeal.

B. Chavez's Initial Statement to Authorities

Chavez was arrested on June 13, 2003, as the result of her participation in this alien smuggling operation. Chavez was interviewed[1] on June 14, 2003, by Department of Homeland Security Special Agents Marc Sanders, Gus Meza and Steve Greenwell.

During her June 14, 2003, statement to Sanders, Meza and Greenwell, Chavez admitted that: (a) she and co-defendants Abelardo Flores, Jr., and Fredy Giovanni Garcia-Tobar were smuggling the aliens found in the trailer in Victoria; (b) that she and Flores had smuggled aliens in a trailer on three prior occasions; (c) that she participated in numerous cell phone calls to make arrangements for aliens to be smuggled – the group discovered on May 14, 2003, and other, prior groups; and (d) the first alien smuggling trip involved approximately 12 aliens, the second trip approximately 30 aliens, the third trip an unknown number of aliens and the final trip involved at least 60 aliens.

In this June 14, 2003, interview, Chavez admitted that she relayed information from Flores to Garcia-Tobar and several other smugglers from May 9, 2003, through

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[1] This interview was videotaped and there is a 77 page transcript of the statements Chavez made during that interview. This transcript has been provided to all defense counsel in this case.

May 13, 2003, as to how many aliens each of them had and where and when they could rendezvous with the trailer towed by co-defendant Tyrone Mapletoft Williams for the purpose of placing the undocumented aliens for which each was responsible into Williams' trailer. During this interview, Chavez stated that Flores or Garcia-Tobar came to her home on May 12, 2003, and told her that "the truck driver" had arrived early and that "they" [either Flores or Garcia-Tobar] had paid for a hotel room for "the truck driver."

C. Chavez's Plea Agreement

On June 12, 2003, Chavez was charged by indictment with one count of conspiracy to smuggle aliens, nineteen counts of harboring aliens, nineteen counts of transporting aliens and an additional nineteen counts of transporting aliens where death resulted. The indictment was superseded on March 15, 2004. Chavez pled guilty to count one of a superseding indictment on June 14, 2004, under the terms of a written plea agreement under FED. R. CRIM. P. 11(c)(1)(A) and (c)(1)(B). That count charged Chavez with knowingly conspiring with others to conceal, harbor, move and transport aliens who had come to, or remained in the United States illegally, in violation of 8 U.S.C. §§ 1324(a)(1)(A)(ii), 1324(a)(1)(A)(iii), 1324(a)(1)(A)(v)(I), 1324(a)(1)(B)(i), 1324(a)(1)(B)(iii) and 1324(a)(1)(B)(iv). The punishment range for that charge was up to life imprisonment because the charge

included an allegation that the death of an alien had resulted from the offense.

Paragraph 1(c) of her plea agreement required Chavez to provide all information relating to any criminal activity known to her, including, but not limited to, the charged alien smuggling offenses. Paragraph 1(d) of her plea agreement required Chavez to testify truthfully as a witness before a grand jury or in any other judicial or administrative proceeding when called upon to do so by the United States. Paragraph 1(f) of her plea agreement required Chavez to voluntarily attend any interviews or conferences as the United States may request. Of principal importance, paragraph 1(g) of her plea agreement required Chavez "(t)o provide truthful, complete and accurate information and testimony" to authorities at all times. Finally, paragraph 2(d) of Chavez's plea agreement provided, in full, as follows:

> The United States will file a U.S.S.G. Section 5K1.1 downward departure motion commensurate with the level of defendant's assistance **if** in the <u>**sole**</u> discretion of the United States it is determined that the defendant has provided <u>substantial</u> <u>assistance</u> in the prosecution of other individuals as contemplated by U.S.S.G. Section 5K1.1

(emphasis in original). The final sentence of paragraph 10 of Chavez's plea agreement – underlined for emphasis in the original – states that "(t)he United States does not make any promise or representation concerning what sentence the defendant will receive."

Chavez's plea agreement, signed under oath and read by Chavez according to her comments to this Court, contained a nine-page stipulated factual basis supporting her plea of guilty. The statement refers to a post arrest video taped statement of Chavez's admissions to federal agents. Chavez therein admitted knowing that Williams arrived in Harlingen, Texas, on May 13, 2003; that, "from Friday, May 9, 2003, through the evening of Tuesday, May 13, 2003, she [Chavez] had frequent cellular telephone conversations with five different smugglers coordinating how many aliens they each had available to be loaded" into William's trailer; and that she told each of these five alien smugglers "when and where to deliver the aliens to be loaded into the trailer."

In the factual basis, Chavez also acknowledged that co-defendant Flores would testify that he and Garcia-Tobar worked for Chavez in smuggling aliens and that they were responsible for recruiting truck drivers to transport the aliens Chavez was smuggling. Chavez acknowledged that Flores would testify that he and Garcia-Tobar recruited co-defendant Williams – the truck driver on May 13, 2003.

Moreover, Chavez acknowledged in her plea agreement that four of the aliens who survived the horrors of May 13, 2003 – Ana Gladis Marquez-Aguiluz, Celia Del Carmen Diaz Marquez, Jose Jamie Martinez and Lorena Osorio-Mendez – would all identify Chavez as the individual who demanded the payment of their smuggling fees

and was responsible for them being placed in Williams' trailer. Finally, in her plea agreement, Chavez conceded that the United States had tape recorded statements from co-defendant Norma Gonzalez Sanchez to an undercover federal agent in which Sanchez identified an individual named "Karla" as the person who was responsible for orchestrating the aliens' transportation.

In paragraph 17 of her plea agreement, Chavez agreed that all of the forgoing facts were true, and that the United States would be able to prove them beyond a reasonable doubt if her case were tried. At her re-arraignment on June 24, 2004, Chavez stated under oath that she had read her plea agreement and that she understood it, then she willingly signed the plea agreement in open court.

Prior to accepting Chavez's plea of guilty, this Court determined that no one promised Chavez anything other than, or different from, the terms contained in the written plea agreement. Chavez assured this Court, under oath, that there were no additional promises. Chavez also assured this Court, under oath, that no one tried to force her to plead guilty. This Court also informed Chavez that, although she might cooperate and provide information, the United States might still decide her assistance had not been "substantial" and might not file a motion for reduction of her sentence. Chavez told this Court, under oath, that she understood this fact as well.

When asked what she had done to violate the law, Chavez told this Court that she "brought undocumented persons into this country" and that "a lot of those people died." After a protracted discussion of the elements of the offense charged in count one of the superseding indictment, Chavez assured this Court that she was pleading guilty to conspiracy to harbor and transport aliens. Regarding the "death resulted" aspect of the charge, this Court clarified for Chavez and her defense counsel, Mr. John C. LaGrappe, that all that is required is for "death to result." Mr. LaGrappe essentially acknowledged that foreseeability was not a requirement. (Rearraignment Transcript, p. 22-23). After this Court's clarification that the deaths of the aliens only had to "result," Chavez assured this Court that she understood that there was no requirement that she foresee that anyone would die.

This Court found Chavez competent and capable of entering an informed plea of guilty; that her plea was knowing and voluntary; and that it was supported by an independent basis in fact concerning each of the essential elements of the offense. Chavez's sentencing was originally set for September 13, 2004. That sentencing was reset on several occasions and is currently set for May 2, 2005.

D. The October 22, 2004, De-Briefing of Chavez

Two prosecutors, AUSA Daniel C. Rodriguez and Stacy de la Torre, and two case agents, Marc Sanders and Shannon Russell, met Chavez and her two attorneys

at the Fort Bend County Jail in Richmond, Texas, on October 22, 2004. The purpose of the meeting was to allow Chavez to begin the de-briefing process and provide substantial assistance to authorities in relation to the prosecution of others involved in this alien smuggling conspiracy. Present throughout the interview with Chavez was Jeffrey D. Sasser, one of her defense attorneys, and a translator employed by, and associated with, her defense attorneys.[2] Chavez's other defense attorney, John C. LaGrappe, was present for the part of the interview before lunch and returned after the interview had resumed after lunch.

During the course of this October 22, 2004, de-briefing, Chavez provided information which directly contradicted statements she made to Special Agent Sanders at the time of her arrest on June 23, 2003. Chavez also made statements which contradicted information provided by others associated with this alien smuggling case. During this initial de-briefing, a decision was made that the information Chavez was providing was false and that Chavez would not be used as a witness for the United States.[3]

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[2] It is the government's understanding that the defendant's translator was at some point Defense Counsel Sasser's wife, but the government is not currently privy to the current status of that relationship.

[3] Chavez's statements were so contradictory that the government determined that they had to document the statements and provide them to the defense counsel for the other co-defendants. Agent Sanders prepared Report No. 76 detailing Chavez's statements. Contrary to Chavez's irrelevant accusations, this report was provided to co-defendants' attorneys.

Specifically, Chavez began the interview by explaining how she came from her native Honduras to the United States. She then stated that her only substantive involvement with the alien smuggling conspiracy was to try and aid the Honduran aliens who survived the ordeal in Victoria to obtain lawful status to remain in the United States. Chavez was confronted with Western Union documents which showed that she had received thousands of dollars through wire transfers during the time frame of the Victoria alien smuggling conspiracy. Chavez claimed that she had only picked up money at Western Union "on a couple of occasions" and that the Western Union employees must have photocopied her identification and used it on other transactions when the money actually was received by someone else.

Chavez identified co-defendant Flores as the leader of the alien smuggling operation. When confronted with statements from Flores and other co-defendants, as well as statements from other witnesses, all to the effect that Chavez was the leader of the operation, she claimed everyone else was lying. When confronted with cell phone records and other documents which corroborated her managerial role in the conspiracy, Chavez again insisted that Flores was "her boss."

When asked about the 1999 Lincoln navigator used in the smuggling offense, Chavez claimed that, after owning it only one day, she sold it to Maria DeGollado at a loss to raise cash to pay for a vehicle that Flores had allegedly wrecked. Chavez

initially stated that she borrowed the wrecked vehicle from a friend and then stated that she borrowed the wrecked vehicle from another alien smuggler. When asked where the wreck occurred, Chavez said that Flores wrecked the borrowed vehicle in Mexico – other evidence contradicted these statements. When confronted with the fact that she claimed she collected smugglers' fees for Flores, and that she could have simply kept the fees until she had sufficient funds to pay for the borrowed vehicle, Chavez stated that she needed the cash for the borrowed vehicle immediately. The investigation had established that DeGollado actually purchased the vehicle directly from Dos Primos Auto Sales and that the vehicle was never registered to Chavez.

At this point, the prosecutors and the agents determined that Chavez had lied about her involvement in the alien smuggling conspiracy and about her receipt of funds from Western Union, and that she had probably lied about the sale of the Lincoln Navigator. The lead prosecutor informed defense counsel that Chavez had lied on several topics; that she was in breach of her plea agreement; and that the interview was terminated.

E. Chavez's Motion to Withdraw Her Guilty Plea

On January 20, 2005, Chavez filed a motion to withdraw her guilty plea. The crux of Chavez's allegation appears to be either (a) that the prosecution did not allow her a meaningful opportunity to de-brief and provide substantial assistance to the

authorities, thus depriving her of the opportunity to qualify for a motion for reduction of sentence under U.S.S.G. § 5K1.1; or (b) that the original offer to move for a reduction of sentence under U.S.S.G. § 5K1.1 was purely ephemeral, as the prosecution never intended to file such a motion.

Chavez's motion contains additional allegations which are irrelevant to her request to withdraw her guilty plea and factually unsubstantiated. As such, those allegations merit only a cursory response. Regarding the statement of Garcia-Tobar which this Court suppressed, the basis of the suppression was that one of the agent's notes indicated that Garcia-Tobar may have requested the presence of an attorney and that the interview continued beyond this request in apparent violation of his right to counsel. Thus, Chavez misconstrues the basis for that suppression. Chavez's reference to Gabriel Gamez appears to be a reference to Gabriel Luria-Gomez. We simply note that Luria-Gomez provided information about the conspiracy, and he is now being prosecuted on a different alien smuggling violation in the McAllen Division of the Southern District of Texas. [M-04-370]. Finally, the government has no information to substantiate the allegations that an unnamed and unidentified Customs' agent assisted in the Victoria tragedy.[4] Moreover, the government has

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[4] The government embraces its obligation to investigation any credible information regarding this or any other allegations of impropriety or criminal conduct pertaining to this offense. Regarding the checkpoint on the night of the incident, the government has video

inquired and verified that no X-ray machine was present or otherwise available at the time that the truck passed through the checkpoint.

II.

STANDARDS AND AUTHORITIES
FOR WITHDRAWAL OF GUILTY PLEAS

Rule 11(d) of the Federal Rules of Criminal Procedure is the current rule governing guilty pleas and states in pertinent part:

> A defendant may withdraw a plea of guilty or nolo contendere:
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> (2) after the court accepts the plea, but before it imposes sentence if:
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> (B) the defendant can show a fair and just reason for requesting withdrawal.

Although Rule 11 is to be construed and applied liberally as was its predecessor, Rule 32, there is no absolute right to withdraw a guilty plea. *United States v. Powell*, 354 F.3d 362, 370 (5th Cir. 2003); *United States v. Glinsey*, 209 F.3d 386, 397 (5th Cir. 2000); *see also United States v. Rojas*, 898 F.2d 40, 43 (5th Cir. 1990) (citing *United States v. Benavides*, 793 F.2d 612, 616 (5th Cir. 1986)). The standard for determining whether or not a defendant may withdraw her guilty plea prior to sentencing is whether "for any reason the granting of the privilege [to withdraw the plea] seems fair

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evidence of the approximately 21-second stop of the tractor-trailer at the Sarita Border Patrol Checkpoint and has interviewed the inspector, Archie Buchanan, who encountered the driver, Tyrone Williams, on the night of the incident. There was nothing out of the ordinary.

and just." *United States v. Hyde*, 520 U.S. 670, 671 (1997); *United States v. Carr*, 740 F.2d 339, 343 (5th Cir. 1984) (citing *Kercheval v. United States*, 274 U.S. 220, 224, 47 S.Ct. 582, 583 (1927)). The burden of establishing that withdrawal is justified – that a fair and just reason exists – rests with the defense at all times. *United States v. Still*, 102 F.3d 118, 124 (5th Cir. 1996); *United States v. Henderson*, 72 F.3d 463, 465 (5th Cir. 1995); *United States v. Moore*, 37 F.3d 169, 172 (5th Cir. 1994).

In *Carr* the United States Court of Appeals for the Fifth Circuit set forth seven factors that the district court should consider in evaluating a motion to withdraw a plea of guilty:

(1) Whether or not the defendant has asserted his innocence;

(2) Whether or not the government would suffer prejudice;

(3) Whether or not the defendant has delayed his withdrawal motion;

(4) Whether or not the withdrawal would substantially inconvenience the court;

(5) Whether or not close assistance of counsel was available;

(6) Whether or not the original plea was knowing and voluntary; and,

(7) Whether or not withdrawal would waste judicial resources.

740 F.2d at 344; *see also United States v. Steele*, 102 F.3d 118, 123-24 (5th Cir.

1996); *United States v. Daniel*, 866 F.2d 749, 751 (5th Cir. 1989). No single factor or combination of factors mandates a particular result; instead, the Court is guided by the totality of the circumstances, with a "special eye" to the seven factors. *United States v. Bond*, 87 F.3d 695, 701 (5th Cir. 1996); *United States v. Badger*, 925 F.2d 101, 104 (5th Cir. 1991).

The rule is not intended to allow a defendant to make a tactical decision to enter a plea and then obtain a withdrawal if she believes she made a mistake. *United States v. Hurtado*, 846 F.2d 995, 997 (5th Cir. 1988). Thus, the absence of prejudice to the government will be insufficient by itself where no credible reason for the withdrawal is proffered. *United States v. Rojas*, 898 F.2d at 43. Delay in presenting the motion to withdraw a plea of guilty impacts on the credibility of the reason for withdrawal: the longer the delay, the more substantial must be the reason. *United States v. Benavides*, 793 F.2d 612, 617,-18 (5th Cir. 1986). Any assertion of innocence must be considered in light of the rationale for not putting forward defenses at the initial proceeding. *United States v. Rasmussen*, 642 F.2d 165, 168 (5th Cir. 1981). Unfulfilled expectations of a deal for a lighter sentence do not constitute a fair and just reason for allowing withdrawal of a guilty plea. *United States v. Badger*, 925 F.2d 101, 104 (5th Cir. 1991). Moreover, the government does not breach a plea agreement containing a provision about moving for a downward

departure for substantial assistance by failing to so move the Court, if the plea agreement term expressly places the decision within the "sole discretion" of the United States. *United States v. Price*, 95 F.3d 364, 368 (5th Cir. 1996).

III.

SUMMARY OF CHAVEZ'S ASSERTIONS

Chavez's motion to withdraw her guilty plea primarily rests upon her unfounded and unsupported allegation that the government deceived her into pleading guilty by promising to "recommend a substantial reduction in her sentence if she truthfully" debriefed while simultaneously never intending to make such a motion. In support of this claim, Chavez[5] makes numerous inflammatory alleged factual assertions that are wholly irrelevant to her motion to withdraw her guilty plea – how federal agents and attorneys conduct debriefings and whether other unindicted co-conspirators participated in this criminal offense are not factors that support a "fair and just" reason to permit withdrawal of a guilty plea. Of the factors that could appropriately support a motion to withdraw a guilty plea, Chavez's pleading provides erroneous and insufficient analysis. Thus, Chavez has utterly failed to carry her burden of demonstrating a fair and just reason for permitting the withdrawal of her

[5] The government notes that there is no actual statement contained within the motion to withdraw the plea of guilty to indicate or establish that the defendant herself actually wants to withdraw the guilty plea.

guilty plea.

IV.

ARGUMENT

A. Plea agreement provisions:

As noted above, Chavez's primary basis for moving to withdraw her plea of guilty is her claim that the government never gave her a fair chance to debrief and therein denied her the benefit of a 5K1.1 downward departure motion. In claiming that this is a fair and just reason to permit withdrawal of her plea, she ignores the plain language of her plea agreement and disregards important aspects of her debriefing in October 2004.

In the plea agreement, the government expressly agreed to file a 5K1.1 downward departure motion, but only "**if** in the **sole** discretion of the United States it is determined that the defendant has provided substantial assistance in the prosecution of other individuals as contemplated by U.S.S.G. Section 5K1.1." (Page 4, Plea Agreement) (emphasis in original). Under such language, the government's refusal to subsequently move for a 5K1.1 downward departure in only reviewable for an unconstitutional motive. *Price*, 95 F.3d at 368. Chavez has not asserted nor established an "unconstitutional motive." Rather, Chavez claims that by October 2004, six months after Chavez had entered her plea of guilty, that the government had

less of a need for any information from Chavez because the government had another person's statement. Such a fact, even if the statement is later suppressed, does not establish a unjust motive by the government. Chavez did not debrief for six months, and it is not unreasonable, improper, or even uncommon for the government to continue seeking evidence from other sources to substantiate criminal charges. Chavez has simply not presented any evidence that, at the time of entering the plea agreement, that the government had any intention other than utilizing her knowledge of the alien smuggling conspiracy to investigate and prosecute other criminals involved in the offense.

Moreover, it was ultimately not the source of other information that undermined Chavez's opportunity to receive a 5K1.1 downward departure motion; it was the fact that she completely minimized her role in the offense and simply lied regarding several things that were contradicted by various sources. Under the guideline provision for substantial assistance motions, the defendant must give substantial assistance in the investigation and prosecution of another person – any information provided by the defendant must be truthful, complete, and reliable. U.S.S.G. § 5K1.1(a)(2). When Chavez was first arrested, she admitted extensive involvement in the drug smuggling conspiracy. (See June 14, 2003 interview). She also made specific factual admissions regarding her culpability in her plea agreement

and during her rearraignment. However, six months after entering her guilty plea, Chavez sang a different tune. After first visiting with both of her defense counsel, Chavez met with the government and contradicted her prior admissions. Chavez now claimed that she was only involved with a single illegal alien whom she was assisting out of the good of her heart and for free. When confronted with Western Union documents containing her signature and a picture of her driver's license, she gave completely illogical explanations for their existence. In the face of such obvious lies, the government is not required to comply with a provision for recommending a reduced sentence where the plea agreement provision vests the government with "sole discretion" regarding the matter.

As an additional matter, Chavez's false statements during the October debriefing are in-and-of-themselves a breach of the plea agreement. The third provision of Chavez's agreement states that she will "provide all information relating to any criminal activity known to [her], including, but not limited to, the charged smuggling offenses." (Plea Agreement, ¶ 1(c)). Another provision requires her "To provide truthful, complete and accurate information and testimony." (Plea Agreement, ¶ 1(g)). As she failed to comply with these provisions, the government would be fully justified in refusing to fulfill any of its obligations under this plea agreement. (Plea Agreement, page 9; section addressing Breach of Plea Agreement).

Indeed, the government could request that this Court set aside the guilty plea and reinstate the full prosecution if it so desired. (Plea Agreement, ¶¶ 13, 14 (expressly providing for such and vesting the United States Attorney's Office with the authority to determine whether Chavez has breached the plea agreement).

B. Seven Factors for Evaluating a Motion to Withdraw a Plea of Guilty:

1. Assertion of Innocence:

Chavez has not asserted her innocence. Indeed, the pleading before this Court wholly lacks any direct statement by Chavez asserting her innocence. Rather, in direct contradiction to the statements made during the rearraignment, defense counsel appear to claim that "foreseeing any potential harm to the immigrants on the trailer" is an element of the offense. (Compare pages 21 to 24 of June 14, 2004 rearraignment transcript to page 15 of the present motion). First, foreseeing the potential harm is simply not an element of an alien smuggling offense under 8 U.S.C. § 1324. Thus, this argument does not amount to an assertion of innocence. Second, Chavez's comments during the rearraignment confirm that she and her attorneys were aware that foreseeing the potential harm was not an element of the offense. Their contrary argument in this present motion presents a serious obstacle to permitting withdrawal on this basis. *See United States v. Groll*, 992 F.2d 755, 758 (7th Cir. 1993) (defendant presenting reason for withdrawing plea that contradicts the answers

at Rule 11 hearing faces an "uphill battle in persuading the judge that his purported reason for withdrawing his plea is 'fair and just.'"); *see also United States v. Abreo*, 30 F.3d 29, 31 (5th Cir. 1994).

2. Prejudice to government; Substantial inconvenience to the Court; and Waste of judicial resources:

These three factors essentially address similar concerns. Chavez only addresses inconvenience to the Court and claims that there would be none because the Court has not yet set a sentencing date or prepared a presentence investigation report. However, permitting Chavez to withdraw her plea will require another full trial with substantially the same evidence and witnesses presented in the recent trial of Garcia-Tobar, *et al.* Although Williams trial is pending, he is charged with a capital offense, and Chavez would likely claim prejudice to be tried together with him. The only other potential trial is that of Erica Cardenas, and that would occur only if the Fifth Circuit Court of Appeals reverses a suppression ruling of this Court. Chavez could have been tried at the same time as Garcia-Tobar, Victor Jesus Rodriguez, and Claudia Carrizales-Gonzalez had Chavez raised this issue shortly after the October 2004 debriefing. Another long trial would deplete scarce judicial resources and clog this Court's docket for another extended period of time. Likewise, by the time this Court is able to schedule a full trial for Chavez, this case will exceed

two years of time from when the offense occurred and maybe more. This could prejudice the government. In any event, these three factors are substantially intertwined. *See United States v. Moya*, 730 F.Supp. 35, 42 (N.D.Tex. 1990), aff'd 968 F.2d 16 (5th Cir. 1992). All of these factors weigh against permitting Chavez from withdrawing her plea.

3. Delay in moving to withdraw plea:

Chavez acknowledges that it has been eight months since her plea, but claims the reason for the delay is that they just learned of AUSA Rodriguez's conduct in regards to Garcia-Tobar's statement. However, the basis of Chavez's motion does not rest upon the circumstances of Garcia-Tobar's statement. Chavez does not even identify how the Garcia-Tobar statement supports her motion to withdraw her plea. At a minimum, defense counsel became aware that it was likely that the government would not move for a 5K1.1 reduction after the October 2004 interview. There is simply no explanation for waiting to file this motion. Counsel could have filed this motion shortly after the October 2004 interview. It is certainly possible that Chavez and her counsel just wanted to see how the first trial turned out. It is also very possible that Chavez's counsel now believe that the suppression of Garcia-Tobar's statement increases Chavez's chances of prevailing in a jury trial. In any event, Chavez bears the burden on each factor, and she has not established any reasonable

explanation for not filing this motion in a more timely manner.

4. Availability of close assistance of counsel:

Chavez's counsel admit that close assistance of counsel was available. They claim, however, that their recommendation to plea guilty was based "on false information provided by Mr. Rodriguez." They do not specifically identify what "information" was "false." This most likely refers to the allegation that the government never intended to move for a 5K1.1 reduction. However, Chavez has not demonstrated any legitimate basis for this conclusion, particularly at the time she entered her plea - June 14, 2004. Moreover, the incriminating statements Chavez made immediately after her arrest, together with four of the undocumented aliens directly identifying Chavez as a participant in the smuggling conspiracy substantially implicated Chavez supporting a tactical decision to plea guilty and cooperate to get a reduced sentence. Again, the 5K1.1 motion was not guaranteed by its very terms. Thus, Chavez's counsel have not identified any "false" information which persuaded Chavez to plead guilty.

They also claim that Mr. Rodriguez's "conduct" at the October debriefing was unexpected and not foreseeable. It could likewise be said that Chavez's minimizing her role and simply lying about the facts was not expected or foreseen. While the government does not contest that the interview became tense and counsel for both

sides raised their voice, it is certainly a possible result when a defendant declares a desire to cooperate only to advance clear and obvious lies. In any event, the manner in which AUSA Rodriguez responded at the October 2004 debriefing had absolutely no effect upon what advice defense counsel gave Chavez before entering a plea some six months prior. Chavez has not carried her burden under this factor either.

5. Knowing and Voluntary Original Plea:

As a final matter, Chavez has wholly ignored the factor addressing whether the original plea was knowing and voluntary. *United States v. Glinsey*, 209 F.3d 386, 397 n.15 (5th Cir. 2000) (*citing United States v. Brewster*, 137 F.3d 853, 857 (5th Cir. 1998)). Perhaps that is because it is such a heavy factor militating against Chavez's request to withdraw her guilty plea. Nevertheless, Chavez bears the burden of establishing that this factor supports a fair and just reason for withdrawing her guilty plea. *Powell*, 354 F.3d at 370 (5th Cir. 2003) (citing *Brewster*, 137 F.3d at 858). This she cannot do.

This Honorable Court accepted Chavez's guilty plea only after addressing Chavez personally in open court, pursuant to FED. R. CRIM. P. 11, and determining that she had reviewed the written plea agreement completely with her counsel and that she was voluntarily entering a guilty plea. These facts suggest that Chavez is not entitled to withdraw her plea under FED. R. CRIM. P. 11(d)(2). *Glinsey*, 209 F.3d at

397.

RULE 11 requires that a guilty plea be made knowingly and voluntarily. FED. R. CRIM. P. 11(c, d); *see United States v. Dayton*, 604 F.2d 931, 934-35 (5th Cir.1979) (*en banc*) (describing knowledge and voluntariness requirements as "core considerations . . . that manifestly must lie at the heart of any respectable [guilty plea] system"). Compliance with RULE 11 satisfies due process concerns relating to voluntariness. *McCarthy v. United States*, 394 U.S. 459, 464-65, 89 S.Ct. 1166,1170 (1969). Where there is no showing that the guilty plea would have changed upon a more precise explanation of the charge, a claim of involuntariness fails. *See United States v. Reyna*, 130 F.3d 104, 110-11 (5th Cir. 1997).

At her re-arraignment, Chavez assured this Court, under oath, that no one promised her anything other than what is contained in the written plea agreement, and that no one tried to force her to plead guilty. This Court clearly informed Chavez that, although she might cooperate and provide information, the United States might still decide her assistance had not been "substantial" and might not file a motion for reduction of her sentence. Chavez affirmed that she understood this possibility.

Chavez told this Court that she "brought undocumented persons into this country" and that "a lot of those people died." This Court plainly set forth the elements of the offense, and Chavez assured this Court that she was pleading guilty

to conspiracy to harbor and transport aliens. Chavez further assured this Court that she understood that whether the deaths were foreseeable was not an element of the substantive crime to which she plead guilty.

The government expressly described in great detail the facts it would prove if Chavez's case proceeded to trial. The Court asked Chavez how she pled and she unequivocally responded "guilty." This Court accepted Chavez's plea as knowing and voluntary. Chavez executed the written plea agreement in open court after orally pleading guilty to count one of the superseding indictment.

For a plea to be knowing and voluntary, the defendant must be advised of and understand the consequences of the [guilty] plea. *United States v. Gaitan*, 954 F.2d 1005, 1011 (5th Cir. 1992) (quoting *United States v. Pearson*, 910 F.2d 221, 223 (5th Cir. 1990)). Along this line, "as long as the [defendant] understood the length of time he might possibly receive, he was fully aware of his plea's consequences." *United States v. Young*, 981 F.2d 180, 184 n.4 (5th Cir. 1992) (citation and quotation marks omitted). Here, the Court informed Chavez at her re-arraignment that she faced a maximum of life imprisonment and Chavez averred that she understood this admonishment. Accordingly, Chavez was adequately informed and aware of the consequences of her plea.

The overall plea colloquy was more than sufficient to satisfy RULE 11 requirements of inquiring into Chavez's understanding of the charges against her and her role in the offense. She was addressed personally to ascertain if she understood the crime with which she was charged. A factual recitation followed and Chavez expressed a full understanding of the consequences of that plea. Her statements under oath belie her instant complaint. *See United States v. Cervantes*, 132 F.3d 1106, 1110 (5th Cir. 1998).

This Court found Chavez competent and capable of entering an informed plea of guilty; that her plea was knowing and voluntary; and that it was supported by an independent basis in fact concerning each of the essential elements of the offense. Obviously, Chavez has now changed her mind about her plea, but "a mere change of mind is insufficient to permit the withdrawal of a guilty plea before sentencing ...." *United States v. Hoskins*, 910 F.2d 309, 311 (5th Cir. 1990). Chavez's allegations are nothing more than a request to be released from what she now believes to be a bad bargain. She has not demonstrated any defect in her original plea and should not be permitted to withdraw her plea now. There is no fair and just reason to allow Chavez to be released from her bargain.

CONCLUSION

Chavez has not established any just and fair reason to permit her withdrawal of her plea at this time. She has not demonstrated or even asserted an accurate claim of innocence nor has she established any defect in her original plea on June 14, 2004. That close assistance of counsel was available; that no logical reason was advanced for waiting until after a co-defendant's trial and a suppression ruling that is favorable to Chavez; and that the inconvenience and wasting of resources factors all weigh against Chavez's request, this Court should deny Chavez's motion.

WHEREFORE PREMISES CONSIDERED, the Government respectfully opposes Chavez's motion to withdraw her plea of guilty, and asks this Court to deny the motion.

Respectfully submitted,

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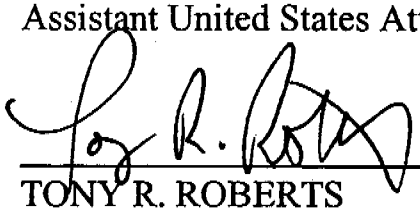
By: 

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CERTIFICATE OF SERVICE

I, Daniel C. Rodriguez, Assistant United States Attorney, do hereby certify that a copy of the government's Opposition to Karla Chavez-Joya's Motion to Withdraw Plea of Guilty was mailed on January 21, 2005, via certified mail, return receipt requested and via facsimile transmission to:

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. KARLA PATRICIA **CHAVEZ**-JOYA Defendant.	§ § § § § § § § §	CR. NO. H-03-221-S-01

ORDER

CAME ON TO BE CONSIDERED THIS DATE Karla Patricia Chavez-Joya's Motion to Withdraw Plea of Guilty and the government's opposition thereto. The Motion is HEREIN DENIED.

SIGNED at Houston, Texas, this _____ day of _____, 2005.

_____
VANESSA D. GILMORE
UNITED STATES DISTRICT JUDGE