IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA *v.* WILLIAM BRYANT WHEELER	Criminal Action No. 1:15-CR-390-MHC

GOVERNMENT'S RESPONSE TO
DEFENDANT'S MOTION TO WITHDRAW GUILTY PLEA

The United States of America, by John A. Horn, United States Attorney for the Northern District of Georgia, and Matthew S. Carrico, Assistant United States Attorney, files this response to Defendant William Bryant Wheeler's motion to withdraw his guilty plea. (Doc. 35).

Under Rule 11(d), a defendant may withdraw his guilty plea after the court accepts his plea, but before the court imposes sentence, if "the defendant can show a fair and just reason for requesting the withdrawal." Fed. R. Crim. P. 11(d)(2)(B). The defendant has the burden of proving that he is entitled to withdraw his guilty plea. *United States v. Izquierdo*, 448 F.3d 1269 (11th Cir. 2006). In determining if the defendant has met his burden under Rule 11(d), a district court must consider whether: (1) close assistance of counsel was available; (2) the plea was knowing and voluntary; (3) judicial resources would be conserved; and (4) the government would be prejudiced if the defendant were allowed to withdraw his plea. *United States v. Cesal*, 391 F.3d 1172, 1179 (11th Cir. 2004); *United States v. Buckles*, 843 F.2d 469 (11th Cir. 1988). The district court also can

consider "the defendant's admission of factual guilt at the Rule 11 hearing and the timing of the motion to withdraw." *United States v. Rogers*, 848 F.2d 166, 168 (11th Cir. 1988). As each of these elements weigh against the defendant, Mr. Wheeler should not be permitted to withdraw his guilty plea.

1. Wheeler Received Close Assistance of Counsel

The rule allowing for withdraw of a guilty plea was not intended "to allow a defendant to make a tactical decision to enter a plea, wait several weeks, and then obtain a withdrawal if he believes he made a bad choice." *United States v. Hurtado*, 846 F.2d 995, 997 (11th Cir. 1988) (citing *United States v. Carr*, 740 F.2d 339, 345 (5th Cir. 1984). Put another way, a motion to withdraw should not reflect "a calculated effort to improve one's position instead of a 'swift change of heart.'" *United States v. Pitts*, 463 F. App'x 831, 833 (11th Cir. 2012) (quoting *United States v. Rogers*, 848 F.2d 166, 168 (11th Cir. 1988). That is what appears to be happening here.

The defendant sought the benefits of entering into a plea agreement with the Government expeditiously when he pled guilty on March 11, 2016. (Doc. 30). On April 20, 2016, a district court published an opinion giving the defendant hope that if he was allowed to withdraw his guilty plea, there might be a basis to suppress some of the evidence against him in this case. *See United States v. Levin*, 2016 WL 1589824 (D. Mass. April 20, 2016) *amended and superseded by United States v. Levin*, 2016 WL 1589824 (D. Mass. May 5, 2016). Specifically, the court granted a motion to suppress evidence seized pursuant to a search warrant, where that search warrant derived from evidence obtained pursuant to a Network Investigative Technique ("NIT") search warrant out of a different district. *Levin*,

2016 WL 1589824 at *4. The court found the NIT search warrant exceeded the geographic scope of the issuing magistrate judge's authority under Rule 41. (*Id.*).

On April 27, 2016, seven days after the opinion in *Levin* was issued, the defendant filed his motion to withdraw his guilty plea. (Doc. 35). This chain of events makes it clear that the defendant did not have a swift change of heart as to his decision to plead guilty, but rather is making a calculated decision to try and improve his position by relying on the recently published District of Massachusetts opinion in *Levini*.[1] Simple regret, and an inability to foresee the

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[1] Wheeler's motion focuses extensively on *Levin* and treats as fact the notion that, if challenged, the Eastern District of Virginia search warrant authorizing the NIT would be found to be invalid and all evidence seized as a result would be suppressed. (Doc. 35 – 3-6) ("Had counsel been aware of the warrant's deficiency, he would not have answered the same.). While defendant's motion to withdraw is not the appropriate vehicle to litigate the validity of the warrants at issue in this case, it should be pointed out that the majority of courts that have looked at the exact same issues raised in *Levin* have come to the opposite conclusion – that any violation of Rule 41 that occurred does not warrant suppression. This includes the most recent court to look at the issue which specifically analyzed the reasoning in *Levin*. *See United States v. Werdene,* 2:15-cr-00434 (E.D. PA May 18, 2016) (finding suppression not warranted even though NIT technically violated Rule 41) attached hereto as Exh. 1; *United States v. Epich*, 2016 WL 953269, *2 (E.D. Wisc. March 14, 2016) (finding that even if Rule 41 was violated, "violations of federal rules do not justify the exclusion of evidence that has been seized on the basis of probable cause, and with advance judicial approval.")(internal quotations omitted); *United States v. Michaud*, 2016 WL 337263, (W.D. Wash. Jan. 28, 2016) (NIT technically violated Rule 41 although not the spirit of Rule 41, suppression not warranted for such a technical violation, furthermore defendant had no expectation of privacy in IP address); *United States v. Farrell*, 2016 WL 705197, *2 (W.D. Wash. Feb. 23, 2016) (TOR users do not have a reasonable expectation of privacy in their IP addresses). Needless to say, the Government does not concede that if Mr. Wheeler is allowed to withdraw his

future, do not form sufficient basis to withdraw one's guilty plea, and they certainly do not mean that Wheeler failed to receive close assistance of counsel. *See United States v. Medlock*, 12 F.3d 185, 187 (11th Cir. 1994) (denying defendant's attempt to withdraw guilty plea after district court determined that sentencing enhancement under ACCA would not apply).

Here Mr. Wheeler was asked at sentencing, "do you feel you've had sufficient time to think about and discuss the matter fully with your attorney before entering your plea of guilty today?" (Transcript of Change of Plea Hearing ("Tr.") attached hereto as Exhibit 2 at 14-15). Mr. Wheeler responded, "[y]es, sir." (Tr. 15). The Court further asked Mr. Wheeler, "[a]re you satisfied with the representation of your lawyer in this case?" (*Id.*). Mr. Wheeler responded, "[y]es, sir." (*Id.*). Court's looking at this issue have found similar exchanges sufficient to establish that the defendant had close assistance of counsel. *See United States v. Harrison*, 505 F. App'x 876, 880 (11th Cir. 2013) (finding close assistance of counsel where defendant asked "whether he felt he had 'a sufficient opportunity to talk about [his] case with [the defense counsel] and have him answer any questions,' and whether he was satisfied with 'the representation [defense counsel] has provided,'" and defendant answered yes to both questions); *United States v. Lancaster*, 137 F. App'x 316, 319 (11th Cir. 2005) (finding close assistance of counsel where defendant said he was satisfied with lawyer's representation of him). The Court should do the same in Mr. Wheeler's case.

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guilty plea that any of the evidence seized in Mr. Wheeler's case should be suppressed.

Again, it is Mr. Wheeler's position that the standard indicia of close assistance of counsel do not apply in his case because the close counsel he did receive was ineffective. (Doc. 35-6). Specifically, his attorney was ineffective by not challenged the NIT search warrants on the same grounds used in *Levin*. (*Id.*) The Government strongly disputes the notion that Mr. Wheeler received ineffective assistance of counsel.[2] But regardless of the Government's position on this issue, a determination cannot be made absent an evidentiary hearing on the matter. *See United States v. Harrison*, 505 F. App'x 876, 880-81 (11th Cir. 2013). Such a hearing is more appropriately part of a 28 U.S.C. § 2255 motion, rather than a motion to withdraw one's guilty plea. *Id.* Therefore, the Court should deny the defendant's motion, move on to sentencing, and Mr. Wheeler can raise his ineffective assistance of counsel claim at a later date. If the Court is inclined to

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[2] Wheeler's motion incorrectly states that "undersigned counsel simply failed to spot the issue that the *Eastern District of Washington* search warrant exceeded the magistrates." (Doc. 35-6). Clearly, defendant meant to say the Eastern District of Virginia, which is the Court that issued the NIT search warrant. This might be a simple typo, or perhaps more of a Freudian slip. At the time that Mr. Wheeler had pled guilty, the only court that had published an opinion addressing the NIT search warrants was the Western District of Washington, and that court held that suppression of the search warrants was not appropriate. *See United States v. Michaud*, 2016 WL 337263, (W.D. Wash. Jan. 28, 2016) (NIT technically violated Rule 41 although not the spirit of Rule 41, suppression not warranted for such a technical violation, furthermore defendant had no expectation of privacy in IP address); *See also United States v. Farrell*, 2016 WL 705197, *2 (W.D. Wash. Feb. 23, 2016) (TOR users do not have a reasonable expectation of privacy in their IP addresses). This shows that at the time Mr. Wheeler pled guilty the advice he likely received regarding challenging the NIT search warrants was in line with the authority that existed on the issue.

fully take up this issue at this time, it is the Government's position that a more fulsome evidentiary record is required before the Court can rule.

2. Wheeler's Plea was Knowing and Voluntary

"A guilty plea is knowing and voluntary if the defendant entered the plea without coercion and understood the nature of the charges and the consequences of the plea." *Id*. During the plea colloquy the Court verified with Mr. Wheeler and his attorney that other than the plea agreement in this case no one had made Mr. Wheeler any promises to induce his guilty plea, including no promises as to what his sentence would be, and no one had threatened him or forced him to plead guilty in anyway. (Tr. 13-14). Therefore his plea was voluntary. *See id.* at 879; *United States v. Oliver*, 316 F. App'x 877, 878 (11th Cir. 2008). Similarly, the Court verified with Mr. Wheeler both that he knew the elements of the crime to which he was pleading guilty and the factual basis for his plea, and that Mr. Wheeler and his attorney agreed with both. (Tr. 15-17). The Court also thoroughly explained to Mr. Wheeler the rights he was giving up by pleading guilty, went over the possible penalties he faced by pleading guilty, and explained how the sentencing guidelines worked and confirmed that Mr. Wheeler had discussed the guidelines with his attorney and how they might apply to his case. (Tr. 5-8, 15-121). Therefore, Mr. Wheeler understood the nature of the charges and consequences of his plea. *See Harrison*, 505 F. App'x at 879; *Oliver*, 316 F. App'x at 878. Mr. Wheeler's plea was entered without coercion, and Mr. Wheeler understood the nature of the charges and the consequences of the plea. Thus, it was made knowingly and voluntarily.

"When a defendant has received close assistance of counsel and pleaded guilty knowingly and voluntarily, [the court does] not give considerable weight or attention to the third and fourth factors" below. *Harrison*, 505 F. App'x at 880. Therefore, based on the first two factors alone the Court should deny Mr. Wheeler's motion to withdraw. The third and fourth factors, however, also weigh against Mr. Wheeler's motion to withdraw his guilty plea.

3. Denial of Wheeler's Motion would Conserve Judicial Resources

Mr. Wheeler's entire motion to withdraw amounts to an ineffective assistance of counsel claim. (Doc. 35). He argues that allowing him to withdraw his plea will conserve judicial resources because if he's not allowed to withdraw his plea the Court will have to deal with the issue of ineffective assistance of counsel on a 28 U.S.C. § 2255. However, no judicial resources will be saved because, as discussed above, if the Court takes up the issue of ineffective assistance of counsel at this stage of the proceedings it will need to conduct an evidentiary hearing to further develop the factual record regarding this claim. Furthermore, "experience teaches that a claim of ineffective assistance is best determined in a collateral proceeding brought under 28 U.S.C. § 2255, where a complete evidentiary hearing can be afforded and all of the relevant information weighed." *United States v. Harrison*, 505 F. App'x 876, 880-81 (11th Cir. 2013). Additionally, there is no assurance that if the Court were to grant Mr. Wheeler's motion to withdraw his guilty plea, that it will not have to deal with the issue of ineffective assistance of counsel on a 28 U.S.C. §2255 motion down the road. For example, if Mr. Wheeler's motion is granted and he eventually is found guilty or decides to plead guilty, he might file a claim for ineffective assistance of counsel

because his attorney recommended that he withdraw his guilty plea which necessarily would void any plea agreement in his case.

Mr. Wheeler also threatens an appeal if the Court does not grant his motion to withdraw his guilty plea. The court cannot be persuaded to rule incorrectly simply because a defendant threatens appeal. Additionally, it is equally possible the Government could appeal the Court's grant of Mr. Wheeler's motion to withdraw his guilty plea. Such appeals should in no way be factored into the Court's calculus in conserving judicial resources.

The only certainty in terms of conserving judicial resources is that by denying Mr. Wheeler's motion the Court will not have to conduct a suppression hearing, and it will not have to conduct a trial or second plea colloquy down the road. Therefore, denying Mr. Wheeler's motion will conserve judicial resources. *See United States v. Freixas*, 332 F.3d 1314, 1319 (11th Cir. 2003).

4. The Government would be Prejudiced if Wheeler is Allowed to Withdraw His Plea.

In *Buckles* the Court found that time and expense necessary to get ready for trial weighed against granting a motion to withdraw. *See Buckles*, 843 F.2d at 474. Allowing the defendant to withdraw his guilty plea will cause the Government additional time and expense that it would otherwise not occur if this case were to move forward to sentencing. More importantly, however, is that the Court "need not find prejudice to the government before it can deny a defendant's motion to withdraw." *United States v. Wright*, 492 F. App'x 972, 974 (11th Cir. 2012) (internal quotations omitted); *United States v. Reese*, 280 F. App'x 854, 859 (11th Cir. 2008) (upholding denial of motion to withdraw even when it was

undisputed the government would not suffer prejudice). If the Court were to decide to hold a hearing on Mr. Wheeler's motion, the Government should be allowed to put on evidence to establish whatever prejudice it would suffer if Mr. Wheeler were allowed to withdraw his guilty plea. However, this step is not necessary for the Court to deny Mr. Wheeler's motion.

Conclusion

The Court should deny Mr. Wheeler's motion to withdraw his guilty plea. Mr. Wheeler received close assistance of counsel up to and including his guilty plea; his plea was made knowingly and voluntarily; denial of the motion would conserve judicial resources; and the Government would be prejudiced if his motion was granted. As such, Mr. Wheeler cannot show a fair and just reason as to why the Court should allow him to withdraw his plea.

Respectfully submitted,

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May 24, 2016

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