IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

United States of America,

 Criminal Action Number

versus 1:15-CR-390-MHC

William Bryant Wheeler.

**Reply in Support of Motion to Withdraw Plea**

1. The Court should hold a hearing

The government argues that the Court cannot rule on Mr. Wheeler’s motion to withdraw his plea without holding a hearing concerning whether he received close assistance of counsel. (Doc. 40 at 5). This is correct. The government then also argues that nevertheless, the Court should not have such a hearing, instead requiring that Mr. Wheeler litigate the issue through an ineffective-assistance-of-counsel claim in a later petition pursuant to 28 U.S.C. § 2255. (*Id.*).

This would be inappropriate. Mr. Wheeler’s motion is properly before the Court. If the Court needs to hold a hearing to develop an adequate record from which to rule, then it should hold that hearing. The fact that a hearing is necessary is not a proper basis for denying the motion.

1. An uninformed plea cannot be knowing and voluntary

It is undisputed that at the change-of-plea hearing, Mr. Wheeler stated that he had not been induced or coerced to plead, understood his rights, and understood the nature of the charge and the factual basis. The government argues that this ends the inquiry, and that Mr. Wheeler’s plea was therefore knowing and voluntary. (Doc. 40 at 6).

This interpretation would make this factor a nullity except in the rare case where the court had made an error in the colloquy. The cases show that the “knowledge” at issue in this factor is not just of the elements of the charge and the facts as then known to the defendant, but the broader set of relevant information could reasonably be expected to influence a defendant’s decision whether to plead guilty.

In *United States v. Garcia*, 401 F.3d 1008, 1010 (9th Cir. 2005), for example, the defendant had confirmed at his change of plea that it was, “knowing, informed, and voluntary.” Nevertheless, the Ninth Circuit found that the district court’s denial of the motion to withdraw his plea, made on the basis of newly discovered evidence, was an abuse of discretion. *Id*. at 1014. Here, the government has cited no cases in which the court found the defendant had received ineffective assistance, but said that the plea was nevertheless knowing.

1. Consumption of judicial resources is relative

Any time a defendant is allowed to withdraw a guilty plea, it will cause the expenditure of additional judicial resources. In this multi-factor test, then, this factor must be evaluated by how many additional resources would be consumed, and how that weighs against the other factors. Here, Mr. Wheeler has made clear that his reason for moving to withdraw his plea is to be able to litigate a motion to suppress evidence. As stated in his motion to withdraw, if that motion to suppress is ultimately denied, the case is unlikely to go to trial. Thus, the amount of additional resources which would be required would be limited, and this distinguishes this case from many where the purpose of defendants’ motions to withdraw was to go to trial.

1. The government has not shown it would be prejudiced

While the Court may not be required to find prejudice to the government to deny a motion to withdraw a plea, the Court is required to consider as a factor whether or not there is any prejudice. *United States v. Buckles*, 843 F.2d 469 (11th Cir. 1988). The government does not cite any prejudice which would occur if Mr. Wheeler were allowed to withdraw his plea, simply that it would have to use additional resources to continue to litigate the case. This is not the same as prejudice. The Eleventh Circuit in setting out this standard clearly knew how to distinguish between the conservation of resources, for example judicial resources, considered in the third factor, and prejudice to a party.

The government states that the *Buckles* court held that, “time and expense necessary to get ready for trial weighed against granting a motion to withdraw.” (Doc. 40 at 10). As discussed in Mr. Wheeler’s motion, in *Buckles* the court found there would be prejudice to the government because the defendant had been a fugitive for three years after entry of the plea, and government witnesses had scattered. In such a situation, the government might not be able to find all the witnesses, and their memories may have faded. The government has not put forth evidence or arguments indicating that such circumstances exist in this case.

 Dated: This 6th day of June, 2016.

 Respectfully submitted,

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CERTIFICATE OF SERVICE

 I hereby certify that I filed this *Reply in Support of Motion to Withdraw Plea* using the ECF system, which will electronically notify all counsel of record.

 Dated: This 6th day of June, 2016.

 s/ Colin Garrett, Esq.

 State Bar No: 141751

 Attorney for William Wheeler