No._____

IN THE

UNITED STATES SUPREME COURT OF THE UNITED STATES

_____

LAWRENCE ANDERSON FONSECA,

f/k/a Lawrence Anderson Fonseca-Garcia

Petitioner

Vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

_____

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

TO THE HONORABLE COURT:

Now Comes Petitioner, who is being held in a United States penitentiary and respectfully requests leave to file the attached Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit without prepayment of costs and to proceed in forma pauperis pursuant to Rule 39(1) of this Honorable Court.

Petitioner was represented by Court appointed counsel at trial and on appeal upon appointment of the United States Court for the District of Puerto Rico, and the

First Circuit Court of Appeals, pursuant to the Criminal Justice Act of 1964, as amended 18 U.S.C. Section 3006A(d) and (h)(2)(A).

Accordingly, the Petitioner respectfully prays that he be allowed to dispense with the affidavit requirement, pursuant to Rule 39(1) of this Honorable Court.

Respectfully Submitted, in San Juan, Puerto Rico, this 12th day of January 2023.

S/José R. Olmo-Rodríguez
José R. Olmo Rodríguez
CA1-79544
261 Ave. Domenech, SJ PR 00918
787.758.3570/jrolmo1@gmail.com

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JOSE R. OLMO-RODRIGUEZ
Attorney for Petitioner
Supreme Court Bar #
261 Muñoz Rivera, Ave., SJ PR 00918
787.758.3570/jrolmo1@gmail.com

Questions presented:

1. Whether Fonseca should be allowed to withdraw his guilty plea in light of new evidence supporting his claim of innocence.
2. Whether the district court lacked subject matter jurisdiction over Fonseca when he is a foreign national whose conduct did not affect US commerce.

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STATUTES

TO THE HONORABLE COURT:

The Petitioner, Lawrence A. Fonseca ("Fonseca"), represented by court appointed counsel, respectfully prays and requests that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the First Circuit entered against him in this case.

OPINION BELOW

The opinion of the First Circuit Court of Appeals ("First Circuit") was issued on September 8th, 2022. [Appendix ("App."), p. 1.] The First Circuit denied rehearing on October 17th, 2022. [App., p. 27].

PROCEEDINGS IN FEDERAL COURT

On July 16th, 2014 a grand jury returned an indictment, in USDC-PR case 14-434, alleging that, from about May 2012 to about July 2014, (1) Lawrence Anderson Fonseca ("Fonseca"), (2) Peter Lev ("Lev"), (3) Sharon Rodriguez ("Rodriguez"), Justin Jeremiah Gumbs ("Gumbs"), and Terrence William Edwards ("Edwards") conspired to

import five, or more, kilograms of cocaine into the United States, in violation of 21 USC §963, 959 and 960, and committed money laundering, in violation of 18 USC section 1956(a).

Before trial, the US provided Fonseca with government reports of Gumbs' pretrial statements which showed that Gumbs stated that he conspired with Fonseca to scam Edwards. According to the report, the scam consisted on telling Edwards that they had several kilograms of cocaine available which they could sell to Edwards and requesting $45,000 as an initial deposit from Edwards which Fonseca and Gumbs intended to keep without ever producing drugs to Edwards.

However, at the final paragraph of the report, Gumbs stated that although it all began as a scam, "[i]t was later that drugs were involved" and the "drug venture was going to be really done (not a con at the moment)".

The evidence also shows that, during the conversations between Fonseca and the co-conspirators, no mention was made of importing any drugs into the US.

The evidence shows that Edwards sent $45,000 from a US bank account to two other US bank accounts in the name of Fonseca and his accomplices.

On October 16th, 2015 Fonseca filed a motion requesting the dismissal of the charges alleging lack of subject matter jurisdiction. On March 4th, 2016 the district court issued a Memorandum and Order ("Memorandum") denying Fonseca's dismissal requests. [App., p. 28]

The undisputed evidence shows that Fonseca, a citizen of Tortola, B.V.I., was never in the United States or within United States jurisdiction at any time during the timeframe of the events, and never until after he was arrested in the Dominican Republic and transported against his will to Puerto Rico. Fonseca argued to the district court that there is no subject matter jurisdiction over the charges

because, as they pertain to Fonseca, the events on which these charges are based all occurred outside the territorial limits of the United States. The district court denied finding that the adequate procedure for Fonseca's challenge was the one provided by Federal Rule of Criminal Procedure 29.

On August 1st, 2016 Fonseca entered a guilty plea, pursuant to a plea agreement, in which the prosecution would recommend a sentence of imprisonment at the lower end of the applicable Guideline sentencing range for a total adjusted offense level of 32 and Fonseca would argue for a sentence of 120 months of imprisonment.

At the change of plea hearing, Fonseca admitted the facts alleged in the indictment and the individual acts committed in furtherance of the conspiracy which included that, on or about September 28th, 2012, Edwards sent, along with others, (a) a $5,0000 USD money transfer via Money Gram from California, USA to Tortola, BVI to defendant Fonseca and (b) a $35,000 USD wire transfer from codefendant Gumbs' account in California, USA to

codefendant Rodriguez at her bank account in Puerto Rico, USA.

On August 1st, 2016 a magistrate judge issued a Report and Recommendation finding that Fonseca was competent to enter the plea, aware of the nature of the offense charged and the maximum penalties it carries, understands that the charge is supported by evidence and a basis in fact, and admitted to the elements of the offense in an intelligent and voluntary manner with full knowledge of the consequences of his guilty plea.

On July 11th, 2017 the district court held a hearing on codefendant Gumbs' request for consideration of mitigating factors to his sentence in which codefendant and cooperating witness Edwards provided testimony that supports Fonseca's innocence claim. Edwards stated that Gumbs and Fonseca lied to him about obtaining drugs and that when he went to Tortola he never saw the actual drugs that Fonseca

was supposed to be getting even after staying for a long time. Fonseca would later find out about these statements.

After learning of Edwards' statements, on August 10th, 2018 Fonseca filed, through counsel, a fourth motion to withdraw his guilty plea, arguing that Edwards's statements at Gumbs' sentencing hearing supports his claim of innocence and that, instead of undertaking a drug conspiracy with Edwards, Fonseca always intended to scam Edwards out of $45,000, and requested to be allowed to withdraw his guilty plea. Fonseca also alleged that he pled guilty based on his desire to protect his wife, codefendant Rodriguez, but that after pleading guilty he learned of Edwards' statement at Gumbs' hearing that Edwards was actually being scammed out of his money, that no drugs were ever delivered by Fonseca and that Fonseca lied to Edwards. Fonseca argued that if Edwards' statement had been known before his change of plea, Fonseca would not have pled guilty.

On September 27th, 2018 the prosecution opposed arguing that Edwards' statement was not new evidence as codefendant Gumbs' debriefing statements discovered to Fonseca prior to trial included that Gumbs conspired with Fonseca to defraud, scam, or con, Edwards by procuring and retaining the money provided by Edwards for the purchase of cocaine without an actual intent to complete the deal.

On February 25th, 2019 a magistrate judge heard arguments from counsel in a hearing on the motion to withdraw the guilty plea.

On that same date, after the hearing, the prosecution filed a supplemental response in opposition to the request to withdraw the guilty plea. The prosecution reproduced Gumbs' post arrest statements that he always intended to complete the drug venture with Fonseca and Edwards. The prosecution argued that said statement was inconsistent with Fonseca's theory that it was all a con.

On March 11th, 2019 a magistrate judge entered a Report and Recommendation recommending that Fonseca be allowed to withdraw his guilty plea. [App., p. 34] As described by the magistrate judge, Edwards's new statement was that Edwards never saw the actual drugs that he was supposed to get from Fonseca even after staying a very long time at Tortola and that Edwards thought that Fonseca was lying about having access to the cocaine.

The magistrate judge then conducted a five-step analysis to decide whether Fonseca had a fair and just reason to withdraw his guilty plea. Analyzing the first factor the magistrate judge found that Fonseca entered into the guilty plea knowingly and voluntarily, as reflected by the transcript of the change of plea hearing.

As to the second factor, the magistrate judge found that pleading guilty to protect his wife but later realizing that with Edward's new statement, he could prevail on his claim of innocence were not valid grounds as Edward's

statement was not newly discovered exculpatory evidence because Fonseca was aware of Gumbs' statements and because Fonseca provided sworn statements on behalf of his codefendants where he admitted his participation in the alleged conspiracy.

Third, the magistrate judge found that Fonseca vehemently asserted his innocence and has gone to great lengths to withdraw his plea as reflected by the various motions filed by Fonseca and is resolved to stand trial even in the face of an enhancement that would increase his exposure from 10 years to life to 20 years to life.

Fourth, the magistrate judge found that the timing of Fonseca's filing of his motion was reasonable as said period of time began when Fonseca found out about Edward's new statement and not when Fonseca pled guilty, and that Fonseca did everything possible to file the motion sooner, but counsel did not take action on his request.

Finally, the magistrate judge found that the government would not be prejudiced because preparing for and attending trial is not an unreasonable burden since the case was a recent one.

On April 4th, 2019 the prosecution objected the magistrate's report and recommendation arguing that Edwards' statement had been available to Fonseca.

On April 17th, 2019 Fonseca opposed the prosecution's objections reiterating that he pled guilty to avoid a larger sentence and to obtain a favorable deal for his wife, his staunch resolve to face trial and his several efforts to withdraw his guilty plea.

On May 20th, 2019 the district court adopted in part and rejected in part the magistrate's report and recommendation and denied Fonseca's motions to withdraw his guilty plea finding that Fonseca merely repeated the same arguments already rejected. [App., p. 48]

On May 24th, 2019 Fonseca requested reconsideration arguing that he had met the fair and just standard for his reason to seek to withdraw his guilty plea which standard should be applied liberally. Fonseca argued that he pled guilty to avoid a larger sentence and to obtain a favorable deal for his wife. Fonseca also argued that his reason to seek withdrawal is based on the new evidence consisting of Edwards' testimony at Gumbs' sentencing hearing.

On that same date, it was denied by the district court finding that Fonseca merely repeated the same arguments previously rejected. [App., p. 49]

On June 5th, 2019 Fonseca filed a second motion for reconsideration arguing that he could not file his motion to withdraw until 7 months after his guilty plea because he was transferred to a prison outside Puerto Rico and when he was able to communicate with his attorney, his attorney told him that it was too late to withdraw his plea. However, Fonseca

filed pro se motions to withdraw as soon as he was transferred back to Puerto Rico.

On June 6th, 2019 the district court denied the second motion for reconsideration finding that Fonseca could not explain why he did not file pro se motions while at the prison outside of Puerto Rico. [App., p. 50]

On June 11th, 2019 Fonseca was sentenced to 120 months of imprisonment. On that same date, judgment was entered. [App., p. 51]

A timely notice of appeal was filed and the First Circuit entered its opinion on September 8th, 2022 denying the appeal. A timely petition for rehearing was filed and denied on October 17th, 2022.

The present timely Petition for Certiorari followed.

JURISDICTIONAL STATEMENT

The District Court's jurisdiction over this criminal case was conferred by 18 U.S.C. section 1331. The First

Circuit's jurisdiction over this appeal from the district court's judgment of conviction was conferred by 18 U.S.C. 3742(a), and 28 U.S.C. 1291.

The jurisdiction of this Court is invoked under 28 USC section 1254(1). On September 8th, 2022, a panel of the First Circuit Court of Appeals ("First Circuit") composed by Honorable Judges Barron, Selya and Lipez, issued an Opinion dismissing all of Fonseca's arguments on appeal, and Judgment dismissing the appeal. [App., p. 1] Petitioner filed a petition for rehearing. On October 17th, 2022, the First Circuit denied the petition for rehearing en banc. [App., p. 27] This petition is filed within 90 days of the First Circuit's denial of the petition for rehearing en banc pursuant Rule 20.1 of this Court.

CONSTITUTIONAL PROVISIONS AND STATUTES

The Sixth Amendment guarantees the rights of criminal defendants to know who your accusers are and the **nature of the charges and evidence against you**.

The Fourteenth Amendment prohibits the deprivation of any person of liberty without due process of law.

STATEMENT OF THE CASE

The facts that are material to the consideration of the questions presented are included in the section describing the proceedings in federal court.

ARGUMENTS

The First Circuit has so far departed from the accepted and usual course of judicial proceedings, and sanctioned such a departure by the District Court, as to call for an exercise of this Court's supervisory power. The First Circuit departed from its own precedents to confirm a conviction and judgment that were not fair by any standards.

A. Fonseca should be allowed to withdraw his guilty plea in light of new evidence supporting his claim of innocence.

A court has discretion to grant a request for withdrawal of a plea of guilty before sentencing upon a defendant's showing of a "fair and just reason" US v. Ramos,

810 F.2d 308, 311(1st. Cir. 1987)(citing Fed.R.Crim.P.32(d). Although the standard for a presentence withdrawal remains a liberal one, withdrawal is not an absolute right. Id. While the defendant is not permitted to withdraw his guilty plea "simply on a lark," US v. Hyde, 520 U.S. 670, 676-77 (1997), **the "fair and just" standard is generous and must be applied liberally**. "During the interval between the acceptance of a guilty plea and sentencing, the district court should liberally allow withdrawal of guilty pleas for any fair and just reason." US v. Gurka, 605 F.3d 40, 42-43 (1st Cir.2010) (citing US v. Mescual-Cruz, 387 F.3d 1, 6 (1st Cir.2004)) (internal quotation marks omitted).

Courts have delineated several factors that are relevant in assessing whether to allow a defendant to withdraw his guilty plea. These include (1) whether the defendant entered into the guilty plea knowingly and voluntarily; (2) whether the reasons motivating defendant to withdraw the plea are plausible; (3) defendant's assertion of innocence; (4) and the amount of time elapsed between the

guilty plea and the filing of the motion to withdraw. US v. Parrilla-Tirado, 22 F.3d 368, 371-72(1st. Cir. 1994) Finally, if the combined weight of these factors tilts in the defendant's favor, then the court must also assess the quantum of prejudice, if any, that will inure to the government. US v. Doyle, 981 F.2d 591, 594(1st. Cir. 1992)

Fonseca's guilty plea was made voluntarily and with understanding of the nature of the charges and the consequences of the plea. Fonseca agrees that transcript reveals that the magistrate judge scrupulously followed the Rule 11 procedures, taking great care to explain the proceedings and making sure that defendant understood the charges against him, his potential exposure, and the implications of pleading guilty.

However, a person's knowledge and voluntariness to enter a plea deal sometimes **is done for a reason other than acknowledging guilt**. There are numerous recorded instances of people knowingly and voluntarily pleading

guilty for crimes that they did not commit. See for example a list compiled by the Innocence Project[1] of 31 individuals that pled guilty for crimes that they not commit for reasons other than being guilty. E.g. John Dixon who pled guilty to a rape he didn't commit and spent 10 years in New Jersey prison before DNA testing proved his innocence. After pleading guilty, he asked the judge to withdraw his plea and hold a trial, **but the motion was denied and he was sentenced to 45 years in prison** and other examples listed.

In part, the fundamental principle of providing a mechanism for withdrawing a knowing and voluntarily entered guilty plea is to acknowledge the existence of a reasonable probability that a person may have entered a plea in a knowing and voluntarily fashion for reasons other than being guilty.

[1] The Innocence Project. (01.26.09). *When the Innocent Plead Guilty*,https://www.innocenceproject.org/when-theinnocent-plead-guilty/.

Fonseca's guilty plea was knowing and voluntary but he had other reasons for entering it, **namely avoiding a larger sentence and trying to cut a favorable deal for his wife**. If the plea would have been entered by a person that had no capacity to do so it would probably be null leaving little room for discussion in the matter. That is not the case here. **The "fair and just" standard is generous and must be applied liberally;** weighting the first factor heavily against Fonseca goes against the liberal application of the standard.

Fonseca is charged with conspiracy to import, and conspiracy to distribute and possess with intent to distribute narcotics and money laundering. Conspiracy to commit a particular substantive offense cannot exist without at least a degree of criminal intent necessary for the substantive offense itself; knowledge of illegal importation is necessary for conspiracy conviction as well.

Mens rea allows the criminal justice system to differentiate between someone who did not mean to commit a crime and someone who intentionally set out to commit a crime.

Edwards testified during an evidentiary hearing held on July 11th, 2017 that Gumbs and Fonseca lied to him about obtaining drugs and that when he went to Tortola he never saw the actual drugs that Fonseca was supposed to be getting even after staying for a long time.

It is plausible, based on both Fonseca's constant allegations and Edwards' allocution that there was no actual *mens rea* on behalf of Fonseca to conduct a drug smuggling venture; what Fonseca was plausibly doing was stealing and scamming Edwards' money. Applying liberally the standard the reasons motivating Fonseca to withdraw the plea are plausible.

Additionally, Gumbs stated that he conspired with Fonseca to scam Edwards out of $45,000 by telling Edwards

that they could obtain cocaine for him. However, at the final paragraph of the report, Gumbs stated that "[i]t was later that drugs were involved" and the "drug venture was going to be really done (not a con at the moment)". Therefore, Gumbs statement incriminates Fonseca as it establishes a real drug venture.

Therefore, Edwards' statement is definitely new evidence that contradicts the previous evidence provided by Gumbs. While Gumbs stated that the situation began as a scam but at the end it was a real drug venture, Edwards testified that although he thought it was a real drug venture, at the end it was all a scam. Therefore, the importance of Edwards's testimony is that it contradicts Gumbs' statement against Fonseca.

Fonseca filed at least four motions requesting the withdrawal of his guilty plea. One element is common amongst ALL OF THEM; he was innocent. Some of the

details change, but Fonseca nonetheless begged for redress, even in a *pro se* manner.

Fonseca's staunch resolve to withdraw his guilty plea is a valid basis to seek remedy from the Court under this prong contrary to the Government's assertions.

Fonseca asked the district court for a remedy in almost any way possible. Probably, if he had been on bail, he would have come personally to bang at the district court's door and shout with papers on hand. The Magistrate's Report took 3 pages to describe all the movements raised by Fonseca alerting the district court that he was innocent.

Fonseca filed the motion to withdraw 7 months after entering the plea of guilty and although there is not a specific time for when the temporal element of withdrawal is timely or not there is a relevant "chronology" that more than tilts these TWO elements in Fonseca's favor.

The longer the wait to bring a motion to withdraw a plea, the less likely a court will be to grant the motion.

Courts view timeliness as a rough proxy for the strength of the reason to withdraw the guilty plea. If a defendant had been truly mistaken in entering the plea, the defendant would move quickly to withdraw it. The longer the defendant waits to withdraw the plea, the less likely the decision was made in error. The longer the defendant waits, the more likely the defendant's motion is based on strategic reasons unrelated to whether the defendant properly entered into the plea agreement.

However, there is no strategic reason for Fonseca to delay his withdrawal, he already knew the probable punishment that he was facing and some information was already available for trial. Fonseca did not have an ulterior motive as he always alleged his innocence since March 2007. However, the Court should not peg itself to a numerical standard, e.g. 7 months, but to the liberal application of justice. Because the question of improper delay is so fact specific, **broad generalities cannot be made regarding how long is too long**.

Courts have found time periods ranging from merely 13 days to 10.5 years to be too long to bring a motion to withdraw a guilty plea. See US v. Ramos, 810 F.2d 308, 313(1st Cir. 1987) (delay of 13 days too long); US v. Oksanen, 362 F.2d 74 (8th Cir. 1966) (delay of 10 years too long); US v. Marrero-Rivera, 124 F.3d 342, 352(1st. Cir. 1997) (14 weeks); US v. Isom, 85 F.3d 831, 839 (1st Cir. 1996)(2 months); US v. Fitzhugh, 78 F.3d 1326, 1328 (8th Cir. 1996)(9 months); US v. Bashara, 27 F.3d 1174, 1181 (6th Cir. 1994)(6 weeks); US v. Carr, 740 F.2d 339, 345 (5th Cir. 1984)(22 days); US v. Burnett, 671 F.2d 709, 712 (2nd Cir. 1979)(5 years); US v. Shillitani, 16 F.R.D. 336, 339 (S.D.N.Y. 1954)(3 years).

However, the prosecution argues that codefendant Lev cannot be brought as a witness because he was deported and that preparing for trial is burdensome. But besides codefendant Lev, all of the other witnesses are available and there is no particular importance to Lev's testimony.

B. Whether the district court lacked subject matter jurisdiction over Fonseca when he is a foreign

national whose conduct did not affect US commerce.

There are five principles of extraterritorial authority generally recognized under international law: (1) territorial jurisdiction, based on the location where the alleged crime was committed, including "objective" territorial jurisdiction, which allows countries to reach acts committed outside territorial limits but intended to produce and producing detrimental effects within the nation; (2) nationality jurisdiction, based on the nationality of the offender; (3) protective jurisdiction, based on the protection of the interests and integrity of the nation; (4) universality jurisdiction, for certain crimes where custody of the offender is sufficient; and (5) passive personality jurisdiction, based on the nationality of the victim. Groleau v. US, 389 U.S. 884 (1967); Rivard v. US, 375 F.2d 882, 885 (5th Cir.); US v. Layton, 509 F.Supp. 212, 215 (N.D. Cal. 1981); US v. King, 552 F.2d 833, 851 (5th Cir .1976). In the case at bar, the government could only conceivably claim jurisdiction under

the first principle, that is, the objective territorial jurisdiction principle.

A variation referred to as the law of the flag principle has also been recognized, see US v. Baker, 609 F.2d 134, 138(5th Cir. 1980), which allows the exercise of jurisdiction over a crime committed aboard a United States flag vessel so long as Congress has evinced an intention to do so.

Under the objective territorial jurisdiction principle, a federal court has jurisdiction "where there was proof that defendant's actions either produced some effect within the United States, or even if the defendant never performed any act within the United States, that he was part of a conspiracy in which some co-conspirator's activities took place within United States territory." US v. Baker, 609 F.2d 134, 138 (5th Cir. 1980), citing US v. Postal, 589 Fd. 862 (5th Cir. 1979); US v. Cadena, 585 F.2d 1252 (5th Cir. 1978); US v. Winter, 509 F.2d 975 (5th Cir. 1975). The Supreme Court, per Justice Holmes, said: Acts done outside a jurisdiction, but intended to produce and producing effects within it, justify a State in

punishing the cause of the harm as if he had been present at the effect, if the state should succeed in getting him within its power. Strassheim v. Daily, 221 U.S. 280 (1911). "This principle has been applied to confer jurisdiction over conspiracies when at least one of the conspirators commits an overt act in the territorial jurisdiction of the United States district court." US v. Schmucker-Bula, 609 F.2d 399, 402 (7th Cir. 1980), citing Winter, 509 F2d at 982 and US v. Lawson, 507 F.2d 433, 445 (7th Cir. 1974).

Technical compliance with the above conditions does not, however, without more, confer a federal court with subject matter jurisdiction over an alien not present in the United States. "The territorial exercise of jurisdiction must be reasonable." Republic of France v. Moghadam, 617 F.Supp. 777, 787 (N.D. Cal. 1985). "As long as the territorial effects are not *so inconsequential as to exceed the bounds of reasonableness* imposed by international law, prescriptive jurisdiction is legitimately exercised," and "jurisdiction exists only when *significant effects* were intended within the

prescribed territory." Laker Airways Ltd. V. Sabena Belgian World Airlines, 731 F.2d 909, 923 (D.C. Cir. 1984)

As will be seen below, the evidence in the possession of the government as produced in discovery establishes that Fonseca was never in United States territory and never intended that his acts have an effect in the United States. Even assuming, *arguendo*, that the facts are as the government claims, the most that can be said is that the Fonseca agreed to import controlled substances into Tortola, B.V.I., (which never happened) after which his participation in the conspiracy would be complete. Fonseca never set foot in the United States, and never had any intention of doing so. Neither did he show any intention of importing, transporting or delivering anything to the United States, and as a matter of fact never did. Fonseca had no control of or input in what any of his co-defendants would do with the controlled substances once he delivered them to them or put them at their disposition in Tortola, B.V.I., which was all he had agreed to do (but as a matter of fact never did). More

importantly, any acts which may have been committed by his co-defendants within the United States, which were not within his control, were not significant enough to confer this court with subject matter jurisdiction over Fonseca, and the exercise of federal jurisdiction on the basis of said inconsequential acts would be unreasonable. Accordingly, Count 1 should have been dismissed.

In the discovery of this case the government provided Department of Homeland Security's reports of investigation which essentially summarize the entire case and there is an absolute lack of evidence that Fonseca committed any illegal acts within U.S. territory or had any intent that his acts would have any effect within U.S. territory.

Thus, not only is it undisputed that Mr. Fonseca was never in U.S. territory, but the evidence cannot establish that his actions had any effect within U.S. territory, particularly considering that no narcotics were ever produced or existed. It should be beyond peradventure that nonexistent items can simply not produce effects, anywhere.

This being so, the Court has no subject matter jurisdiction against Mr. Fonseca here, and Count 1 should be dismissed.

There were persons associated with this case who committed some acts within U.S. territory. As the reports of investigation prepared in this case evinced, however, in the overall context of the case, such actions were so insignificant and inconsequential as to render the exercise of federal jurisdiction but this Court in this case unreasonable. A review of the evidence shows that these individuals wired, over the span of almost two years and sometimes from a place inside the United States, monetary amounts ranging from as little as $150.00 to as much as $5,000.00. Needless to say, these amounts would have fallen woefully short of serving to finance anything near the number of kilograms of cocaine that the government is charging Fonseca with allegedly intending to import into the United States. In fact, they would have been insufficient, even in the aggregate, to pay for even a fraction of one (1) kilogram of cocaine. As such, in the overall context of the case, they constitute

insubstantial and insignificant actions by alleged co-conspirators which would make the exercise of subject matter jurisdiction by the court in the instant case unreasonable as per the case law cited above.

Given the preceding, this Honorable Court should hold that Fonseca did not take any action within U.S. territory or having effects within U.S. territory that would confer subject matter jurisdiction to this Court. Consequently, the indictment should be dismissed on this ground as to the appearing defendant.

CONCLUSION

WHEREFORE, Petitioner respectfully requests that the Honorable Court grant this petition.

Respectfully Submitted, in San Juan, Puerto Rico, this 12th day of January 2023.

S/José R. Olmo-Rodríguez
José R. Olmo Rodríguez
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CERTIFICATE OF SERVICE

I, José R. Olmo-Rodríguez, court appointed counsel for the petitioner Lawrence A. Fonseca, hereby CERTIFY that I deposited copies of the foregoing Petition for a Writ of Certiorari, Motion for Leave to Proceed in Forma Pauperis, and the correspondent Appendix into the United States Mail, with the proper Priority Mail postage affixed, addressed to: Supreme Court of the United States, Clerk's Office, 1 First Street, NE, Washington, DC 20543; and to the U.S. Solicitor General of the Justice Department in Washington D.C. to 950 Pennsylvania Avenue NW, Washington D.C. 20530, United States.

In San Juan, Puerto Rico, this 12th day of January 2023.

S/José R. Olmo-Rodríguez
José R. Olmo Rodríguez
Supreme Court Bar #
El Centro I suite 215 SJ PR 00918
787.758.3570/jrolmo1@gmail.com

CERTIFICATE OF COMPLIANCE

I, José R. Olmo-Rodríguez, court appointed counsel for the petitioner Lawrence A. Fonseca, hereby CERTIFY that this petition complies with the page limit as it contains less than 40 pages.

In San Juan, Puerto Rico, this 12th day of January 2023.

S/José R. Olmo-Rodríguez
José R. Olmo Rodríguez
Supreme Court Bar #
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787.758.3570/jrolmo1@gmail.com

APPENDIX

United States Court of Appeals
For the First Circuit

No. 19-1791

UNITED STATES OF AMERICA,

Appellee,

v.

LAWRENCE ANDERSON FONSECA,
f/k/a Lawrence Anderson Fonseca-Garcia,

Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

[Hon. Jay A. García-Gregory, U.S. District Judge]

Before

Barron, Chief Judge,
Selya and Lipez, Circuit Judges.

José R. Olmo-Rodríguez for appellant.
Thomas F. Klumper, Assistant United States Attorney, Senior Appellate Counsel, with whom W. Stephen Muldrow, United States Attorney, and Mariana E. Bauzá-Almonte, Assistant United States Attorney, Chief, Appellate Division, were on brief, for appellee.

September 8, 2022

LIPEZ, Circuit Judge. Lawrence Anderson Fonseca and four co-defendants were charged with conspiring to import cocaine into the United States, in violation of 21 U.S.C. §§ 959, 960 and 963, and money laundering to promote this conspiracy in violation of 18 U.S.C. § 1956(a)(2)(A). Following the denial of his motion to dismiss the indictment, Fonseca pleaded guilty to the conspiracy count. He subsequently filed several motions to withdraw his plea, each of which was denied by the district court. On appeal, Fonseca argues that he should be allowed to withdraw his guilty plea and that the indictment against him should be dismissed. Although our rationale on the plea withdrawal request differs somewhat from that of the district court, we affirm.

I.

A. The Underlying Conviction

Fonseca is a citizen and resident of the British Virgin Islands ("BVI"). As set forth in the statement of facts incorporated into his plea agreement, Fonseca and his co-defendants conspired, from approximately May 2012 to July 2014, to import at least five kilograms of cocaine into the United States. The statement of facts identifies several overt acts committed in the United States in furtherance of the conspiracy, although ultimately no drugs were ever imported into the country. The government has not disputed that Fonseca lived in the BVI throughout the relevant timeframe.

Fonseca first moved to dismiss the indictment in October 2015. Relying on principles of extraterritorial jurisdiction, he argued that the district court lacked subject matter jurisdiction over the case because he was a citizen and resident of the BVI and, he claimed, had taken no actions with an actual or intended effect in the United States. He also argued that any overt acts undertaken in the United States by his co-conspirators were too insignificant to support subject matter jurisdiction over him. Finally, Fonseca argued that the court lacked personal jurisdiction over him because he had been unlawfully transported to Puerto Rico after being detained by United States agents in the Dominican Republic, and that the court should, at a minimum, hold an evidentiary hearing on this issue. The district court denied these claims in March 2016.

Fonseca pleaded guilty in August 2016 with the assistance of counsel. As described above, the plea agreement incorporated a statement of facts, which Fonseca "adopt[ed] . . . as his own testimony." In this statement, he acknowledged that he had conspired to import cocaine into the United States and that he or his co-conspirators had engaged in several overt acts involving money transfers to or from the United States. The transactions included Fonseca's receipt of a $5,000 wire transfer from California, sent by his co-defendant Terrence Edwards, and a $35,000 transfer of funds from co-defendant Justin Gumbs to the

United States bank account of Fonseca's wife and co-defendant, Sharon Rodriguez. The plea agreement also included a waiver of appeal provision, in which Fonseca agreed that if his sentence was consistent with (or more lenient than) the recommendation set forth in the plea agreement, he "knowingly and voluntarily waive[d] and surrender[ed] his right to appeal the judgment and sentence in this case." On the recommendation of a magistrate judge, the district court accepted his guilty plea.

B. Fonseca's Plea Withdrawal Motions

In March 2017, several days before his scheduled sentencing date, Fonseca filed his first pro se motion to withdraw his plea, as well as a motion to "withdraw" his counsel from the case. In the plea withdrawal motion, he argued that he was innocent, claiming that his involvement in the conspiracy was "[i]nconclusive," and that his attorney had misled and pressured him into pleading guilty and had not adequately investigated the allegations.

The district court postponed the sentencing hearing pending a decision on these motions and referred the attorney withdrawal motion to a magistrate judge for disposition, who denied it after a hearing. The district court denied the plea withdrawal motion, finding that Fonseca had pleaded guilty knowingly, voluntarily, and intelligently. The court noted that Fonseca's "general, unsubstantiated" statement that he was innocent was not

entitled to any weight and that he had not explained why he had adopted the statement of facts in his plea agreement admitting to the offense conduct. The district court also found that Fonseca had not proffered any evidence that he had been confused about the accusations or had been unduly pressured into pleading guilty. Finally, the court found that the delay of more than seven months between Fonseca's guilty plea and the motion weighed against withdrawal, as did the prejudice to the government if withdrawal were permitted (i.e., the court's belief that the government would be prejudiced by the additional cost to prepare for trial).

In May 2017, Fonseca again moved pro se to withdraw his guilty plea and asserted various defenses. Several months later, before that motion was decided, he filed a third pro se motion raising similar arguments and emphasizing the court's purported lack of personal jurisdiction over him. The court denied both motions in November 2017, concluding that Fonseca had not put forth any new arguments.

In February 2018, four days before Fonseca's rescheduled sentencing date, new counsel for Fonseca appeared and filed a request to again continue sentencing, which the court granted. Following several more postponements allowed by the court, Fonseca filed a fourth motion to withdraw his guilty plea.

In support of his new request, Fonseca cited statements made by his co-defendant Edwards, who had testified at the

sentencing hearing of co-defendant Gumbs. At this sentencing hearing -- which occurred in August 2017, between Fonseca's second and third plea withdrawal requests -- Edwards made several comments that Fonseca claims are exculpatory as to him. First, Edwards testified that he had traveled to the BVI in October 2012 to help Fonseca and Gumbs obtain narcotics but found that "there was nothing" when he arrived. Edwards also stated that, at several points during the conspiracy, Edwards had told Gumbs that he believed Gumbs was lying about whether Gumbs and Fonseca would ultimately procure drugs. Fonseca argued that this testimony showed that Fonseca's communications with his co-defendants about importing drugs were actually part of a scam to steal money from them -- and, hence, that Fonseca had not taken part in any actual conspiracy to import drugs.

The new request was referred to a magistrate judge, who found that Fonseca's assertion that he is innocent and the timing of his request -- which was made after he learned of Edwards's testimony -- weighed in favor of withdrawal. However, the magistrate judge found that Fonseca's plea had been knowing and voluntary and that Edwards's testimony was not new, nor was it exculpatory -- findings that weighed against withdrawal.[1] The

[1] Nevertheless, as we will discuss in more detail, the magistrate judge -- and later the district court -- appears to have erroneously believed that the mere invocation of an innocence

magistrate judge then considered the question of prejudice to the government and concluded that the government would not be significantly prejudiced by withdrawal. Weighing these factors together, the magistrate judge recommended that the district court grant Fonseca's motion.

The district court took a different view. Although it agreed with the magistrate judge's assessment of several of the factors militating for and against withdrawal, it disagreed that the timing of the request favored withdrawal. The district court also found that Fonseca had not adequately explained either the nearly one-year gap between Edwards's testimony and Fonseca's fourth withdrawal motion, or the initial seven-month delay between the plea itself and his first withdrawal motion in March 2017. Further, the district court found that the government would be prejudiced by withdrawal. It therefore denied Fonseca's request to withdraw his plea.

Fonseca filed two motions for reconsideration, both of which were denied. In June 2019, he was sentenced to 120 months' imprisonment, which was consistent with the recommendation set forth by the government in his plea agreement. This appeal followed.

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claim was sufficient to tilt this factor in Fonseca's favor, regardless of the strength of the claim.

II.

Fonseca raises three arguments on appeal. He claims that the district court (1) abused its discretion by denying his request to withdraw his guilty plea,[2] (2) erred in denying his motion to dismiss for lack of subject matter jurisdiction, and (3) erred in denying his motion to dismiss for lack of personal jurisdiction.

A. Plea Withdrawal

Before turning to the merits of Fonseca's plea withdrawal claim, we briefly address the waiver-of-appeal provision in his plea agreement, which prohibits an appeal from the "judgment and sentence" in his case. Unlike most other circuits, we have never squarely addressed whether an appeal from the denial of a motion to withdraw a plea constitutes a challenge to a defendant's "judgment" or "conviction" as a matter of law.[3]

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[2] While Fonseca has moved to withdraw his plea several times, the arguments he raises on appeal pertain to his fourth plea withdrawal request, and he does not renew any arguments that were specific to any of his earlier requests. Accordingly, our analysis is limited to his fourth motion. See Young v. Wells Fargo Bank, N.A., 828 F.3d 26, 32 (1st Cir. 2016) (stating that we do not consider arguments for reversing a district court's decision that were not raised in a party's opening brief).

[3] We have previously suggested that there is a "strong argument" that an appeal from the denial of a motion to withdraw a plea is encompassed by the language of an appellate waiver barring challenges to the conviction and sentence. See United States v. Caramadre, 807 F.3d 359, 377 n.9 (1st Cir. 2015). Indeed, all other circuits to have addressed the issue have found that a plea withdrawal motion constitutes a challenge to the defendant's conviction. See, e.g., United States v. Alcala, 678

If it does, then Fonseca's motion would fall within the scope of the appeal waiver, and we would ordinarily enforce this provision so long as it was entered into knowingly and voluntarily, and so long as doing so would not work a "miscarriage of justice." See United States v. Teeter, 257 F.3d 14, 23-26 (1st Cir. 2001).[4]

However, the government has conceded that we should proceed directly to the merits of Fonseca's appeal on the motion to withdraw issue -- i.e., the question of whether the district court abused its discretion in denying Fonseca's motion to withdraw his guilty plea. In making this concession, the government relies on a series of cases in which we have held that "a court may opt to go directly to the merits of an appeal where a defendant who has entered a guilty plea and agreed to waive his right to appeal seeks to challenge an aspect of the plea which, 'if successful, would invalidate both the plea itself and the waiver of his right to appeal.'" United States v. Sevilla-Oyola, 770 F.3d 1, 10 n.17

F.3d 574, 578 (7th Cir. 2012) (holding that "a defendant challenges his conviction when he challenges the district court's denial of his motion to withdraw a plea"); United States v. Toth, 668 F.3d 374, 378–79 (6th Cir. 2012) (same, and collecting cases from other circuits).

[4] The "miscarriage of justice" exception to enforcement of an otherwise valid appellate waiver "requires a strong showing of innocence, unfairness, or the like." Sotirion v. United States, 617 F.3d 27, 36 (1st Cir. 2010) (quoting United States v. Gil-Quezada, 445 F.3d 33, 37 (1st Cir. 2006)). We express no view on whether Fonseca could meet this requirement, as he has not raised this issue.

(1st Cir. 2014) (quoting United States v. Chambers, 710 F.3d 23, 27 (1st Cir. 2013)).

The government is correct that we have previously held that a motion to withdraw a guilty plea is a challenge to the plea's validity when the defendant argues that the plea was not entered into knowingly and voluntarily. See Chambers, 710 F.3d at 27. Likewise, we have held that a motion to withdraw a guilty plea on the ground that the district court failed to ascertain a sufficient factual basis for the plea is also a challenge to the plea's "validity." See United States v. Torres-Vázquez, 731 F.3d 41, 44 (1st Cir. 2013). However, our case law has yet to directly address the specific scenario raised here: whether a claim of newly discovered exculpatory evidence underlying a claim of innocence, asserted as part of the grounds for permitting the withdrawal of a guilty plea, is a challenge to the plea's validity.

We need not decide whether Fonseca's innocence claim falls squarely within this line of cases, however, because -- even assuming we were to resolve this question favorably to Fonseca and conclude that the waiver of appeal provision in the plea agreement does not bar an appeal from the denial of his motion to withdraw the plea -- his argument that the district court abused its discretion fails on the merits. We therefore accept the government's concession and assume, as do the parties, that

Fonseca's claim is reviewable for the purposes of resolving this appeal.

1. Legal Standard

We review the district court's denial of a request to withdraw a guilty plea for abuse of discretion. United States v. Mendoza, 963 F.3d 158, 161 (1st Cir. 2020). The ultimate question is whether the defendant has demonstrated that a "fair and just reason" for withdrawal exists. See United States v. Parrilla-Tirado, 22 F.3d 368, 371 (1st Cir. 1994) (quoting Fed. R. Crim. P. 32(d)). To assess whether that burden has been met, courts consider the totality of the circumstances, including: "(1) whether the plea was knowing and voluntary and in compliance with [Federal] Rule [of Criminal Procedure] 11, (2) the strength of the reason for withdrawal, (3) the timing of the motion to withdraw, (4) whether the defendant has a serious claim of actual innocence, (5) whether the parties had reached (or breached) a plea agreement, and (6) whether the government would suffer prejudice if withdrawal is allowed." United States v. Gardner, 5 F.4th 110, 118 (1st Cir. 2021).[5] The most important consideration is whether the plea was

[5] At times we have suggested that district courts are required to defer consideration of prejudice to the government until after the defendant has made a preliminary showing of a fair and just reason for withdrawal. See United States v. Merritt, 755 F.3d 6, 9 (1st Cir. 2014). At other times we have treated the presence or absence of prejudice to the government holistically, as a relevant factor to be weighed against the others in determining whether a fair and just reason for withdrawal exists. See United States v.

knowing and voluntary. See United States v. Isom, 580 F.3d 43, 52 (1st Cir. 2009).

2. The Strength of the Reason for Withdrawal and a Serious Claim of Actual Innocence

Fonseca primarily argues that he should be allowed to withdraw his guilty plea because the testimony of co-defendant Edwards provided exculpatory evidence that was unavailable to him when he pleaded guilty. As previously described, Edwards testified at co-defendant Gumbs's sentencing hearing that, in October 2012 when Edwards first traveled to the BVI to help Fonseca procure drugs, "there was nothing" -- i.e., Fonseca and Gumbs had not identified or secured any drugs. He also testified that he could never be sure when Gumbs was lying about his plans to import drugs with Fonseca. Fonseca argues that this testimony supports his claim that his interactions with Edwards and others were part of a scam, that he never intended to import drugs, and that he pleaded guilty to help secure a more favorable plea deal for his wife (co-defendant Rodriguez).[6] He maintains that he would not have pleaded

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Dunfee, 821 F.3d 120, 127 (1st Cir. 2016) (per curiam); compare Gardner, 5 F.4th at 118-19 & n.9 (considering these factors holistically), with id. at 122 (Lynch, J., dissenting) (arguing that a court may consider prejudice only if the totality of the other factors weighs in favor of withdrawal). This case does not require us to resolve this apparent uncertainty in our case law, as the totality of the circumstances weigh against Fonseca's request regardless of which approach is taken.

[6] Fonseca also made general assertions of innocence in his first three plea withdrawal motions, but these motions did not

guilty if Edwards's testimony had been available to him at the time.

A court must assess the force and plausibility of the reasons proffered for withdrawal. See United States v. Isom, 85 F.3d 831, 837 (1st Cir. 1996). Here, because the primary reason for withdrawal Fonseca proffered -- Edwards's testimony -- is inextricably bound up with his claim of innocence, we consider the "strength of the reason" and the "serious claim of actual innocence" factors together.

The district court found that Fonseca's explanation for the withdrawal request was implausible. It noted that the substance of Edwards's testimony was not new. In so concluding, it relied on summaries of recorded phone calls between Edwards and Gumbs that were provided to Fonseca in discovery prior to his plea.[7] These summaries included conversations between Edwards and Gumbs in the spring of 2014 discussing Fonseca's past failure to secure drugs. During these conversations, Edwards told Gumbs that, among other things, Fonseca was "full of shit" and did not have any drugs. Elsewhere in the call summaries, Edwards expresses to Gumbs that he does not trust Fonseca and is tired of dealing with

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develop the argument that he raised in his fourth motion, and on appeal, regarding the efforts to "scam" his co-defendants.

[7] Fonseca's plea agreement confirmed that "[f]ull discovery ha[d] been provided to the defendant."

him. The district court further concluded that, "while portions of Edwards's testimony may support [Fonseca's] claim of innocence, they are certainly not exculpatory." Finally, the district court noted Fonseca's shifting explanations for his guilty plea. In his first two motions to withdraw his plea, Fonseca had argued that he had been pressured to plead guilty by his counsel. In his fourth plea withdrawal request, however, Fonseca conceded that his plea had been knowing and voluntary, and instead asserted for the first time -- and with no record support -- that he had pleaded guilty to secure a better deal for Rodriguez.

We see no error in the district court's consideration of Fonseca's proffered reasons for withdrawal. The statements Fonseca received in discovery were substantially similar to Edwards's testimony, and Fonseca therefore could have made the same arguments about his lack of intent before he pleaded guilty. See United States v. Adams, 971 F.3d 22, 38-39 (1st Cir. 2020) (affirming denial of a plea withdrawal motion based on evidence to which the defendant had access before his plea). Nor did the district court err in finding that Fonseca's evolving rationales for seeking to withdraw his guilty plea raised concerns about the veracity of his newly proffered reasons. Cf. Parrilla-Tirado, 22 F.3d at 371 ("[P]lausibility [of the asserted reasons for withdrawal] must rest on more than the defendant's second thoughts

about some fact or point of law, or about the wisdom of his earlier decision [to plead guilty]." (internal citations omitted)).

The district court's conclusion that Edwards's testimony was not "exculpatory" is also supportable. Edwards's testimony, if credited, would establish that Edwards harbored some mistrust of Fonseca, but this fact is not inherently exculpatory. Moreover, other portions of Edwards's testimony could undermine Fonseca's claim of innocence. For example, Edwards also attested to the authenticity of a photograph of what is alleged to be a brick of cocaine in Fonseca's car.[8]

As to the "serious claim of actual innocence" factor, the district court did not explicitly analyze whether Fonseca had raised such a claim. Instead, it determined that Fonseca's repeated assertions of his innocence since pleading guilty weighed in favor of withdrawal, without considering whether these assertions were "serious." We have made clear that "weak and implausible assertions of innocence" do not weigh in favor of withdrawal. See United States v. Sanchez-Barreto, 93 F.3d 17, 24 (1st Cir. 1996); see also United States v. Gates, 709 F.3d 58, 69 (1st Cir. 2013) ("Merely voicing a claim of innocence has no weight in the plea-withdrawal calculus; to be given weight, the claim must be credible."). The district court therefore erred in

[8] Fonseca disputed that this was cocaine before the district court.

crediting Fonseca for merely asserting his innocence. See United States v. Ramos, 810 F.2d 308, 313 (1st Cir. 1987) (noting that the "court did not abuse its discretion in refusing to give weight to a self-serving, unsupported claim of innocence raised judicially for the first time after the Rule 11 hearing"). However, we take the district court's supportable conclusion that Edwards's testimony was not exculpatory as tantamount to a finding that Fonseca's claim of innocence -- which is primarily supported by Edwards's testimony -- is not "serious." We therefore conclude that the district court supportably found that Fonseca had not proffered a "serious claim of actual innocence" notwithstanding the fact that it also erroneously credited him for the mere assertion of his innocence. See Sanchez-Barreto, 93 F.3d at 24 (suggesting that district courts are better positioned to determine whether invocations of innocence are credible and affirming a district court's assessment that the defendants' claims were too weak to favor withdrawal).[9]

3. The Remaining "Fair and Just Reason" Factors

We briefly address the remaining factors assessed by the district court: the timing of Fonseca's motion, whether his plea

[9] We note that we are particularly reluctant to disturb the district court's conclusion where, as here, the claim of innocence contradicts statements made or adopted by Fonseca in the plea agreement and at the change of plea hearing. See United States v. Santiago Miranda, 654 F.3d 130, 139 (1st Cir. 2011).

was entered knowingly and voluntarily, and any prejudice to the government.

i. The Timing of the Motion

Courts consider the length of time between the entry of a guilty plea and a motion for withdrawal. An "excessive delay saps strength from any proffered reason for withdrawal." United States v. Doyle, 981 F.2d 591, 595 (1st Cir. 1992).

The district court found that this factor also weighed against withdrawal, noting that, by the time Fonseca filed his fourth withdrawal motion in August 2018, roughly six months had passed since his new attorney's notice of appearance and over one year had passed since Gumbs's sentencing hearing, at which Edwards had testified. The district court reasoned that Fonseca had not justified either of these delays, nor had he justified the seven-month delay between the entry of the plea itself and his first plea withdrawal request.[10]

The district court reasonably weighed these delays against withdrawal. Even assuming, arguendo, that Fonseca only needed to justify the roughly year-long gap between Edwards's testimony and his fourth withdrawal request (as opposed to the

[10] In this respect, the district court's reasoning differed from that of the magistrate judge. The magistrate judge recommended that the timing factor be weighed in Fonseca's favor because his motion came after he learned of Edwards's testimony. We find the district court's reasoning more persuasive.

longer delay from the entry of the plea itself), Fonseca has failed to proffer any reason for this lengthy delay. Nor has he justified the months-long delay between his new attorney's February 2018 notice of appearance and the motion. See, e.g., United States v. Dunfee, 821 F.3d 120, 131 (1st Cir. 2016) (per curiam) (holding that an approximately two-month delay between entry of the guilty plea and defendant's motion to withdraw weighed against withdrawal); United States v. Pagan-Ortega, 372 F.3d 22, 31 (1st Cir. 2004) (same).

ii. Knowing and Voluntary

Fonseca concedes that his plea was knowing and voluntary. Given that the knowing and voluntary nature of a plea is the "most important" issue to consider in the withdrawal analysis, the district court properly reasoned that Fonseca's undisputedly knowing and voluntary plea weighed heavily against withdrawal. See Isom, 580 F.3d at 52.

iii. Prejudice to the Government

The district court also addressed the issue of prejudice. It found that the government would be prejudiced by the burden of trial preparation and the unavailability of one of its witnesses, Peter Lev, who had since been deported. Fonseca objects to the district court's reliance on Lev's absence because the government did not raise this argument before the magistrate judge and introduced it for the first time in its objections to

the report and recommendation. Fonseca is correct that the government has waived this argument. See United States v. Rosado-Cancel, 917 F.3d 66, 69 (1st Cir. 2019) (deeming an argument waived when it was not properly raised before a magistrate judge). Moreover, in the absence of an argument regarding Lev, the government's general invocation of prejudice from its trial preparation obligations falls short of tilting this factor in its favor. See Gardner, 5 F.4th at 118-19 (noting that this factor did not weigh in the government's favor when the government could show no prejudice "beyond the burdens that inevitably accompany any withdrawal [such as] . . . proceeding to trial").

* * *

In sum, the district court's analysis of the plea withdrawal motion was flawed in two respects. First, the district court erred in concluding that Fonseca's mere assertion of innocence weighed in favor of withdrawal, despite the substantive weakness of his claim. Second, it erred in its prejudice analysis by assigning weight to a waived argument and to garden-variety trial preparation by the government. However, the district court properly found that Fonseca's reasons for seeking withdrawal lacked plausibility, that his claim of innocence was not strong,

that his motion was belated, and that his plea was voluntary -- all factors that properly weigh against withdrawal.[11]

Ultimately, the district court's errors were immaterial to the result it reached. Its error in assigning weight to Fonseca's repeated assertions of innocence was favorable to Fonseca. If the court had properly declined to credit Fonseca's substantively weak assertion of innocence, the fair and just reason for withdrawal calculus would have weighed even more heavily against him. And while the court applied undue weight to the government's general invocation of prejudice, this error in finding prejudice to the government was also immaterial under the circumstances. The mere absence of prejudice to the government, without more, does not suffice to establish a "fair and just reason" for withdrawal. See Nunez Cordero v. United States, 533 F.2d 723, 726 (1st Cir. 1976) (rejecting the premise that "absent a showing of prejudice by the government, withdrawals of pleas before sentence should be granted as a matter of course").

In criminal matters subject to the trial court's discretion, we typically find an abuse of discretion only when the court commits a "material error of law" or some sort of "meaningful error in judgment." United States v. Jordan, 813 F.3d 442, 445

[11] We also note that the parties reached a plea agreement, which was not breached. Although the district court did not analyze this factor, we have held that this fact, too, weighs against withdrawal. See Isom, 85 F.3d at 839.

(1st Cir. 2016) (quoting Ruiz-Troche v. Pepsi Cola of P.R. Bottling Co., 161 F.3d 77, 83 (1st Cir. 1998)) (applying this standard with regard to the exclusion of expert testimony); see also United States v. Walker, 665 F.3d 212, 222-23 (1st Cir. 2011) (adopting a similar standard regarding motions for change of venue). Here, although the district court erred in weighing two of the relevant factors, these errors, for the reasons we have explained, were not material errors of law or judgment that undermined the court's proper exercise of discretion in denying the motion to withdraw the guilty plea. Hence, we find no abuse of discretion, and a remand would serve no purpose. Cf. United States v. Gendraw, 337 F.3d 70, 72-73 (1st Cir. 2003) (noting that we are not required to remand when the record contains no basis to support a different decision).

B. Subject Matter Jurisdiction

The parties agree that the appeal waiver provision in Fonseca's plea agreement does not bar his challenge to the district court's subject matter jurisdiction, an issue that may be raised at any time. See United States v. González, 311 F.3d 440, 442 (1st Cir. 2002). We review the court's jurisdictional ruling de novo. See United States v. Vargas-De Jesús, 618 F.3d 59, 63 (1st Cir. 2010).

Fonseca claims that the district court lacked subject matter jurisdiction over the conspiracy charge because he never

entered the United States during the conspiracy and did not intend for his actions to have an impact in the United States. This argument has no merit. Federal district courts have jurisdiction over "all offenses against the laws of the United States." 18 U.S.C. § 3231. "Thus, if an indictment or information alleges the violation of a crime set out 'in Title 18 or in one of the other statutes defining federal crimes,' that is the end of the jurisdictional inquiry" on a motion to dismiss. See United States v. George, 676 F.3d 249, 259 (1st Cir. 2012) (quoting González, 311 F.3d at 442); see also United States v. Frias, 521 F.3d 229, 235-36 (2d Cir. 2008) (stating that an indictment that "plainly track[ed] the language of the statute and state[d] the time and place of the alleged [crime]" was sufficient to invoke the district court's jurisdiction).

Fonseca does not contest that the indictment tracked the language of 21 U.S.C. §§ 959, 960, and 963, the statutes he was charged with violating. Nor does he raise any other challenge to the indictment itself. He instead disputes whether the government would ultimately be able to prove that he personally acted with the intent to cause any effects in the United States. This argument goes to the sufficiency of the evidence, not to whether the indictment -- which was facially valid -- should be dismissed. See United States v. Stewart, 744 F.3d 17, 22 (1st Cir. 2014) ("[A]t the motion-to-dismiss stage, the allegations are taken as

true, leaving for the jury the questions of the actual scope of the conspiratorial agreement . . . .").

Moreover, Fonseca concedes that a federal court has jurisdiction over a conspiracy, and every member of that conspiracy, if at least one overt act alleged to be in furtherance of the conspiracy was committed in the United States. See United States v. Inco Bank & Tr. Corp., 845 F.2d 919, 920-21 (11th Cir. 1988) (per curiam); see also Rivera v. United States, 57 F.2d 816, 819 (1st Cir. 1932) ("The place of the conspiracy is immaterial provided an overt act is committed within the jurisdiction of the court."). And he does not dispute that at least some of his co-defendants committed overt acts in the United States that were alleged to be part of the conspiracy. Indeed, he stipulated in his plea agreement that his co-defendants transferred at least $40,000 either to or from the United States, with the intent to further a drug trafficking conspiracy.

Fonseca attempts to avoid this precedent by arguing that the acts of his co-conspirators were so insignificant and inconsequential that the exercise of jurisdiction over him would be unreasonable as a matter of law. In so arguing, Fonseca appears to invoke the territorial effects doctrine, which holds that "a sovereign only possesses jurisdiction to prosecute a crime where . . . the effect within the territory is substantial." United

States v. Woodward, 149 F.3d 46, 66 (1st Cir. 1998) (internal quotation marks omitted).

However, Fonseca provides no support for the proposition that the $40,000 in transferred funds referenced in his plea agreement -- the existence of which he has not disputed -- is somehow insignificant as a matter of law. Indeed, Fonseca cites no case in which any monetary amount was considered so insignificant as to render unreasonable the exercise of jurisdiction over a drug trafficking offense. And while he argues that the amount of money transferred by his co-conspirators was insufficient to purchase a distribution-level quantity of cocaine, this argument could only conceivably relate to the scope of the conspiracy and whether these overt acts furthered the conspiracy's objectives. But, as we have discussed, these questions are inappropriate for resolution at the motion to dismiss stage. See Stewart, 744 F.3d at 22.

The district court properly denied Fonseca's motion to dismiss for lack of subject matter jurisdiction.

C. Personal Jurisdiction

Fonseca also argues that the district court should have divested itself of personal jurisdiction over him or, in the alternative, granted him a hearing to assess whether it should do so. This claim is based on his allegation that he was unlawfully transported to the United States to secure his appearance in this

case. See United States v. Toscanino, 500 F.2d 267, 275 (2d Cir. 1974) (holding that, in extreme circumstances, a district court should divest itself of jurisdiction over a criminal case if the defendant's presence was secured by the government's "deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights").[12]

Fonseca's claim fails, however, because it is barred by the appeal waiver provision in his plea agreement. Indeed, Fonseca develops no serious argument otherwise. While he claims in his brief that the plea agreement "contains a waiver of appeal from the sentence, but not from the denial of the motions to dismiss for lack of in personam jurisdiction," this argument flies in the face of the agreement's plain text, which bars appeal of both his "judgment and sentence." Fonseca's argument that the district court should have declined to exercise personal jurisdiction over him is necessarily a challenge to its "judgment" of guilt in this case. See United States v. Baramdyka, 95 F.3d 840, 843-44 (9th Cir. 1996) (holding that a valid waiver of the right to appeal the

[12] We note that the Second Circuit has since held that one of the holdings of Toscanino -- that noncitizens "may invoke the Fourth Amendment against searches conducted abroad by the U.S. government" -- was abrogated by the Supreme Court in United States v. Verdugo-Urquidez, 494 U.S. 259 (1990). See In re Terrorist Bombings of U.S. Embassies in E. Afr., 552 F.3d 157, 167 n.5 (2d Cir. 2008). Because we conclude that the waiver of appeal provision in the plea agreement bars this claim, we need not delve further into the merits of Fonseca's reliance on Toscanino.

defendant's conviction and sentence applied to his challenge to the district court's purported lack of personal jurisdiction over him). Fonseca's challenge to the district court's exercise of personal jurisdiction therefore falls within the scope of the appeal waiver provision.

Affirmed.

United States Court of Appeals
For the First Circuit

No. 19-1791

UNITED STATES,

Appellee,

v.

LAWRENCE ANDERSON FONSECA, f/k/a Lawrence Anderson Fonseca-Garcia,

Defendant - Appellant.

Before

Barron, Chief Judge,
Selya, Lynch, Lipez, Kayatta, Gelpí, and Montecalvo,
Circuit Judges.

ORDER OF COURT

Entered: October 17, 2022

Pursuant to First Circuit Internal Operating Procedure X(C), the petition for rehearing en banc has also been treated as a petition for rehearing before the original panel. The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and petition for rehearing en banc be denied.

By the Court:

Maria R. Hamilton, Clerk

cc:
Thomas F. Klumper, Timothy R. Henwood, Myriam Yvette Fernandez-Gonzalez, Mariana E. Bauza Almonte, Jose Ramon Olmo-Rodriguez, Lawrence Anderson Fonseca

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA, Plaintiff, v. [1] LAWRENCE ANDERSON-FONSECA, Defendant.	CRIMINAL NO. 14-434 (JAG)

MEMORANDUM AND ORDER

GARCIA-GREGORY, D.J.

Pending before the Court is Lawrence Anderson-Fonseca's ("Anderson" or "Defendant") Motion to Dismiss for Lack of Subject Matter and *in personam* Jurisdiction (the "Motion"). Docket No. 119. For the reasons outlined below, the Motion is DENIED.

DISCUSSION[1]

I. Subject Matter Jurisdiction

Defendant argues that this Court lacks subject matter jurisdiction over this case for two related reasons. Docket No. 119 at 3-6. For clarity, the Court will address each argument separately.

The first reason Anderson proffers is that "there is an absolute lack of evidence that [Defendant] committed any illegal acts within U.S. territory or had any intent that his acts

[1] Count I of the Indictment charges Defendant with violating 21 U.S.C. §§ 963, 959, 960 (conspiracy to import controlled substances into the United States). Docket No. 3 at 1-2. Count II charges Defendant with violating 18 U.S.C. § 1956(a)(2)(A) (money laundering to promote a specified unlawful activity). *Id.* at 2.

would have any effect within U.S. territory." *Id.* at 4. Defendant specifically contends that, at most, the Government's evidence establishes that he agreed to import narcotics into Tortola, B.V.I., after which he would have no longer been involved in the conspiracy. *Id.* at 3, 5. Anderson further emphasizes that the narcotics were never actually produced; thus, he argues that "the evidence cannot establish that his actions had any effect within U.S. territory" and that "[i]t should be beyond peradventure that nonexistent items can simply not produce effects, anywhere." *Id.* at 5. Therefore, Anderson moves this Court to dismiss Count 1 of the Indictment for lack of subject matter jurisdiction. *Id.* Defendant's argument, however, is premature.

Pursuant to Rule 12 of the Federal Rules of Criminal Procedure, a defendant can raise prior to trial "any defense, objection, or request that the court can determine *without a trial on the merits*." Fed. R. Crim. P. 12(b)(1) (emphasis added). Although "a district court must rule on any issue *entirely segregable from the evidence to be presented at trial*, [it] may in its discretion defer a ruling on any motion that requires trial of any nontrivial part of 'the general issue' that is, the presentation of any significant quantity of evidence relevant to the question of guilt or innocence . . . ." *United States v. Barletta*, 644 F.2d 50, 57-58 (1st Cir. 1981) (emphasis added).

Defendant's first jurisdictional argument is not "entirely segregable from the evidence to be presented at trial," *id.*; quite the contrary. What Defendant is really asking the Court is to dismiss Count I of the Indictment based on the sufficiency of the Government's evidence as to an element of offense charged —namely, Defendant's intent that the narcotics be unlawfully imported into the United States. *See* 21 U.S.C. § 959. Not only is the question of subject matter jurisdiction intertwined with the merits of the case, it is in fact a substantive element of the offense, proof of which the Government must present to the jury at trial. *See, e.g., United States v.*

Poulin, 588 F. Supp. 2d 58, 61-62 (D. Me. 2008) (denying without prejudice a motion to dismiss the indictment where the motion depended "on factual assertions about the circumstances surrounding the offense that [were] interwoven with evidence about whether the defendant committed the crime [] charged"); *United States v. Ayarza-Garcia*, 819 F.2d 1043, 1048 (11th Cir. 1987) (affirming the denial of a motion to dismiss because "when a question of federal subject matter jurisdiction is intermeshed with questions going to the merits, the issue should be determined at trial"). Granting Defendant the relief requested would not only entail that the Court conduct its own trial on the merits, it would considerably encroach on the providence of the ultimate finder of fact. Accordingly, Defendant's Motion on this basis is DENIED WITHOUT PREJUDICE.[2]

Defendant's second argument is that the actions taken by his co-conspirators within the United States "were so insubstantial and inconsequential as to make the exercise of territorial jurisdiction by this Court unreasonable." Docket No. 119 at 5-7. Again, Defendant's argument is premature.

Defendant lists for the Court the acts by his co-conspirators that, he argues, are insubstantial and inconsequential. Docket No. 119 at 6. He first points to a number of money transfers that took place over the span of two years, ranging from $150 dollars to $5,000 dollars. *Id.* According to Defendant, "these amounts would have fallen woefully short of serving to finance anything near the amount of kilograms of cocaine that the Government is charging

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[2] Defendant is advised that the proper vehicle to challenge the sufficiency of the Government's evidence is a motion for judgment of acquittal under Rule 29 of the Federal Rules of Criminal Procedure, not a motion to dismiss. *See* Fed. R. Crim. P. 12(b); *see also United States v. Stewart*, 744 F.3d 17, 21 (1st Cir. 2014) (citing *United States v. Guerrier*, 669 F.3d 1, 3-4 (1st Cir. 2011) ("[C]ourts routinely rebuff efforts to use a motion to dismiss as a way to test the sufficiency of the evidence behind an indictment's allegations.").

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[Defendant] with allegedly intending to import into the United States." *Id.* Defendant also calls attention to some of his co-conspirators' travel records, noting that "[s]ince there is no specific action associated with any of these trips, it is unquestionable that such trips cannot be claimed to have been conducted 'in furtherance of' a conspiracy, or to have been significant, substantial or consequential in the context of the conspiracy." *Id.* at 6-7. The problem with Defendant's argument is that, again, it requires that the Court not only examine the Government's evidence before trial, but also weigh it. Therefore, and for the same reasons discussed above, Defendant's Motion on this basis is DENIED WITHOUT PREJUDICE. *Stewart*, 744 F.3d at 22 ("[A]t the motion-to-dismiss stage, the allegations are taken as true, leaving for the jury the questions of the actual scope of the conspiratorial agreement, whether the acts alleged actually occurred, and, if so, whether they furthered the conspiracy's objectives."); *United States v. Upton*, 559 F.3d 3, 11 (1st Cir. 2009) ("Determining the contours of the conspiracy ordinarily is a factual matter entrusted largely to the jury.").

II. Personal Jurisdiction

In his Motion, Defendant also moves the Court to schedule an evidentiary hearing "concerning the circumstances surrounding [his] arrest" so that the Court can determine whether it can lawfully exercise personal jurisdiction over him. Docket No. 119 at 8. He argues that, depending on what is found at the hearing, *Toscanino* could be applicable here and divest the Court of personal jurisdiction. *Id.*[3] The Court is not persuaded that an evidentiary hearing is required at this time.

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[3] In *United States v. Toscanino*, the Second Circuit held that due process "require[es] a court to divest itself of jurisdiction over the person of a defendant where it has been acquired as the result of the government's

As Defendant himself points out, those courts that have adopted the *Toscanino* approach have applied it quite narrowly.[4] Essentially, a court must divest itself of personal jurisdiction only in egregious cases, such as where a defendant has been subjected to torture. *See United States v. Sorren*, 605 F.2d 1211, 1215 (1st Cir. 1979) (collecting cases). Yet Defendant here does not allege that he was mistreated in any way during or after his arrest. Nor did he submit an affidavit or any kind of proof to that effect. Absent, at the very least, a preliminary showing that there is a need for an evidentiary hearing, the Court has no basis to grant this request. *Id.* at 1216 (explaining that *Toscanino* and its progeny do not require that a Court hold an evidentiary hearing in all cases); *United States v. Panitz*, 907 F.2d 1267, 1273 (1st Cir. 1990) (holding that "[t]he test for granting an evidentiary hearing in a criminal case [is] substantive," requiring that "the defendant make a sufficient threshold showing that material facts [are] in doubt or dispute"). Accordingly, Defendant's request for an evidentiary hearing is DENIED.

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deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights." 500 F.2d 267, 275 (2d Cir. 1974).

[4] In *Toscanino*, for example, the defendant "was forced to walk up and down a hallway for seven or eight hours at a time. When he could no longer stand he was kicked and beaten but all in a manner contrived to punish without scarring. When he would not answer, his fingers were pinched with metal pliers. Alcohol was flushed into his eyes and nose and other fluids . . . were forced up his anal passage. [Finally, agents] attached electrodes to [the defendant's] earlobes, toes, and genitals. Jarring jolts of electricity were shot throughout his body, rendering him unconscious for indeterminate periods of time but again leaving no physical scars." 500 F.2d at 270.

CONCLUSION

For the reasons explained above, Defendant's Motion is DENIED.

IT IS SO ORDERED.

In San Juan, Puerto Rico, this Friday, March 04, 2016.

s/ Jay A. Garcia-Gregory
JAY A. GARCIA-GREGORY
United States District Judge

IN THE UNITED STATES COURT
FOR THE DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA Plaintiff, v. [1] LAWRENCE ANDERSON FONSECA, Defendants.	CIV. NO.: 14-434 (JAG/SCC)

REPORT AND RECOMMENDATION

Defendant Lawrence Anderson Fonseca was indicted with four other defendants for violations of 21 U.S.C. §§ 963, 959, and 960 and 18 U.S.C. §1956(a)(2)(A). *See* Docket No. 3. In Count One, Mr. Fonseca was charged with conspiracy to import controlled substances, and in Count Two, with money laundering to promote a specified unlawful activity. *Id.*

Mr. Fonseca entered into a plea agreement with the government whereby he pled guilty to Count Two of the indictment. *See* Docket Nos. 337 an 340. On August 1, 2016, I presided over Mr. Fonseca's change of plea hearing. Docket

No. 340. The Presiding Judge adopted my Report and Recommendation ("R&R") and accepted the defendant's guilty plea. Docket No. 342. The Court set the sentencing hearing for March 14, 2017. Docket No. 363.

On March 8, 2017 Mr. Fonseca filed a motion requesting that his attorney withdraw from representation. Among the reasons proffered, he adduced that his counsel had provided ineffective assistance. *See* Docket No. 401. On that same day, Mr. Fonseca filed a *pro se* motion to withdraw his guilty plea alleging that he had evidence to prove his innocence. *See* Docket No. 402. The government opposed. Docket No. 411.

The Presiding Judge referred the motion at Docket No. 401 to the undersigned and held the *pro se* motion to withdraw the plea under advisement pending disposition of the former. Docket Nos. 403 and 404. After holding a hearing on the matter, I denied defendant's request for new legal representation. Docket No. 414.

Defendant's Motion to Withdraw Plea of Guilty faced a similar fate. The Presiding Judge denied it on May 2, 2017, noting that defendant did not proffer compelling reasons to justify the withdrawal of a plea made knowingly and voluntarily. *Id.*

Defendant filed a *pro se* appeal of the Court's decision. *See* Docket No. 449. The First Circuit, however, dismissed the interlocutory appeal for lack of jurisdiction. *See* Docket No. 495.

While the appeal was pending, Mr. Fonseca filed another *pro se* motion reiterating his request to withdraw his guilty plea and claiming his innocence. *See* Docket No. 464. On November 9, 2017 the Court denied his motion and stated that defendant "had not put forth new arguments not already considered by the Court." Docket No. 503. The Court also denied defendant's request for a hearing to determine whether his request to withdraw had merits. Subsequently, the Court rescheduled the sentencing hearing for August 13, 2018. Docket No. 544.

Five days before the sentencing hearing was set to take place, Mr. Fonseca's new counsel filed a motion to continue the hearing stating that he would be filing a motion to withdraw his client's guilty plea. Docket No. 545. The Court entered an order to show cause why the sentencing should be continued when the Court had already denied defendant's previous attempts to withdraw his plea. Docket No. 546.

In response to the order to show cause, the defendant

raised the following arguments: (1) that there is newly discovered evidence that surfaced during the July 11, 2017 testimony of codefendant Terrence Williams Edwards; (2) that the purpose of the conspiracy for which he was indicted was not to actually sell narcotics but to commit a scam where he pretended to sell narcotics in order to keep the money from potential buyers; (3) that the money obtained for the scam was used to pay his household bills and debts; (4)that he had no criminal intent to participate in a drug conspiracy. *See* Docket No. 547 at pg. 3.

The Presiding Judge referred the motion at Docket No. 547 to the undersigned for a Report and Recommendation and hearing if necessary. *See* Docket No. 548. A hearing was held on February 25, 2019. *See* Docket No. 582.

I. Analysis

A court has discretion to grant a request for withdrawal of a plea of guilty before sentencing upon a defendant's showing of a "fair and just reason." *United States v. Ramos*, 810 F.2d 308, 311 (1st Cir. 1987)(citing Fed. R. Crim. P. 32(d)). "Although the

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standard for a presentence withdrawal remains a liberal one," withdrawal is not an absolute right. *Id.* Courts have delineated several factors that are relevant in assessing whether to allow a defendant to withdraw his guilty plea. These include (1) whether defendant entered into the guilty plea knowingly and voluntarily; (2) whether the reasons motivating defendant to withdraw the plea are plausible; (3) defendant's assertion of innocence; (4) and the amount of time elapsed between the guilty plea and the filing of the motion to withdraw. *United States v. Parrilla-Tirado*, 22 F.3d 368, 371-72 (1st Cir. 1994). "If the combined weight of these factors tilts in the defendant's favor, then the court must also assess the quantum of prejudice, if any, that will inure to the government." *United States v. Doyle*, 981 F.2d 591, 594 (1st Cir. 1992). The court will discuss each factor in turn.

The first step of the inquiry is whether the defendant's guilty plea was made voluntarily and with understanding of the nature of the charges and the consequences of the plea. After reviewing the transcript of the change of plea hearing, I

find that it was. The transcript reveals that the Court scrupulously followed the Rule 11 procedures,[1] taking great care to explain the proceedings and making sure that defendant understood the charges against him, his potential exposure, and the implications of pleading guilty. *See* Docket No. 430. Although defendant stated at the hearing on the motion to withdraw that he "simply signed" the plea and did not read it, the transcript of his change of plea hearing shows otherwise. During the colloquy with the Court, Mr. Fonseca unequivocally stated that "he understood every part" of the plea agreement, and that "he agreed with everything" contained therein. *See* Transcript, Docket No. 430, at pg. 9, lines 1-20. This factor thus weighs against granting the withdrawal.

Similarly, the reasons proffered by defendant to justify his change of heart are not entirely convincing. Mr. Fonseca argues that he originally pled guilty to protect his wife, (who

1 Fed. R. Crim. P. 11 concerns pleas.

was also a codefendant), but when he became aware of potential exculpatory statements made by codefendant Terrence Williams Edwards, he realized that he could prevail on his claim of innocence.

In short, Edwards testified during an evidentiary hearing held on July 11, 2017. *See* Docket No. 475. The purpose of the hearing was to determine whether codefendant Justin Jeremiah Gumbs complied with the safety valve provisions.

Edwards testified that he had a plan with Gumbs and Fonseca to raise $45,000 to start a drug smuggling venture. *See* Docket No. 484 at pgs. 128 and 129. Mr. Fonseca relied on portions of Edwards' testimony where stated that he never saw Fonseca conducting the drug transactions as part of the scheme, except for one instance in which Fonseca showed him a brick of cocaine inside the trunk of his car. Docket No. 484, pg. 144, lines 2-7. Specifically, Edwards stated that he went to Tortola on October of 2012 to "help out" in furthering the drug-smuggling operation and describes the following scenario: "We went down there, and there was nothing. He

never – we never saw the actual drugs that he was supposed to be getting, and we ended up staying for a very long time." *Id.* at pg. 133, lines 11-14. According to Fonseca, what Edwards thought was a kilo of cocaine was packaged to appear that way to deceive him but did not contain real drugs.

Fonseca further relates that Edwards wrote him several emails complaining about the delay in getting the drugs and suggesting that Fonseca was lying about having access to them. Docket No. 484, pg. 154, lines 4-8.

Fonseca proffers to the Court that Edwards's testimony supports what he has been claiming all along: that his objective was to steal money paid in advanced from drug buyers but that he never intended to deal with actual narcotics. *See* Docket No. 547 at pg. 7.

The government counters that what Fonseca characterizes as "new exculpatory evidence" is not so. For starters, the defendant was aware of everything that co-defendant Gumbs stated at the time that he took his plea and thus cannot raise the "new evidence" card now. Furthermore, the government

says, Fonseca provided sworn affidavits on behalf of his codefendants where he admitted his participation in the alleged conspiracy. In its Motion at Docket No. 581, the government proffered some of the evidence that it will present at trial to undermine Fonseca's allegations of innocence.

Weighing all these considerations, I find that defendant's characterization of Edwards' testimony as "newly discovered exculpatory evidence" is not accurate. Although certain portions appear to support defendant's claims of innocence, other portions could be interpreted as doing the opposite. Also, through discovery, defendant must have been privy to his co-defendants' version of what transpired between them. Therefore, this factor also weighs against granting the withdrawal.

The next factor, on the other hand, weighs heavily in favor of defendant. Throughout this case, he has vehemently asserted his innocence and has gone to great lengths to withdraw his plea. As early as July 24, 2015, Mr. Fonseca

complained to the Court that he was at odds with his attorney regarding the defense strategy. Docket No. 104. One of their main disagreements, as Mr. Fonseca later revealed, was over whether to move for withdrawal of the guilty plea. Mr. Fonseca was so adamant to do so, that he filed the request *pro se*. Mr. Fonseca also appealed *pro se* the denial of his first motion to withdraw guilty plea. Docket No. 449. In several submissions to the Court, the defendant has claimed that the reason why he wants to withdraw the plea is because he is innocent of the drug charges. *See* Docket Nos. 114, 119, 401, 402, 449 and 464.

But what is perhaps the most compelling testament to Fonseca's staunch resolve to go to trial is what transpired at the motion to withdraw hearing. At some point, the government stated that if the case went to trial, it would seek an enhancement under 21 U.S.C. § 851 based on Fonseca's prior conviction for drug importation. The enhancement would increase Fonseca's exposure to 20 years to life. Even when faced with that dire scenario, Mr. Fonseca

unequivocally told the Court that he still wanted to withdraw his plea and go to trial. Given defendant's consistent pleas of innocence, the "innocence" factor tilts in favor of granting the withdrawal.

As to the "timing" consideration, defendant filed the motion to withdraw 7 months after entering the plea of guilty. *See* Docket Nos. 340 and 402. In weighing the timing factor, courts pay close attention to the "chronology." *Doyle*, 981 F.2d at 595. "While an immediate change of heart may well lend considerable force to a plea withdrawal request, a long interval between the plea and the request often weakens any claim that the plea was entered in confusion or under false pretenses." *Id*.

Defendant, however, explains that it was upon learning of Edwards testimony that he thought he had a shot at prevailing and thus it was then that he filed the motion. Furthermore, there is support in the record for his assertion that he repeatedly asked his attorney to move for withdrawal and ultimately resorted to doing so himself. Given these

circumstances, I think that the "timing" factor weighs in favor of defendant.

Because the analysis of the factors up to this point is equally tilted in favor, and against, the withdrawal, I move on discuss whether the government would be prejudiced by granting defendant's request. The government argues that it would be heavily prejudiced if defendant withdraws his plea because it would have to go to trial only as to co-defendant Fonseca. All other co-defendants in the indictment have pled guilty. Moreover, the government had prepared for trial during the months of April through August 2016 and had incurred considerable expense in the process. *See* Docket No. 557. Reinstating trial proceedings "would unnecessarily burden third parties who had spent time preparing for trial and had allocated time and resources to respond to trial subpoenas." *Id.*

Hence, the government's claim of prejudice rests on the resources incurred in preparing for and attending trial and on the burden it poses on third parties. In balancing the equities,

I find that these reasons do not weigh in the government's favor.

This case is less than five years old, all witnesses are arguably still available, and the evidence is accessible. Although preparing for trial necessarily involves considerable resources and requires third parties to juggle scheduling issues, no specific circumstance that would make this case a drain of resources or an organizational ordeal has been brought to the Court.

For the reasons set forth, and because a majority of the factors weigh in favor of granting withdrawal, I recommend that defendant be allowed to withdraw his guilty plea.

IT IS SO RECOMMENDED.

The parties have fourteen days to file any objections to this Report and Recommendation. Failure to file the same within the specified time waives the right to appeal this Report and Recommendation. *Henley Drilling Co. v. McGee*, 36 F.3d 143,150-51 (1st Cir. 1994); *United States v. Valencia-Copete*, 792 F.2d 4 (1st Cir. 1986).

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In San Juan, Puerto Rico, this 11th day of February, 2019.

S/ SILVIA CARREÑO-COLL
UNITED STATES MAGISTRATE JUDGE

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05/20/2019	595	ORDER noted 591 Motion Submitting Objections to R&R as to Lawrence Anderson Fonseca (1); adopting in part and rejecting in part 586 Report and Recommendation as to Lawrence Anderson Fonseca (1); denying 547 Motion to Withdraw Plea of Guilty as to Lawrence Anderson Fonseca (1). **Defendant's Motion to Withdraw Plea of Guilty is hereby DENIED. The case shall proceed to sentencing without further delay.** Signed by Judge Jay A. Garcia-Gregory on 5/20/2019. (MQ) (Entered: 05/20/2019)

Get 597

05/24/2019	598	ORDER denying 597 Motion for Reconsideration as to Lawrence Anderson Fonseca (1). Defendant's Motion for Reconsideration merely repeats the same arguments already considered and rejected by the Court in its Memorandum and Order, Docket No. 595. The Court has repeatedly denied Defendant's motions to withdraw his plea, and Defendant has failed to put forth any new arguments or evidence to justify reconsideration. Signed by Judge Jay A. Garcia-Gregory on 5/24/2019. (MQ) (Entered: 05/24/2019)

06/06/2019	604	ORDER denying 603 Second Motion for Reconsideration as to Lawrence Anderson Fonseca (1). Defendant attempts to explain the 7-month delay between his change of plea hearing and the first motion seeking to withdraw his guilty plea, claiming that it was due to his transfer to another prison. However, Defendant fails to explain why or how that would impede him from filing a *pro se* motion, as he later did on multiple occasions, while at that prison. Moreover, Defendant failed to address the other two reasons why the Court found that the timing factor weighed against Defendant. *See* Docket No. 595 at 3-4. As such, Defendant has failed to proffer sufficient reasons to warrant reconsideration of this matter and, thus, the Motion is hereby DENIED. **Because this issue has been litigated and re-litigated on at least 6 occasions, Defendant may not file any additional motions regarding this matter. Defendant may raise this issue on appeal, if he wishes. Failure to comply may result in the imposition of sanctions. This case shall be set for sentencing without any further delay.** Signed by Judge Jay A. Garcia-Gregory on 6/6/2019. (MQ) (Entered: 06/06/2019)

AO 245B (Rev. 02/18) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT

District of Puerto Rico

UNITED STATES OF AMERICA
v.
LAWRENCE ANDERSON FONSECA
T/N: Lawrence Anderson Fonseca-Garcia

JUDGMENT IN A CRIMINAL CASE

Case Number: 3:14-CR-00434-001 (JAG)

USM Number: 17907-069

Allan A. Rivera-Fernandez, Esq.
Defendant's Attorney

THE DEFENDANT:

☑ pleaded guilty to count(s) one (1)

☐ pleaded nolo contendere to count(s) which was accepted by the court.

☐ was found guilty on count(s) after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21, U.S.C. Section 963, 959 and 960 & (b)(1)(B)	Conspiracy to possess, manufacture or distribute and import into the United States at least 30 kilograms of cocaine.	7/30/2014	one (1)

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☑ Count(s) two ☑ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

7/11/2019
Date of Imposition of Judgment

s/ Jay A. Garcia-Gregory
Signature of Judge

Jay A. Garcia-Gregory, U.S. Senior District Judge
Name and Title of Judge

7/11/2019
Date

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DEFENDANT: LAWRENCE ANDERSON FONSECA T/N: Lawren
CASE NUMBER: 3:14-CR-00434-001 (JAG)

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

One hundred and twenty (120) months.

☑ The court makes the following orders and recommendations to the Bureau of Prisons:

1. That defendant be designated to suitable institution in the state of South Carolina.
2. That defendant be enrolled in an educational/vocational rehabilitation training program, such as mechanics.

☑ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

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DEFENDANT: LAWRENCE ANDERSON FONSECA T/N: Lawren
CASE NUMBER: 3:14-CR-00434-001 (JAG)

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of :

Five (5) years.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☑ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

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DEFENDANT: LAWRENCE ANDERSON FONSECA T/N: Lawren
CASE NUMBER: 3:14-CR-00434-001 (JAG)

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

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DEFENDANT: LAWRENCE ANDERSON FONSECA T/N: Lawren
CASE NUMBER: 3:14-CR-00434-001 (JAG)

SPECIAL CONDITIONS OF SUPERVISION

1. He shall not commit another Federal, state, or local crime, and shall observe the standard conditions of supervised release recommended by the United States Sentencing Commission and adopted by this Court.

2. He shall not unlawfully possess a controlled substance, and refrain from possessing firearms, destructive devices, or other dangerous weapons.

3. He shall refrain from the unlawful use of controlled substances and submit to a drug test within fifteen (15) days of release; thereafter, submit to random drug testing, no less than three (3) samples during the supervision period and not to exceed 104 samples per year accordance with the Drug Aftercare Program Policy of the U.S. Probation Office approved by this Court. If any such samples detect substance abuse, the defendant shall participate in an in-patient or out-patient substance abuse treatment program for evaluation and/or treatment, as arranged by the U.S. Probation Officer until duly discharged. The defendant is required to contribute to the cost of services rendered (co-payment) in an amount arranged by the U.S. Probation Officer based on the ability to pay or availability of third party payment.

4. He shall provide the U.S. Probation Officer access to any financial information upon request.

5. He shall submit to a search of her person, property, house, residence, vehicles, papers, computer, other electronic communication or data storage devices or media, and effects (as defined in Title 18, U.S.C., Section 1030(e)(1)), to search at any time, with our without a warrant, by the probation officer, and if necessary, with the assistance of any other law enforcement officer (in the lawful discharge of the supervision functions of the probation officer) with reasonable suspicion concerning unlawful conduct or a violation of a condition of probation or supervised release. The probation officer may seize any electronic device which will be subject to further forensic investigation/analyses. Failure to submit to such a search and seizure, may be grounds for revocation. The defendant shall warn any other residents or occupants that their premises may be subject to search pursuant to this condition.

6. The defendant shall cooperate in the collection of a DNA sample as directed by the U.S. Probation Officer, pursuant to the Revised DNA Collection Requirements, and Title 18, U.S. Code Section 3563 (a)(9).

7. If deported or granted voluntary departure, the defendant shall remain outside the United States and all places subject to its jurisdiction unless prior written permission to reenter is obtained from the pertinent legal authorities and the defendant notifies in writing the Probation Officer of this Court to that effect.

DEFENDANT: LAWRENCE ANDERSON FONSECA T/N: Lawren
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CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	JVTA Assessment*	Fine	Restitution
TOTALS	$ 100.00	$ 0.00	$ 0.00	$ 0.00

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss**	Restitution Ordered	Priority or Percentage

TOTALS	$ 0.00	$ 0.00

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

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SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☑ Lump sum payment of $ 100.00 due immediately, balance due

☐ not later than _____, or
☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

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