APPENDIX A

U*nited States v. Powell,* No. 22-50294

(5th Cir. May 1, 2023)

United States Court of Appeals for the Fifth Circuit

No. 22-50294
Summary Calendar

United States Court of Appeals
Fifth Circuit
FILED
May 1, 2023
Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

DARWIN POWELL,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 5:18-CR-68-1

Before STEWART, DUNCAN, and WILSON, *Circuit Judges*.

PER CURIAM:[*]

Darwin Powell challenges his conviction for conspiracy to distribute and possess with intent to distribute five kilograms or more of cocaine and his below-Guidelines sentence of 420 months of imprisonment. He argues that the district court erred by denying his motions to withdraw his guilty plea and for reconsideration. We review the denials of both motions for an abuse

[*] This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

of discretion. *See United States v. Strother*, 977 F.3d 438, 443 (5th Cir. 2020); *United States v. Rabhan*, 540 F.3d 344, 346-47 (5th Cir. 2008). "A district court abuses its discretion if it bases its decision on an error of law or a clearly erroneous assessment of the evidence." *Strother*, 977 F.3d at 443 (citation omitted).

"A defendant may withdraw a guilty plea after the district court accepts the plea, but before it imposes a sentence, by showing a 'fair and just reason' for seeking withdrawal." *Strother*, 977 F.3d at 443 (quoting FED. R. CRIM. P. 11(d)(2)(B)). The defendant has the burden of proof. *Strother*, 977 F.3d at 443. This court considers seven factors, namely, whether (1) the defendant asserted his innocence, (2) withdrawal would prejudice the Government, (3) the defendant delayed in filing the motion, (4) the withdrawal would substantially inconvenience the court, (5) close assistance of counsel was available, (6) the plea was knowing and voluntary, and (7) withdrawal would waste judicial resources. *Id.* (citing *United States v. Carr*, 740 F.2d 339, 343-44). However, these factors "are non-exclusive," *United States v. Urias-Marrufo*, 744 F.3d 361, 364 (5th Cir. 2014), and no one factor or combination of factors is dispositive. *Strother*, 977 F.3d at 443.

The district court found that the assertion-of-innocence and voluntariness-of-plea factors weighed against Powell based primarily on the factual basis to which he agreed as part of his plea agreement and his testimony under oath at rearraignment. *See Blackledge v. Allison*, 431 U.S. 63, 74 (1977) ("Solemn declarations in open court carry a strong presumption of verity."). Although he cites his testimony from the hearing on his motion to withdraw that he was innocent and did not understand the meaning of the plea agreement, the district court found this testimony incredible, and he does not attempt to show that the district court clearly erred this regard. *See Strother*, 977 F.3d at 443.

While Powell contends that some of the Government's claims of prejudice lack specificity and are unconvincing, he does not meaningfully address the district court's finding that the Government would be prejudiced because it had spent substantial time and resources negotiating a series of property forfeitures contained in the plea agreement; he thus fails to show that the district court clearly erred in weighing this factor against him. *See Strother*, 977 F.3d at 443. Likewise, we defer to the district court's determination whether it would have been inconvenienced and whether judicial resources would be wasted. *See United States v. McKnight*, 570 F.3d 641, 650 (5th Cir. 2009).

Despite that counsel provided close assistance during plea negotiations and at rearraignment, Powell complains that his attorney failed to file a motion to withdraw as soon as Powell requested that he do so. To the extent that Powell claims that his attorney rendered ineffective assistance by failing to timely file a motion to withdraw, "[i]neffective assistance is a basis for invalidating a conviction under the Sixth Amendment and is not, strictly speaking, relevant to the decision of whether Defendant was denied close assistance of counsel under *Carr* analysis." *See Urias-Marrufo*, 744 F.3d at 365. Our decision does not prejudice Powell's right to raise an ineffective assistance of counsel claim on this basis in a subsequent 28 U.S.C. § 2255 proceeding. *See McKnight*, 570 F.3d at 648. Powell fails to show that the district court clearly erred in finding that all of the *Carr* factors weighed against him except for the timeliness of his motion to withdraw. *See Strother*, 977 F.3d at 443.

Powell does not meaningfully address, and has therefore abandoned any challenge to, the district court's holding that he waived the attorney-client privilege with regard to statements contained in his former attorney's affidavit. *See Yohey v. Collins*, 985 F.2d 222, 225 (5th Cir. 1993). Even if Powell's rights under the Confrontation Clause extend to the hearing on his

motion to withdraw, the district court held that any error in admitting the affidavit was harmless because its consideration of the *Carr* factors would not have been impacted if the affidavit had been excluded. *See United States v. Noria*, 945 F.3d 847, 853 (5th Cir. 2019) (holding that violations of Confrontation Clause are subject to harmless error analysis). Powell does not challenge that holding on appeal. *See Yohey*, 985 F.2d at 225.

Powell fails to show the district court abused its discretion by denying his motion for reconsideration without first conducting an evidentiary hearing regarding whether he voluntarily waived his Fifth and Sixth Amendment rights before making inculpatory statements to law enforcement officers. *See United States v. Powell*, 354 F.3d 362, 370 (5th Cir. 2003). Finally, in arguing that *Carr* was decided incorrectly because it improperly limits the discretion of the district court in applying Rule 11(d)(2)(B), Powell ignores that the *Carr* factors are not exclusive. *See Urias-Marrufo*, 744 F.3d at 364. To the extent that he argues that *Carr* should be overruled, he properly concedes that his argument is foreclosed. *See United States v. Lipscomb*, 299 F.3d 303, 313 n.34 (5th Cir. 2002).

AFFIRMED.

APPENDIX B

Recommendation of U.S. Magistrate Judge

On Motion to Withdraw Guilty,

(March 18, 2020)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

UNITED STATES OF AMERICA,	§	
	§	
Plaintiff,	§	
	§	
v.	§	SA-18-CR-68(1)-OLG
	§	
DARWIN POWELL,	§	
	§	
Defendant.	§	

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

To the Honorable Chief United States District Judge Orlando L. Garcia:

This Report and Recommendation concerns Defendant's Motion to Withdraw Plea of Guilty Plea Before Sentencing (Docket Entry 128), which was referred to the undersigned for consideration. The undersigned held a hearing on the motion on March 11, 2020. For the reasons set out below, I recommend that Defendant's motion (Docket Entry 128) be **DENIED**.

I. Jurisdiction.

The District Court has original jurisdiction over this case pursuant to 18 U.S.C. § 3231. I have jurisdiction to issue this recommendation pursuant to 28 U.S.C. § 636(b).

II. Background.

Defendant and two others were charged in a four-count indictment. (Docket Entry 3.) On October 16, 2019, Defendant pleaded guilty before the undersigned to Count One of that indictment, charging him with conspiracy to possess with intent to distribute 5 kilograms or more of cocaine, in violation of 21 U.S.C. §§ 841 and 846. (*See* Docket Entries 110, 111, and 141.) Defendant's plea was entered pursuant to plea agreement documents that were initialed and signed by him and his attorney. (*See* Docket Entries 83 and 84.) In the plea agreement,

Defendant agreed to a factual basis in support of Count One of the indictment; the factual basis stated that Defendant "admits that on the date in the indictment, in the Western District of Texas, he intentionally and knowingly possessed more than 5 kilograms of cocaine," that "the substance was in fact cocaine," that "he had agreed with others to possess and distribute the cocaine," and "that some of these actions occurred within the Western District of Texas." (Docket Entry 83, at 6.) These statements were consistent with statements Defendant has provided to investigators on at least four occasions prior to his plea. (*See* Gov't Hearing Ex. 1.)

The undersigned recommended to the District Court that Defendant's guilty plea be accepted, and that recommendation was adopted by the Court without objection from Defendant. (*See* Docket Entries 111 and 113.) Approximately two weeks later however, Defendant, in a *pro se* request for substitute counsel, alleged that he had entered his guilty plea under false pretenses and that he had received ineffective assistance of counsel. (*See* Docket Entry 117.)

The undersigned granted the *pro se* motion for substitute counsel and appointed new counsel for Defendant. (Docket Entry 121.) Represented by his new attorney, Defendant filed a motion to withdraw his plea. (Docket Entry 128.) In that motion, Defendant expressed his desire "to assert his innocence and assert all of his Constitutional and procedural rights at trial." (*Id.* at 3.) He stated that, "in a number of critical aspects he misunderstood important provisions of his plea agreement and plea," particularly the factual basis for the plea, believing that any fact discrepancies "could be addressed later with the Government." (*Id.*)

The Government opposed the motion to withdraw the guilty plea, arguing among other things that the motion was untimely and Defendant has failed to assert his innocence. The Government also argued that it would be prejudiced both in Defendant's case and in the cases of the codefendants and others if the plea were withdrawn. (*See* Docket Entry 142.)

At the hearing on the motion to withdraw, Defendant testified in support of his request to withdraw his plea. In his testimony, Defendant disputed one particular statement in the factual basis: that, acting on Defendant's behalf, a cooperating defendant had negotiated with a cooperating source to purchase 10 kilograms of cocaine. (*See* Docket Entry 83, at 4.) Although he disputed the statement, Defendant provided no evidence to show that it was in any way untrue or inaccurate. Nor did he dispute any of the other statements in the factual basis.

III. Analysis.

Federal Rule of Criminal Procedure 11 states that, after the Court has accepted a defendant's guilty plea, the plea may be withdrawn before sentencing if "the defendant can show a fair and just reason for requesting the withdrawal." FED. R. CRIM. P. 11(d)(2)(B). The factors relevant to determining whether the defendant has made the appropriate showing are well-settled; the Court must consider: (1) whether the defendant has asserted his innocence; (2) whether withdrawal would prejudice the Government; (3) whether the defendant delayed in filing the motion and, if so, the reason for the delay; (4) whether withdrawal would substantially inconvenience the court; (5) whether adequate assistance of counsel was available to the defendant; (6) whether the original plea was knowing and voluntary; and (7) whether withdrawal would waste judicial resources. *United States v. McKnight*, 570 F.3d 641, 645–46 (5th Cir. 2009) (quoting *United States v. Carr*, 740 F.2d 339, 343–44 (5th Cir. 1984)). The *Carr* factors are to be considered in their totality, and the Court's determination is reviewed for abuse of discretion. *McKnight*, 570 F.3d at 646. The Court need not make specific findings with regard to each factor. *United States v. Washington*, 480 F.3d 309, 317 (5th Cir. 2007).

In this case, the *Carr* factors clearly support denial of the motion to withdraw. This is demonstrated by Defendant's sworn statements at the guilty plea colloquy. During the colloquy

with the undersigned, Defendant testified under oath that he had reviewed the indictment and each paragraph of the plea agreement documents with his attorney. (Docket Entry 141, at 7.) He testified that he understood the charge against him, that he had signed and agreed to the plea agreement provisions, and that there was no agreements in the case other than those contained in those documents. (*Id.* at 7, 16.) He admitted his guilt, testifying that he had not been threatened, coerced or forced to do so in any way. (*Id.*) And he specifically agreed to the assertions in the factual basis in the plea agreement. (*Id.* at 17.) Defendant's statements, made under oath in open court, "carry a strong presumption of veracity." *McKnight*, 570 F.3d at 649 (citation omitted). This is particularly true here, where the statements comported with the plea agreement (which Defendant initialed on each page), and with the numerous inculpatory statements that Defendant made to law enforcement officers leading up to the plea. (*See* Docket Entry 83; Gov't Hearing Ex. 1.) Together this evidence rebuts any contention by Defendant that he has credibly asserted his innocence or that his plea was unknowing or involuntary.

At the hearing on his motion to withdraw, Defendant testified that he pleaded guilty under a false impression because he believed he and the Government could amend the factual basis in the plea agreement after the plea. This impression was not false: the plea agreement specifically stated that it could modified in writing, with the requirements that any modification must be "in writing" and "signed by all parties." (Docket Entry 83, at 17.) That Defendant knew this term of his agreement is beyond cavil: his signature appears on the same page, and he, his attorney, and the prosecutor had made a number of written changes to the plea agreement just the week before Defendant's guilty plea. (*See id.*; *see also* Gov't Hearing Ex. 2.)

In any event, Defendant's alleged "false impression" does nothing to detract from the voluntariness of his plea. Even if some of the precise details of the factual basis were to change,

there was more than ample evidence set out there to support the charge in Count One of the indictment (see Gov't Hearing Ex. 1), and Defendant's testimony at the hearing did not credibly assert any claim to innocence whatsoever. Indeed, to the extent that Defendant contradicted his earlier statements under oath to the undersigned during the plea colloquy, his testimony in support of the motion to withdraw was simply incredible.

Most of the remaining *Carr* factors support denial of the motion. Withdrawal would prejudice the Government, which has made prosecution decisions both in this case and others based on Defendant's plea, and which has negotiated Defendant's agreement to forfeiture of both money and real property. (*See* Docket Entry 83, at 14–15.) Withdrawal would also substantially inconvenience the court and waste judicial resources: Defendant's trial, scheduled months ago, was canceled due to his plea, and his codefendant's trial next month would likely be delayed by withdrawal of Defendant's plea. (*See* Docket Entry 98.) Finally, despite his claims, Defendant has failed to show that he received ineffective assistance in conjunction with the guilty plea. To the contrary, Defendant's own testimony showed that his previous attorney carefully negotiated the plea agreement and explained its provisions to Defendant.[1]

In sum, the *Carr* factors weigh heavily in favor of denying Defendant's motion to withdraw his guilty plea. Accordingly, I recommend that the motion be denied.

IV. Conclusion and Recommendation.

For the reasons set out above, I recommend that Defendant Darwin Powell's Motion to Withdraw Plea of Guilty Before Sentencing (Docket Entry 128) be **DENIED**.

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[1] The final *Carr* factor is the timeliness of the motion to withdraw. *See* 740 F.2d at 344. The undersigned does not find that Defendant's motion was untimely.

V. Instruction for Service and Notice for Right to Object.

The United States District Clerk shall serve a copy of this Report and Recommendation on all parties by electronic transmittal to all parties represented by attorneys registered as a "filing user" with the clerk of court. Written objections to this report and recommendation must be filed **within fourteen (14) days** after being served with a copy of same, unless this time period is modified by the district court. 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72(b). The party shall file the objections with the clerk of the court, and serve the objections on all other parties. A party filing objections must specifically identify those findings, conclusions or recommendations to which objections are being made and the basis for such objections; the district court need not consider frivolous, conclusive or general objections. A party's failure to file written objections to the proposed findings, conclusions and recommendations contained in this report shall bar the party from a *de novo* determination by the district court. *Thomas v. Arn*, 474 U.S. 140, 149–52 (1985); *Acuña v. Brown & Root, Inc.*, 200 F.3d 335, 340 (5th Cir. 2000). Additionally, failure to file timely written objections to the proposed findings, conclusions and recommendations contained in this Report and Recommendation shall bar the aggrieved party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court. *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1428–29 (5th Cir. 1996) (en banc).

SIGNED on March 18, 2020.

Henry J. Bemporad
United States Magistrate Judge

APPENDIX C

District Court Order

Denying Motion to Withdraw Guilty,

(May 7, 2020)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

UNITED STATES OF AMERICA	)	
	)	
	)	
v.	)	CRIMINAL NO. SA-18-CR-68-OG
	)	
DARWIN POWELL	)	
	)	

ORDER

On this date, the Court considered the report and recommendation of United States Magistrate Henry J. Bemporad, filed on March 18, 2020. Docket no. 147. Defendant filed objections to the recommendation (docket no. 149) and the Government responded (docket no. 151). After reviewing the record and the applicable law, the Court finds that Defendant's objections should be OVERRULED; the Magistrate Judge's recommendation should be ACCEPTED; and Defendant's motion to withdraw guilty plea (docket no. 128) should be DENIED.

It is therefore ORDERED that the Magistrate Judge's recommendation is ACCEPTED and Defendant's motion to withdraw guilty plea (docket no. 128) is DENIED for the reasons stated in the recommendation.

IT IS SO ORDERED this 7th day of May, 2020.

ORLANDO L. GARCIA
CHIEF U.S. DISTRICT JUDGE

APPENDIX D

Recommendation of U.S. Magistrate Judge

On Motion to Reconsider,

(April 23, 2021)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

UNITED STATES OF AMERICA,	§	
	§	
Plaintiff,	§	
	§	
v.	§	SA-18-CR-68(1)-OLG
	§	
DARWIN POWELL,	§	
	§	
Defendant.	§	

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

To the Honorable Chief United States District Judge Orlando L. Garcia:

This Report and Recommendation concerns Defendant's Sealed Motion to Reconsider Motion to Withdraw Guilty Plea (Docket Entry 175), which was referred to the undersigned for consideration. The undersigned held a hearing on the motion on April 19, 2020, and took the matter under advisement. For the reasons set out below, I recommend that the motion be **DENIED**.

I. Jurisdiction.

The District Court has original jurisdiction over this case pursuant to 18 U.S.C. § 3231. I have jurisdiction to issue this recommendation pursuant to 28 U.S.C. § 636(b).

II. Background.

On October 16, 2019, Defendant pleaded guilty to conspiracy to possess with intent to distribute 5 kilograms or more of cocaine, in violation of 21 U.S.C. §§ 841 and 846. (*See* Docket Entries 110, 111, and 141.) The undersigned recommended to the District Court that Defendant's guilty plea be accepted, and that recommendation was adopted by the Court without objection from Defendant. (*See* Docket Entries 111 and 113.)

Approximately two weeks later, Defendant filed a *pro se* request for substitute counsel. (*See* Docket Entry 117.) The undersigned appointed John Convery as new counsel for Defendant (Docket Entry 121), and Convery filed a motion on Defendant's behalf to withdraw the guilty plea. (Docket Entry 128.) The matter was referred to the undersigned, and a hearing was held on the matter. (*See* Docket Enty150.) At the hearing, Defendant disputed the factual basis supporting his guilty plea, and he testified that he had asserted his innocence to his previous attorney, James Rodriguez, both before and after the plea. (*Id.* at 15–20, 30, 35–36.)

After a hearing, the undersigned recommended that the motion be denied, finding that withdrawal was not appropriate after consideration of the factors set out in *United States v. Carr*, 740 F.2d 339, 343–44 (5th Cir. 1984). (*See* Docket Entry 147.) In recommending denial of the motion, the undersigned found that Defendant's assertions of innocence were not credible. (*Id.* at 5).

Defendant objected to the undersigned's recommendation, again relying on Defendant's assertions of innocence. (*See* Docket Entry 149, at 1–2.) In response, the Government presented an affidavit from Rodriguez, disputing that Defendant had asserted his innocence to him; to the contrary, Rodriguez claimed that Defendant never made such an assertion. (*See* Docket Entry 152-6.) Defendant objected to the Court considering attorney Rodriguez's statement, arguing among other things that Rodriguez's affidavit violated the attorney-client privilege. (*See* Docket Entry 153, at 2.) In a brief order, the District Court overruled Defendant's objections, adopted the Report and Recommendation, and denied the motion to withdraw the plea. (Docket Entry 155.)

In his motion to reconsider, Defendant again raises objections to consideration of the Rodriguez affidavit, arguing that, without Defendant's waiver of the attorney-client privilege, consideration of the affidavit violated the Sixth Amendment. (Docket Entry 175, at 6–7.) Defendant also raises a separate issue as to inculpatory post-arrest statements that the Government relied upon in responding to his original motion to withdraw. (*See* Docket Entry 152-5.) Defendant claims that these statements were taken in violation of his Fifth and Sixth Amendment rights; he bases this argument primarily on a new affidavit from his first attorney, R.C. Pate. (*See* Docket Entry 175, at 2–6; Docket Entry 175-1.)

III. Analysis.

A. *Applicable Law.*

Although motions for reconsideration are not explicitly authorized by the Federal Rules of Criminal Procedure, "they are a recognized legitimate procedural device." *United States v. Lewis*, 921 F.2d 563, 564 (5th Cir. 1991) (citing *United States v. Cook*, 670 F.2d 46, 48 (5th Cir. 1982)); *see also United States v. Scott*, 524 F.2d 465, 467 (5th Cir. 1975) (courts have "continuing jurisdiction over criminal cases and are free to reconsider [their] earlier decisions"). When asked to reconsider a previous decision in a criminal case, courts apply the same legal standard as applies to motions for reconsideration in civil cases. *United States v. CITGO Petroleum Corp.*, 908 F. Supp. 2d 812, 820 (S.D. Tex. 2012); *cf.* FED. R. CIV. P. 54(b) ("[A]ny order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties . . . may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.").

As in civil cases, motions for reconsideration in criminal cases generally "serve the narrow purpose of allowing a party to correct manifest errors of law or fact or to present newly discovered evidence." *United States v. Salinas*, 665 F. Supp. 2d 717, 720 (W.D. Tex. 2009) (citation omitted); *cf. Waltman v. Int'l Paper Co.*, 875 F.2d 468, 473 (5th Cir. 1989). While a trial court always remains free to reconsider a non-final decision "for any reason it deems sufficient," *Austin v. Kroger Texas, L.P.*, 864 F.3d 326, 336 (5th Cir. 2017) (citation omitted), the party who seeks reconsideration should face a heavy burden, in order "to discourage litigants from making repetitive arguments on issues already considered." *Salinas*, 665 F. Supp. 2d at 720.

In this case, Defendant seeks reconsideration of the denial of his motion to withdraw his guilty plea. The legal standards concerning such motions were discussed in my previous Report and Recommendation. (*See* Docket Entry 147, at 3.) As noted in the previous Report, such motions are governed by Federal Rule of Criminal Procedure 11(d)(2)(B), which permits a guilty plea to be withdrawn before sentencing if "the defendant can show a fair and just reason for requesting the withdrawal." FED. R. CRIM. P. 11(d)(2)(B). The factors relevant to this showing are well settled: (1) whether the defendant has asserted his innocence; (2) whether withdrawal would prejudice the Government; (3) whether the defendant delayed in filing the motion and, if so, the reason for the delay; (4) whether withdrawal would substantially inconvenience the court; (5) whether adequate assistance of counsel was available to the defendant; (6) whether the original plea was knowing and voluntary; and (7) whether withdrawal would waste judicial resources. *United States v. McKnight*, 570 F.3d 641, 645–46 (5th Cir. 2009) (quoting *Carr*, 740 F.2d at 344).

These factors are to be considered in their totality, and the Court need not make specific findings with regard to each factor. *United States v. Washington*, 480 F.3d 309, 317 (5th Cir. 2007).[1]

B. *Defendant's Arguments.*

As noted above, Defendant seeks reconsideration of the denial of his motion to withdraw his guilty plea on two main grounds.[2] First, he claims that the Court erred in considering attorney Rodriguez's affidavit in rejecting his prior motion to withdraw. (*See* Docket Entry 175, at 6–7.) Second, he claims that the Court erred in considering post-arrest inculpatory statements he made to law enforcement agents, based on a new affidavit from R.C. Pate, the attorney present at the time of his arrest. (*See id.* at 2–6; *see also* Docket Entry 175-1.) This Report and Recommendation first addresses the issues regarding the Rodriguez affidavit, and then turns to the issues raised by the Pate affidavit.

1. *The Rodriguez affidavit.*

When the Government responded to Defendant's objections to the Report and Recommendation on the motion to withdraw, it included the affidavit from Rodriguez. In that affidavit, Rodriguez disputed Defendant's testimony that he had asserted his innocence; Rodriguez said Defendant never made such an assertion. (*See* Docket Entry 152-6.) In his motion to reconsider, Defendant objects to the Government's filing of the affidavit. He argues that he never

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[1] At the reconsideration hearing, Defendant noted for the record his objection to the appropriateness of utilizing the *Carr* factors in considering a motion to withdraw a guilty plea. The undersigned overruled this objection in light of controlling Fifth Circuit precedent.

[2] Defendant also raises a claim regarding the timing of the District Court's adoption of the undersigned's original recommendation that the guilty plea be accepted. (Docket Entry 175, at 7; *see* Docket Entries 111, 113.) This issue is briefly addressed at note 4, *infra*.

waived the attorney-client privilege regarding any statements he made to Rodriguez, and that, absent such a waiver, consideration of the affidavit violated his Sixth Amendment rights. (Docket Entry 175, at 6.)

Defendant's objection is not a proper basis for reconsideration. Defendant made these same objection to the Rodriguez affidavit when the Government filed it. (*See* Docket Entry 153, at 2.) In adopting the recommendation, the District Court overruled all of Defendant's objections and denied the motion to withdraw. (Docket Entry 155.) The Court's ruling necessarily disposed of Defendant's objections to the affidavit. A motion for reconsideration is not a vehicle to allow parties to "mak[e] repetitive arguments on issues already considered." *Salinas*, 665 F. Supp. 2d at 720.

Even if the Court were to reconsider the objection to the Rodriguez affidavit, it should not change its ruling on the motion to withdraw. As the Government correctly argues, any attorney-client-privilege objection was waived when, at the hearing on the motion to withdraw, Defendant repeatedly testified regarding his statements to Rodriguez. (Docket Entry 180, at 3–4.) And even if the objections to the affidavit were sustained, it would not affect the credibility of Defendant's claims that he asserted his innocence; these claims are contradicted by numerous inculpatory statements Defendant made to the agents in the case, and they are contradicted by his voluntary admission of guilt at the rearraignment before the undersigned. (*See* Docket Entry 141, at 7, 16.) This admission, made under oath in open court, carries "a strong presumption of veracity." *McKnight*, 570 F.3d at 649 (citation omitted).

Finally, the objection to the Rodriguez affidavit goes to only one of the seven *Carr* factors to considered—whether Defendant asserted his innocence. *See id.* at 645. As the undersigned

found in his previous Report and Recommendation, five of the six other factors also weighed in favor of denying the motion to withdraw. (Docket Entry 147, at 3–5.)

For all these reasons, Defendant's objections to the Rodriguez affidavit do not support reconsideration of this motion to withdraw his guilty plea.

2. *The Pate affidavit.*

Defendant also seeks reconsideration in light of an affidavit obtained from R.C. Pate, the attorney who was present at the time of Defendant's federal arrest in February 2018. (Docket Entry 175-1.) According to the affidavit, Pate represented Defendant on an asset-forfeiture matter, and he was present when the arrest warrant in this case was executed. (*Id.*) In his affidavit, Pate states that the arresting agents would not allow Defendant to speak with him privately, and that Defendant invoked his Fifth Amendment rights to refuse to speak to the agents without an attorney present. (*Id.*) In light of his invocation of rights, Defendant claims that his subsequent inculpatory statements to the arresting agents were inadmissible; he argues that the statements should not have been presented to the Court at the hearing on the motion to withdraw the guilty plea, or relied upon by the undersigned in recommending denial of that motion. (Docket Entry 175, at 3–4.)

The Government claims that Defendant waived any right to suppress his statements when he pleaded guilty. (Docket Entry 180, at 4.) Undersigned disagrees. It is generally true that a defendant who pleads guilty voluntarily and unconditionally waives his right to challenge any non-jurisdictional defects in the criminal proceedings that occurred before the plea—including any constitutional violation that might support a motion to suppress. *United States v. Stevens*, 487 F.3d 232, 238 (5th Cir. 2007); *United States v. Wise*, 179 F.3d 184, 186 (5th Cir. 1999). In this

case, however, Defendant disputes the voluntariness of the plea. To the extent that his statements were considered in deciding whether the plea was voluntary, it is far from clear that Defendant has waived Fifth or Sixth Amendment challenges to the statements. Indeed, in another Sixth Amendment context, the Fifth Circuit has stated that non-jurisdictional defects are waived by guilty plea "*except* insofar as [they] relate[ ] to the voluntariness of the giving of the guilty plea." *Smith v. Estelle*, 711 F.2d 677, 682 (5th Cir. 1983) (discussing right to effective assistance) (emphasis in original).

Even if the Fifth and Sixth Amendment challenges are not waived, however, they nevertheless fail to support reconsideration. Under *Edwards v. Arizona*, 451 U.S. 477 (1981), and *Michigan v. Jackson*, 475 U.S. 625 (1986), once an arrested defendant invokes Fifth Amendment and Sixth Amendment rights, the police may not interrogate the defendant in the absence of counsel, and the defendant cannot validly waive his rights to counsel during a "police initiated interrogation" concerning the charged offense. *United States v. Avants*, 278 F.3d 510, 514–15 (5th Cir. 2002) (citations omitted). However, "[i]f the defendant voluntarily and without police prompting initiates a conversation about the charged offense . . . any resulting statements are admissible against the defendant." *Id.* (citations omitted). As shown in a video recording of Defendant's statements, that is precisely what happened in this case. The video shows that Defendant clearly re-initiated conversations with the agents after having invoked his rights. Indeed, the agents expressly told him that, because he had invoked his rights, they could not speak to him unless he initiated the conversation, and when he said he wanted to speak to them, they asked him to write out and sign statement making his wishes clear. As the Government correctly argues, "the video shows that [Defendant] sought the interaction with the agents, re-signed the

waiver on the video, and in his own handwriting wrote that he wanted to speak." (Docket Entry 180, at 5.) Given Defendant's re-initiation of the interaction with agents, the undersigned's consideration of Defendant's statements at the guilty-plea-withdrawal hearing did not violate his Fifth or Sixth Amendment rights.

Defendant argues that the video did not show the entirety of his interaction with the agents, and that the agents "pressured, threatened, and prodded" him until the statements were obtained. Contrary to this claim, no evidence in the record shows that the agents initiated any conversation with Defendant *after* he invoked his rights; the record evidence makes clear that it was Defendant who initiated the conversation that led to him waiving his rights and making inculpatory statements.[3]

Finally, even if the statements should not have been considered at the hearing, any such error is harmless. Like the Rodriguez affidavit discussed *supra,* the challenged post-arrest statements relate primarily to the question of whether Defendant had credibly asserted his innocence; as noted above, any such assertion is belied by his statements to the contrary in open court at his guilty plea. Moreover, even if accepted, the assertion of innocence would implicate only one of the seven *Carr* factors that the Court must consider in deciding a motion to withdraw.

[3] At the hearing on the motion to reconsider, Defendant offered an unsworn affidavit from codefendant LaShonda O'Neill indicating that both she and Defendant had been threatened by the agents with lengthy jail sentences if they did not cooperate. *See* Defendant's Ex. 4. It is not clear from the affidavit, however, if Defendant O'Neill alleges that the threats occurred after Defendants invoked their rights. In any event, the affidavit should not be considered; at the hearing, the undersigned sustained the Government's objections to affidavit on the grounds that it was not sworn and that O'Neill was not present for cross-examination.

Given all these circumstances, Defendant's belated Fifth and Sixth Amendment challenges to his post-arrest statements do not justify reconsideration.[4]

IV. Conclusion and Recommendation.

For the reasons set out above, I recommend that Defendant's Sealed Motion to Reconsider Motion to Withdraw Guilty Plea (Docket Entry 175) be **DENIED**.

V. Instruction for Service and Notice for Right to Object.

The United States District Clerk shall serve a copy of this Report and Recommendation on all parties by electronic transmittal to all parties represented by attorneys registered as a "filing user" with the clerk of court. Written objections to this report and recommendation must be filed **within fourteen (14) days** after being served with a copy of same, unless this time period is modified by the district court. 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72(b). The party shall file the objections with the clerk of the court, and serve the objections on all other parties. A party filing objections must specifically identify those findings, conclusions or recommendations to which objections are being made and the basis for such objections; the district court need not consider frivolous, conclusive or general objections. A party's failure to file written objections to the proposed findings, conclusions and recommendations contained in this report shall bar the party from a *de novo* determination by the district court. *Thomas v. Arn*, 474 U.S. 140, 149–52

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[4] In passing, Defendant also claims that the District Court erred by accepting the undersigned's recommendation regarding his guilty plea before the 14-day objection time passed. (Docket Entry 175, at 7.) Defendant raised this issue in his original motion to withdraw his plea. (Docket Entry 128, at 2.) The undersigned did not discuss the issue in the previous Report and Recommendation (*see* Docket Entry 147), and Defendant elected not to pursue the matter in his objections to that Report (*see* Docket Entry 149). As Defendant chose not to pursue the issue at the time of the Court's previous ruling, the claim cannot now provide a basis for reconsideration.

(1985); *Acuña v. Brown & Root, Inc.,* 200 F.3d 335, 340 (5th Cir. 2000). Additionally, failure to file timely written objections to the proposed findings, conclusions and recommendations contained in this Report and Recommendation shall bar the aggrieved party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court. *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1428–29 (5th Cir. 1996) (en banc).

SIGNED on April 23, 2021.

Henry J. Bemporad
United States Magistrate Judge

APPENDIX E

District Court Order

Denying Motion to Reconsider,

(May 17, 2021)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

UNITED STATES OF AMERICA	)	
	)	
	)	
v.	)	CRIMINAL NO. SA-18-CR-68-OG
	)	
	)	
DARWIN POWELL	)	
	)	

ORDER

On this date, the Court considered the report and recommendation of United States Magistrate Judge Henry J. Bemporad, filed on April 23, 2021. Docket no. 210. Defendant filed objections to the recommendation. Docket no. 215.

After reviewing the record and the applicable law, the Court finds that the Magistrate Judge's recommendation should be and is hereby ACCEPTED and Defendant's motion to reconsider the motion to withdraw guilty plea (docket no. 175) is DENIED for the reasons stated in the recommendation.

IT IS SO ORDERED this 17 day of May, 2021.

ORLANDO L. GARCIA
CHIEF U.S. DISTRICT JUDGE

APPENDIX F

Powell Letter to District Court,

(Nov. 5, 2019)

United States District Court
Western District of Texas
San Antonio Division

NOV. 5, 2019

United States of America § Case Number: SA:18-CR-00068-OLG
§
vs. §
§
(1) Darwin Powell §
(Defendant)

Motion To Request Substitute Counsel

I, Darwin Powell, acting on my own behalf (pro-se) do solomly request that my current attorney James Rodriguez be removed from representing my case upon the receipt of this correspondance. There are current (and past) irreconsilable differences that affect his ability to properly represent me. Due to the conflicts of interest it is in my best interest to request that the United States District Court appoint me new counsel. I have a right to "proper" representation and it is my belief that I have not been afforded such. Due to the "ineffective assistant Counsel" I have entered a plea of Guilty under 'False Pretenses' thus meriting the removal of my current attorney and the withdrawl of said plea.

I pray that the Honorable Judge Orlando Garcia of said United States District Court, Western District of Texas exercises due diligence in accepting and Granting my request in plight of a fair trial.

Respectfully Submitted,
Darwin Powell

DARWIN POWELL
WD: 24082280