

No. _____

In the
Supreme Court of the United States of America

RHONDA GITTENS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On a Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

**Appendix to
Petition for Writ of Certiorari**

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Provisions of Law Involved

The Fifth Amendment to the United States Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Federal Rule of Criminal Procedure 11(d) (originally Rule 32(d)) provides:

Withdrawing a Guilty or Nolo Contendere Plea. A defendant may withdraw a plea of guilty or nolo contendere:

- (1) before the court accepts the plea, for any reason or no reason; or
- (2) after the court accepts the plea, but before it imposes sentence if:
 - (A) the court rejects a plea agreement under 11(c)(5); or
 - (B) the defendant can show a fair and just reason for requesting the withdrawal.

The 1983 Advisory Committee Note to Federal Rule of Criminal Procedure 32(d) (now Rule 11(d)), as it pertains to *pre-sentencing* motions to withdraw a guilty plea, provides:

The amendment to Rule 32(d) is intended to clarify (i) the standard applicable to plea withdrawal under this rule, and (ii) the circumstances under which the appropriate avenue of relief is other than a withdrawal motion under this rule. Both of these matters have been the source of considerable confusion under the present rule. In its present form, the rule declares that a motion to withdraw a plea of guilty or nolo contendere may be made only before sentence is imposed, but then states the standard for permitting withdrawal after sentence. In fact, “there is no limitation upon the time within which relief thereunder may, after sentencing, be sought.” *United States v. Watson*, 548 F.2d 1058 (D.C.Cir. 1977). It has been critically stated that “the Rule offers little guidance as to the applicable standard for a pre-sentence withdrawal of plea,” *United States v. Michaelson*, 552 F.2d 472 (2d Cir. 1977), and that as a result “the contours of [the presentence] standard are not easily defined.” *Bruce v. United States*, 379 F.2d 113 (D.C.Cir. 1967).



The first sentence of the amended rule incorporates the “fair and just” standard which the federal courts, relying upon dictum in *Kercheval v. United States*, 274 U.S. 220 (1927), have consistently applied to presentence motions. See, e.g., *United States v. Strauss*, 563 F.2d 127 (4th Cir. 1977); *United States v. Bradin*, 535 F.2d 1039 (8th Cir. 1976); *United States v. Barker*, 514 F.2d 208 (D.C.Cir. 1975). Under the rule as amended, it is made clear that the defendant has the burden of showing a “fair and just” reason for withdrawal of the plea. This is consistent with the prevailing view, which is that “the defendant has the burden of satisfying the trial judge that there are valid grounds for withdrawal,” see *United States v. Michaelson*, [552 F.2d 472 (2d Cir. 1977)], and cases cited therein. (Illustrative of a reason which would meet this test but would likely fall short of the § 2255 test is where the defendant now wants to pursue a certain defense which he for good reason did not put forward earlier, *United States v. Barker*, *supra*.)

Although “the terms ‘fair and just’ lack any pretense of scientific exactness,” *United States v. Barker*, *supra*, guidelines have emerged in the appellate cases for applying this standard. Whether the movant has asserted his legal innocence is an important factor to be weighed, *United States v. Joslin*, 434 F.2d 526 (D.C.Cir. 1970), as is the reason why the defenses were not put forward at the time of original pleading. *United States v. Needles*, 472 F.2d 652 (2d Cir. 1973). The amount of time which has passed between the plea and the motion must also be taken into account.

A swift change of heart is itself strong indication that the plea was entered in haste and confusion * * *. By contrast, if the defendant has long delayed his withdrawal motion, and has had the full benefit of competent counsel at all times, the reasons given to support withdrawal must have considerably more force.

United States v. Barker, supra.

If the defendant establishes such a reason, it is then appropriate to consider whether the government would be prejudiced by withdrawal of the plea. Substantial prejudice may be present for a variety of reasons. See *United States v. Jerry*, 487 F.2d 600 (3d Cir. 1973) (physical evidence had been discarded); *United States v. Vasquez-Velasco*, 471 F.2d 294 (9th Cir. 1973) (death of chief government witness); *United States v. Lombardozzi*, 436 F.2d 878 (2d Cir. 1971) (other defendants with whom defendant had been joined for trial had already been tried in a lengthy trial); *Farnsworth v. Sanford*, 115 F.2d 375 (5th Cir. 1940) (prosecution had dismissed 52 witnesses who had come from all over the country and from overseas bases).

There is currently some disparity in the manner in which presentence motions to withdraw a guilty plea are dealt with. Some courts proceed as if any desire to withdraw the plea before sentence is “fair and just” so long as the government fails to establish that it would be prejudiced by the withdrawal. Illustrative is *United States v. Savage*, 561 F.2d 554 (4th Cir. 1977), where the defendant pleaded guilty pursuant to a plea agreement that the government would recommend a sentence of 5 years. At the sentencing hearing, the trial judge indicated his unwillingness to follow the government’s recommendation, so the defendant moved to withdraw his plea. That motion was denied. On appeal, the court held that there had been no violation of Rule 11, in that refusal to accept the government’s recommendation does not constitute a rejection of the plea agreement. But the court then proceeded to hold that absent any showing of prejudice by the government, “the defendant should be allowed to withdraw his plea”; only upon such a showing by the government must the court “weigh the defendant’s reasons for seeking to withdraw his plea against the prejudice which the government will suffer.” The other view is that there is no occasion to inquire into the matter of prejudice unless the defendant first shows a good reason for being allowed to withdraw his plea. As stated in *United States v. Saft*, 558 F.2d 1073 (2d Cir. 1977): “The Government is not required to show prejudice when a defendant has shown no sufficient grounds for permitting withdrawal of a guilty plea, although such prejudice may be considered by the district court in exercising its discretion.” The second sentence of the amended rule, by requiring that the defendant show a “fair and just” reason, adopts the *Saft* position and rejects that taken in *Savage*.

The *Savage* position, as later articulated in *United States v. Strauss*, supra, is that the “sounder view, supported by both the language of the rule and by the reasons for it, would be to allow withdrawal of the plea prior to sentencing unless the prosecution has been substantially prejudiced by reliance upon the defendant’s plea.” (Quoting 2 C. Wright, FEDERAL PRACTICE AND PROCEDURE § 538, at 474–75 (1969)). Although that position may once have been sound, this is no longer the case in light of the recent revisions of Rule 11. Rule 11 now provides for the placing of plea agreements on the record, for full inquiry into the voluntariness of the plea, for detailed advice to the defendant concerning his rights and the consequences of his plea and a determination that the defendant understands these matters, and for a determination of the accuracy of the plea. Given the great care with which pleas are taken under this revised Rule 11, there is no reason to view pleas so taken as merely “tentative,” subject to withdrawal before sentence whenever the government cannot establish prejudice.

Were withdrawal automatic in every case where the defendant decided to alter his tactics and present his theory of the case to the jury, the guilty plea would become a mere gesture, a temporary and meaningless formality reversible at the defendant’s whim. In fact, however, a guilty plea is no such trifle, but “a grave and solemn act,” which is “accepted only with care and discernment.”

United States v. Barker, supra, quoting from *Brady v. United States*, 397 U.S. 742 (1970).

The facts of the *Savage* case reflect the wisdom of this position. In *Savage*, the defendant had entered into a plea agreement whereby he agreed to plead guilty in exchange for the government’s promise to recommend a sentence of 5 years, which the defendant knew was not binding on the court. Yet, under the approach taken in *Savage*, the defendant remains free to renege on his plea bargain, notwithstanding full compliance therewith by the attorney for the government, if it later appears to him from the presentence report or the comments of the trial judge or any other source that the court will not follow the government’s recommendation. Having bargained for a recommendation pursuant to Rule 11(e)(1)(B), the defendant should not be entitled, in effect, to unilaterally convert the plea agreement into a Rule 11(e)(1)(C) type of agreement (i.e., one with a guarantee of a specific sentence which, if not given, permits withdrawal of the plea).

The first sentence of subdivision (d) provides that the motion, to be judged under the more liberal “fair and just reason” test, must have been made before sentence is imposed, imposition of sentence is suspended, or disposition is had under 18 U.S.C. § 4205 (c). The latter of these has been added to the rule

to make it clear that the lesser standard also governs prior to the second stage of sentencing when the judge, pursuant to that statute, has committed the defendant to the custody of the Attorney General for study pending final disposition. Several circuits have left this issue open, e.g., *United States v. McCoy*, 477 F.2d 550 (5th Cir. 1973); *Callaway v. United States*, 367 F.2d 140 (10th Cir. 1966); while some have held that a withdrawal motion filed between tentative and final sentencing should be judged against the presentence standard, *United States v. Barker*, 514 F.2d 208 (D.C.Cir. 1975); *United States v. Thomas*, 415 F.2d 1216 (9th Cir. 1969).

Inclusion of the §4205(c) situation under the presentence standard is appropriate. As explained in *Barker*:

Two reasons of policy have been advanced to explain the near-presumption which Rule 32(d) erects against post-sentence withdrawal motions. The first is that post-sentence withdrawal subverts the “stability” of “final judgments.” * * * The second reason is that the post-sentence withdrawal motion often constitutes a veiled attack on the judge’s sentencing decision; to grant such motions in lenient fashion might undermine respect for the courts and fritter away the time and painstaking effort devoted to the sentence process.

* * * Concern for the “stability of final judgments” has little application to withdrawal motions filed between tentative and final sentencing under Section 4208(b) [now 4205(c)]. The point at which a defendant’s judgment of conviction becomes “final” for purposes of appeal—whether at tentative or at final sentencing—is wholly within the defendant’s discretion. * * * Concern for the integrity of the sentencing process is, however, another matter. The major point, in our view, is that tentative sentencing under Section 4208(b) [now 4205(c)] leaves the defendant ignorant of his final sentence. He will therefore be unlikely to use a withdrawal motion as an oblique attack on the judge’s sentencing policy. The relative leniency of the “fair and just” standard is consequently not out of place.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 16-14572-DD

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

RHONDA PEGGY GITTENS,

Defendant - Appellant.

Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: TJOFLAT, MARCUS and WILLIAM PRYOR, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:


UNITED STATES CIRCUIT JUDGE

ORD-42

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-14572
Non-Argument Calendar

D.C. Docket No. 0:15-cr-60181-BB-2

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RHONDA PEGGY GITTENS,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(July 5, 2017)

Before TJOFLAT, MARCUS and WILLIAM PRYOR, Circuit Judges.

PER CURIAM:

Rhonda Peggy Gittens appeals her convictions and 75-month total sentence for conspiring to defraud and commit an offense against the United States, in violation of 18 U.S.C. § 371; aggravated identity theft, in violation of 18 U.S.C. §

1028A(a)(1); and possession of device-making equipment, in violation of 18 U.S.C. § 1029(a)(4). On appeal, she argues that: (1) the district court misapplied the law when it dismissed her motion to withdraw her guilty plea; and (2) the district court plainly erred at sentencing when it denied a reduction in her offense level based on acceptance of responsibility. After careful review, we affirm.

We review the denial of a motion to withdraw a guilty plea for abuse of discretion. United States v. McCarty, 99 F.3d 383, 385 (11th Cir. 1996). District court findings concerning acceptance of responsibility are ordinarily reviewed for clear error. United States v. Calhoon, 97 F.3d 518, 531 (11th Cir. 1996). However, when a defendant does not object to an issue in front of the district court, we review only for plain error. United States v. Siegelman, 786 F.3d 1322, 1330 (11th Cir. 2015). To prevail under the plain-error standard, a defendant must show (1) that there was an error, (2) that it was plain, and (3) that it affected his substantial rights. United States v. Felts, 579 F.3d 1341, 1344 (11th Cir. 2009). Even if all three requirements are met, we may exercise our discretion to correct the error only if it seriously affected the fairness, integrity, or public reputation of the judicial proceedings. United States v. Gonzalez, 834 F.3d 1206, 1218 (2016).

First, we are unpersuaded by Gittens's claim that the district court misapplied the law when it dismissed her motion to withdraw her guilty plea. The Federal Rules of Criminal Procedure provide that a defendant may withdraw a plea

prior to sentencing if the defendant can show a “fair and just reason” for requesting a withdrawal. Fed. R. Crim. P. 11(d)(2)(B). In determining whether the defendant has met her burden to show that a plea should be withdrawn, the district court may consider the totality of the circumstances surrounding the plea, including: (1) whether close assistance of counsel was available; (2) whether the plea was knowing and voluntary; (3) whether judicial resources would be conserved; and (4) whether the government would be prejudiced if the defendant were allowed to withdraw the plea. United States v. Buckles, 843 F.2d 469, 471-72 (11th Cir. 1988). There is a strong presumption that the statements made during a plea colloquy are true. United States v. Medlock, 12 F.3d 185, 187 (11th Cir. 1994).

Here, we find no merit to Gittens’s argument that the district court used an incorrect standard in evaluating her motion to withdraw her guilty plea. For starters, the totality-of-the-circumstances test from Buckles is a proper means for the district court to evaluate whether the defendant met her burden under Rule 11, and that is the test the district court applied. See Buckles, 843 F.2d at 472; Fed. R. Crim. P. 11(d)(2)(B). Moreover, during the hearing on the motion, the district court said that asking about the merits of the case was relevant to whether Gittens could show a fair and just reason for the withdrawal of her guilty plea, and later said that Gittens had the burden under Rule 11 to show a fair and just reason to

withdraw. These comments reveal that the court properly considered the “fair and just” standard of Rule 11. See Fed. R. Crim. P. 11(d)(2)(B).

In addition, when the district court applied the totality-of-the-circumstances test and denied Gittens’s motion to withdraw her guilty plea, it did not abuse its discretion. See McCarty, 99 F.3d at 385. As for the first prong of the test, the record reveals that Gittens received close assistance of counsel from her attorney. See Buckles, 843 F.2d at 472. Indeed, Gittens admitted, under oath at the plea hearing and at the motion hearing, that she had reviewed the case with her attorney during three in-person meetings and in several e-mails, had received discovery and other filings before pleading guilty, and was satisfied with his representation. The attorney also testified that he had discussed the case with her and had reviewed the plea agreement with her before the hearing.

As for the second prong, the record supports the district court’s determination that the plea was knowing and voluntary. Among other things, the district court informed Gittens of the statutory sentencing range, the effect of the guidelines, and the rights she waived by pleading guilty. Gittens conceded at the plea hearing that no one forced her to plead guilty, that she was in fact guilty, and that she agreed with the facts presented. There is a strong presumption that all her statements at the plea colloquy were true. See Medlock, 12 F.3d at 187. And she does not even argue on appeal that her plea was not knowing and voluntary.

As for the third and fourth parts of the test, the government argued at the hearing on the motion to withdraw that it would be difficult to gather witnesses and evidence for two trials, and that judicial resources would not be conserved by allowing Gittens to proceed to two different trials. Gittens does not address either of these two prongs on appeal.

In short, the district court had discretion to apply the Buckles totality-of-circumstances test to Gittens's request to withdraw her plea. On the record before us, it did not abuse its discretion by focusing on the first two factors over the second two, or in determining that there was no fair and just reason to permit withdrawal. See McCarty, 99 F.3d at 385; Fed. R. Crim. P. 11(d)(2)(B).

We also are unconvinced by Gittens's claim that the district court plainly erred at sentencing when it denied a reduction in her offense level based on acceptance of responsibility. Section 3E1.1 provides that, if the defendant clearly demonstrates acceptance of responsibility for the offense, the offense level should be decreased by two. U.S.S.G. § 3E1.1(a). Additionally, upon motion of the government stating that the defendant has assisted authorities by timely notifying authorities of her intention to plead guilty, thereby permitting the government to avoid trial and permitting the government and the court to allocate their resources efficiently, the offense level may be decreased by one. Id. § 3E1.1(b).

A district court's determination that a defendant is not entitled to acceptance of responsibility will not be set aside unless the facts in the record clearly establish that a defendant has accepted personal responsibility. United States v. Sawyer, 180 F.3d 1319, 1323 (11th Cir. 1999). Although a guilty plea will constitute significant evidence of acceptance of responsibility, the evidence may be outweighed by conduct that is inconsistent with acceptance. United States v. Lewis, 115 F.3d 1531, 1537 (11th Cir. 1997); U.S.S.G. § 3E1.1 comment (n.3).

Because Gittens did not challenge the district court's failure to apply a reduction for acceptance of responsibility pursuant to § 3E1.1(a) and (b), we review only for plain error. See Siegelman, 786 F.3d at 1330. Here, the record shows that despite her initial guilty plea, Gittens later moved to withdraw the guilty plea. Because this conduct is inconsistent with acceptance of responsibility, we cannot say that these facts clearly establish that Gittens accepted personal responsibility. See Sawyer, 180 F.3d at 1323; Lewis, 115 F.3d at 1537. Thus, the district court did not plainly err by failing to apply the reduction.

Finally, as for Gittens's argument that U.S.S.G. § 3E1.1 is unconstitutional because it pressures defendants to plead guilty, she has not raised a valid constitutional argument. In United States v. Henry, 883 F.2d 1010, 1010–12 (11th Cir. 1989), we held that the denial of a § 3E1.1 reduction is not impermissible punishment for the exercise of Fifth or Sixth Amendment rights. We explained

that § 3E1.1 may affect how criminal defendants choose to exercise their constitutional rights, but not every burden on the exercise of a constitutional right and not every encouragement to waive a right is invalid. Id. at 1011. We've also said that the district court's consideration, at sentencing, of the defendants' denial of culpability at trial does not impermissibly punish the defendant for exercising her constitutional right to stand trial. United States v. Jones, 934 F.2d 1199, 1200 (11th Cir.1991). Thus, because we've already held that § 3E1.1 is not unconstitutional, we affirm. See Henry, 883 F.2d at 1101; Jones, 934 F.2d at 1200.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION
CASE NO. 0:15-cr-60181-BB-2

UNITED STATES OF AMERICA,

Plaintiff,

April 13, 2016
5:39 p.m.

vs.

RHONDA PEGGY GITTENS,

Defendant.

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TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE BETH BLOOM
UNITED STATES DISTRICT JUDGE

Appearances:

FOR THE GOVERNMENT: UNITED STATES ATTORNEY'S OFFICE
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W I T N E S S

ON BEHALF OF THE DEFENDANT: PAGE

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1 (Call to order of the Court, 5:39 p.m.)

2 THE COURT: Good afternoon. Go ahead and have a seat.

3 Can we close the blinds. I see the ...

4 Let me just get into Ms. Gittens case -- yeah. Those
5 are actually the notes from the jurors, so those are just
6 exhibits.

7 Okay, Toniann.

8 COURTROOM DEPUTY: Calling Case Number, 15-60181,
9 Criminal, United States of America v. Rhonda Peggy Gittens.

10 Counsel, please state your appearances for the record.

11 MR. KARADBIL: Good evening, Your Honor. Neil
12 Karadbil on behalf of the Government.

13 MR. TORTELLA: Good evening, Your Honor. Greg
14 Tortella on behalf of the United States.

15 MS. PUGLISI: Sabrina Puglisi, on behalf of Rhonda
16 Gittens, who is present before the Court.

17 THE COURT: Good afternoon to each of you. Thank you
18 for accommodating our trial schedule. I realize this was
19 scheduled at 5:00 and we changed the time.

20 Ms. Gittens, before the Court is your motion, Docket
21 Entry 81, to withdraw your plea of guilty. I have reviewed
22 Docket Entry 81, as well as the Government's response.

23 And as the Defendant bears the burden, Ms. Puglisi,
24 whenever you're ready to proceed.

25 MS. PUGLISI: Yes.

1 Judge, I would call Rhonda Gittens. I don't know if
2 you want her to go to the witness stand or how you want to do
3 it.

4 THE COURT: Yes. Thank you.

5 RHONDA PEGGY GITTENS, DEFENDANT, SWORN

6 COURTROOM DEPUTY: Thank you.

7 Please state your name, for the record.

8 THE DEFENDANT: Rhonda Gittens.

9 COURTROOM DEPUTY: Thank you. You may have a seat.

10 DIRECT EXAMINATION

11 BY MS. PUGLISI:

12 Q. Ms. Gittens, did you take a plea to the charges in the
13 Superseding Information in this case?

14 A. Yes.

15 Q. Was that done on January 22nd, 2016?

16 A. Yes.

17 Q. Make sure you speak up loud enough, so people can hear you,
18 okay?

19 Prior to entering into your plea in court, did you enter a
20 plea through a written agreement between yourself and the
21 United States Government?

22 A. Yes.

23 Q. And did you read and review that agreement, that Plea
24 Agreement, prior to signing it?

25 A. Yes.

1 Q. And on the last page of that agreement, did you, in fact,
2 sign it?

3 A. Yes.

4 Q. Did you receive a Factual Proffer, which set forth facts
5 alleged that you had committed?

6 A. Yes.

7 Q. Did you review that -- read it, and review it?

8 A. Yes.

9 Q. Did you, in fact, sign it on the last page?

10 A. Yes.

11 Q. On the day, January 22nd, 2016, you came before this Court.
12 Do you remember that?

13 A. Yes.

14 Q. And prior to entering a change of plea, or prior to the
15 Court accepting your change of plea, Her Honor asked you
16 certain questions and you answered certain questions?

17 A. Yes.

18 Q. Do you recall -- and I want to go through some of those
19 questions. Do you recall she asked you, Page 10: "Are you
20 fully satisfied with the counsel, representation, and advice
21 given to you in this case by your attorney, Mr. Kritzer," to
22 which, you answered: "Yes"?

23 A. Yes.

24 Q. And do you recall Page 11 she asked: "Did you have a full
25 opportunity to discuss it with Mr. Kritzer and have all your

1 questions answered," to which, you said: "Yes"?

2 A. Yes.

3 Q. Do you recall her asking you: "Has anyone forced you or
4 threatened you to enter into this plea," to which, you
5 answered: "No"?

6 A. Yes.

7 Q. Is it true that the Court read to you the Superseding
8 Information in its entirety?

9 A. Yes.

10 Q. Do you recall the Court asking, with respect to Title 18,
11 United States Code, Section 371, referring to Page 22 of the
12 transcript: "Ms. Gittens, how do you plead to Count 1 of the
13 Superseding Information," to which, you answered: "Guilty"?

14 A. Yes.

15 Q. The Court asked: "Has anyone forced you or threatened you
16 to enter your plea of guilty," to which, you answered: "No"?

17 A. Yes.

18 Q. The Court asked: "Has anyone made any promises or
19 assurances to you, other than what's contained in the Plea
20 Agreement, to persuade you to enter your plea of guilty," to
21 which, you answered: "No"?

22 A. Yes.

23 Q. "Are you entering a plea of guilty on your own free will,"
24 to which, you answered: "Yes"?

25 A. Yes.

1 Q. "Are you entering a plea of guilty to because you have, in
2 fact, committed this offense," to which, you answered: "Yes"?

3 A. Yes.

4 Q. The Court then, on Page 23, asked: "Ms. Gittens, are you
5 entering a plea of guilty because you have, in fact, committed
6 the offense of conspiracy to defraud and commit an offense
7 against the United States," to which, you answered: "Yes"?

8 A. Yes.

9 Q. The Court then, on Page 25, asked you with respect to Count
10 11, the means of identification, using Social Security number
11 ending in 4386, belonging to BF, used to submit a fraudulent
12 federal income tax return: "As to this count, how do you plead
13 to that charge," to which you answered: "Guilty." Do you
14 recall that?

15 A. Yes.

16 Q. She asked a series of questions pertaining to that,
17 specifically: "Has anyone forced you or threatened you to
18 enter your plea of guilty to this charge?" You answered:
19 "No"?

20 A. Yes.

21 Q. "Has anyone made any promises or assurances to you, other
22 than what's set forth in the Plea Agreement, to persuade you to
23 plead guilty," to which, you answered: "No"?

24 A. Yes.

25 Q. "Are you entering a plea of guilty on your own free will?"

1 You said: "Yes"?

2 A. Yes.

3 Q. "Are you entering a plea of guilty because you have, in
4 fact, committed this offense?"

5 Yes?

6 A. Yes.

7 Q. The Court then asked you with respect to charged Count 16,
8 specifically in violation of Title 18, Sections 1029,
9 Subsection A, Subsection 4 and 2. Did anyone -- how did you
10 plead to that charge, Page 28. You answered: "Guilty;" is
11 that right?

12 A. Yes.

13 Q. The Court asked: "Has anyone forced you or threatened you
14 to enter your plea of guilty?" You answered: "No"?

15 A. Yes.

16 Q. "Has anyone made any promises or assurances to you, other
17 than what's contained in the Plea Agreement, to persuade you to
18 plead guilty?" You said: "No"?

19 A. Yes.

20 Q. "Are you entering a plea of guilty on your free will?" You
21 said: "Yes"?

22 A. Yes.

23 Q. "Are you entering a plea of guilty because you have, in
24 fact, committed the offense of possession of device-making
25 equipment?" You said: "Yes"?

1 A. Yes.

2 Q. The Court asked if you had reviewed the -- or had
3 discussions and reviewed the evidence in support of the
4 elements of the charges with your attorney at the time, Glenn
5 Kritzer, and you answered: "Yes;" is that right?

6 A. Yes.

7 Q. The Government was asked to give a recitation of the facts
8 against you. After that was done, the Court asked you:
9 "Ms. Gittens, did you hear the statement of facts Mr. Karadbil
10 presented to the Court," and you answered: "Yes"?

11 A. Yes.

12 Q. She asked if you were in agreement with those facts. You
13 said: "Yes"?

14 A. Yes.

15 Q. She asked if those -- "Are those facts true?" You said:
16 "Yes"?

17 A. Yes.

18 Q. She asked if you were in agreement with the facts and again
19 if those facts were true, and you said: "Yes"?

20 A. Yes.

21 Q. And then the Court accepted your guilty plea; is that
22 right?

23 A. Yes.

24 Q. At any time, did you advise your attorney that you were
25 innocent of the charges?

1 A. Yes.

2 Q. When did you do that?

3 A. On our first meeting, immediately after I was released.

4 Q. And on how many occasions did you meet with Mr. Kritzer?

5 A. About three times.

6 Q. And during that period of time, did you advise him -- did
7 you continue to advise him that you were innocent?

8 A. Yes.

9 Q. At any time, did you advise him that you were guilty of the
10 charges?

11 A. No.

12 Q. So why did you plead guilty?

13 A. Mr. Kritzer advised me that it was in my best interest to
14 take the plea, even though I was innocent.

15 Q. And why did he feel it was in your best interest?

16 A. Because he stated that no one would believe that a smart
17 individual, as myself, having a master's degree, didn't know
18 anything about what was going on, that a jury would not believe
19 me.

20 Q. Based upon your discussions with Mr. Kritzer, and his
21 belief that it was in your best interest to take a plea, did
22 you, in fact, come before the Court and accept the plea with --
23 that was offered by the Government?

24 A. Yes.

25 Q. After you took the plea -- I mean, we're here today for you

1 to withdraw your plea, so let me ask you this: At the time
2 that you answered all these questions, which we reviewed, that
3 you clearly stated you were guilty to the Court -- are you
4 guilty?

5 A. No.

6 Q. And why did you answer "Yes" to being guilty, when you, in
7 fact, are not?

8 A. Because I was informed that it was in my best interest to
9 accept the plea.

10 Q. At what point did that change for you?

11 A. Immediately after I accepted the plea, I knew I had made a
12 big mistake in accepting something I wasn't guilty to.

13 Q. What did you do?

14 A. I seeked advice from several attorneys. One of them was
15 David Marcus, who advised me that I needed to let my attorney
16 know that I would like to withdraw my plea.

17 Q. And how quickly after you entered your change of plea did
18 you seek the advice of other attorneys?

19 A. The next day.

20 Q. On January 30th, one week after you took your plea, did you
21 advise Mr. Kritzer via email that you wanted to withdraw your
22 plea?

23 A. Yes.

24 MS. PUGLISI: And Judge, I'm referring to Docket Entry
25 Number 58, which was the emergency motion to change counsel

1 that Ms. Gittens filed on February 3rd. But within it are
2 exhibits attached. It's a January 30th email to Mr. Kritzer
3 from Ms. Gittens.

4 BY MS. PUGLISI:

5 Q. And at that time, do you say to Mr. Kritzer: "Please file
6 a motion to withdraw my plea of guilty on my case effective
7 immediately. I am innocent, and I feel that I don't have your
8 support and was forced to do something, despite the fact that I
9 repeatedly informed you that I am innocent?"

10 A. Yes.

11 Q. And later in that same email, you stated: "You repeatedly
12 told me that even though I was innocent that no one would
13 believe me"?

14 A. Yes.

15 Q. And Mr. Kritzer responded on February 1st, 2016, stating:
16 "I never said that I would not try your case. I told you that
17 we could not possibly win both cases, that the Government had
18 very strong evidence, and that it was a very good plea deal,
19 especially for two cases. You made the decision to enter the
20 guilty plea after I recommended it."

21 Is that some of what he advised you at that time?

22 A. Yes.

23 Q. And did you respond back to him: "In response to your
24 phone call on Saturday, on my request to withdraw my guilty
25 plea, I would like to have the Court and prosecutor notified

1 immediately, with no delay, that I will be seeking another
2 attorney, as you advised me, because you refused to take my
3 case to trial. Much to my surprise and disappointment, you
4 have still advised me that I should plead guilty to something I
5 am innocent for because, quote, the Government does not lie and
6 they indicted me because it is true, end quote. I do not want
7 to proceed with an attorney that does not believe me and is
8 advising me to proceed with a guilty plea when I am innocent."

9 Did you advise him of that?

10 A. Yes.

11 Q. And on February 3rd, 2016, did you file an emergency motion
12 to change counsel?

13 A. Yes.

14 Q. And why did you do that?

15 A. Because Mr. Kritzer said that he would not put in the
16 motion to withdraw my plea.

17 Q. Okay. And was your purpose for seeking new counsel in
18 order to be able to file a motion to withdraw your plea?

19 A. Yes.

20 Q. And your hearing on that was set for February 18th; is that
21 right?

22 A. Yes.

23 Q. And on that day I was appointed to represent you?

24 A. Yes.

25 Q. And since the time that I have represented you, you and I

1 have spent approximately five -- we have had five meetings for
2 at least two hours each time, right?

3 A. Yes.

4 Q. And we have reviewed all of the evidence?

5 A. Yes.

6 Q. And it gave me the opportunity to review the evidence?

7 A. Yes.

8 Q. And I, in fact, told you that sometimes a plea could be in
9 a person's best interest; is that right?

10 A. Yes.

11 Q. But you advised me that you didn't care about that. You
12 didn't feel that you could go to trial -- you -- you didn't
13 feel you could stay with a guilty plea when you, in fact, were
14 not guilty?

15 A. Yes.

16 Q. And I had you take a polygraph examination; is that right?

17 A. Yes.

18 Q. And what was the result of that?

19 A. I passed the polygraph test.

20 Q. Stating that you were -- provided truthful information?

21 A. Correct. Yes.

22 MS. PUGLISI: Judge, I don't have any other questions
23 at this time.

24 THE COURT: Thank you, Ms. Puglisi.

25 Any questions for Ms. Gittens?

1 MR. KARADBIL: Thank you, Your Honor.

2 CROSS-EXAMINATION

3 BY MR. KARADBIL:

4 Q. Ms. Gittens, you said you met with Mr. Kritzer three times?

5 A. Yes.

6 Q. And you also had email communications with him?

7 A. Yes.

8 Q. You attached email communications to your motion. Were
9 those all the email communications that you had with him?

10 A. No.

11 Q. There were actually others?

12 A. Yes.

13 Q. Were the others discussing the merits of the case against
14 you?

15 A. Yes.

16 Q. Okay. And so, in conjunction with your representation by
17 Mr. Kritzer, you had a number of discussions about the evidence
18 that there was against you, correct?

19 A. I'm not clear. What do you mean specifically?

20 Q. You got discovery in the case, right?

21 A. I got a copy of the discovery, yes.

22 Q. You reviewed the discovery?

23 A. Yes.

24 Q. You had a chance to meet with him at his office to go over
25 that as well?

1 A. Yes.

2 Q. And he had a chance to discuss possible defenses that you
3 had?

4 A. We never really discussed possible defenses. It was always
5 stated that I would not be able to prove my innocence.

6 Q. Okay. You said every time you met with him you said you
7 were innocent?

8 A. Correct.

9 Q. So he would -- did he confront you with some of the
10 evidence saying: "How are you going to explain this?"

11 A. No. We never specifically went over the evidence. I was
12 given a disc to go over and to bring to his attention anything
13 that I did not understand, in which I emailed him that I didn't
14 understand or there wasn't anything that I believed that made
15 any sense. And then when I went to his office, we never
16 specifically went over evidence.

17 Q. Okay. So did you give him any reasons why you were
18 innocent other than saying: "I'm innocent"?

19 A. Yes. The fact that there was nothing there that put me in
20 place. I didn't have anything to do with what was going on.

21 Q. Okay. Let's talk about that. There's actually two cases
22 against you, correct?

23 A. Yes.

24 Q. You knew there was a case back in 2012, when you owned
25 these -- a tax preparation business?

1 A. Correct.

2 Q. And also a check cashing place?

3 A. Yes.

4 Q. One was 2G. That was the -- that was the tax preparation
5 business?

6 A. Yes.

7 Q. 2G is "Godfrey & Gittens," correct?

8 A. No. It's just a name that I came up with. I wanted to do
9 3G. It wasn't available, so I did it as 2G.

10 Q. Okay. And it's just a coincidence that Walther Godfrey,
11 who was the only person working with you in that business, had
12 the same last name as you did or same initial last name?

13 MS. PUGLISI: Judge, I'm going to object to these
14 questions because even if we went to trial, Judge, a defendant
15 has a right to not testify and to have his statements used
16 against him in trial. And so I don't think that we should have
17 to get into the specifics to where the Court is going to be
18 having her -- or the prosecutor is allowed to cross-examine
19 her, then use whatever statement she may have against her in a
20 trial.

21 THE COURT: And while ultimately it may not be
22 admissible at the time of trial, it is relevant with regard to
23 whether the Defendant can show a fair and just reason for
24 requesting the withdrawal of her guilty plea. So this
25 questioning is certainly relevant to that issue. So the

1 objection is noted. It's overruled.

2 BY MR. KARADBIL:

3 Q. In addition to 2G, which was the tax business, you had,
4 G & G Check Cashing, correct?

5 A. Correct.

6 Q. You incorporated it?

7 A. Yes.

8 Q. You were the owner?

9 A. Yes.

10 Q. The president?

11 A. Yes.

12 Q. And G & G stood for "Gittens & Godfrey," correct?

13 A. No.

14 Q. The only employee you had there beside yourself initially
15 was him?

16 A. No.

17 Q. He actually -- his name wasn't on any of the paperwork, was
18 it?

19 A. No.

20 Q. You later worked with Mark Brown?

21 A. When you mean "later," meaning "later" at what time?

22 Q. After -- sometime after you incorporated and started both
23 these businesses.

24 A. Mark Brown has always worked for me from the very
25 beginning.

1 Q. Okay. And you discussed with Mr. Kritzer the fact that
2 Mark Brown was going to testify against you?

3 A. Did we -- you're asking me did we?

4 Q. Yes. Did you?

5 A. No.

6 Q. That never came up, the fact that you had a cooperating
7 codefendant who was going to testify against you?

8 A. He stated that he may testify against me, but we never went
9 into detail of any defenses. We mainly discussed getting into
10 a plea.

11 Q. So he told you it was in your best interest to plea?

12 A. Correct.

13 Q. And at some point, you decided to actually plead guilty?

14 A. Yes.

15 Q. How much -- how long before your actual date of January
16 22nd, 2016, where you came to court, did you make that
17 decision?

18 A. I made the decision after he advised me.

19 Q. Could you give me an idea when that was. Was it a week
20 before, two weeks before, a month before?

21 A. I don't recall. We went over the plea several times. And
22 then once he got the final plea is when I made the decision.

23 Q. Actually, you had the paperwork, which was a Statement of
24 Facts and a Plea Agreement, well before January 22nd, didn't
25 you?

1 A. Yes.

2 Q. And after -- he went over the Statement of Facts with you?

3 A. Yes.

4 Q. And he went over the Plea Agreement with you as well?

5 A. Yes.

6 Q. And at any time between going over that Plea Agreement and
7 walking into court January 22nd, 2016, did you tell

8 Mr. Kritzer: "I've changed my mind. I don't want to plead
9 guilty"?

10 A. As I recall, the day of when I was accepting the plea, I
11 did lean over to him and ask him if I still had to accept the
12 plea, and he said: "Yes," as I was accepting it here in the
13 courtroom.

14 Q. Is that after the judge had begun asking you questions --

15 A. Yes.

16 Q. -- about accepting the plea?

17 A. Yes.

18 Q. At what point in the proceeding was it that you leaned over
19 to Mr. Kritzer and asked him that?

20 A. The initial question of asking how am I pleading.

21 Q. So you're saying before you answered the question that
22 you're pleading guilty, you leaned over to Mr. Kritzer?

23 A. Yes.

24 Q. And you said: "Do I have to?"

25 A. Yes.

1 Q. And what were Mr. Kritzer's exact words?

2 A. "Yes."

3 Q. Other than that, in any email communication, did you tell
4 Mr. Kritzer you had changed your mind and didn't want to plead
5 guilty?

6 A. Prior to --

7 Q. Prior to the plea being entered.

8 A. No.

9 Q. So the point in which you say that you had said: "Do I
10 have to plead guilty," are you saying that is the point you
11 changed your mind about pleading guilty?

12 A. No. I've always not wanted to sign the plea; however, I've
13 been advised that that's the best interest, even though I'm
14 innocent.

15 Q. These are different events. The Statement of Facts, you
16 signed separately, correct?

17 A. Correct.

18 Q. Same Statement of Facts that I read at the time of your
19 plea, correct?

20 A. When you say "different times," you mean I signed that
21 prior to it?

22 Q. Yes. You had that document well in advance of the hearing,
23 didn't you?

24 A. Correct.

25 Q. You had plenty of time to read it over and say: "Well, no,

1 I just -- I didn't do these things"?

2 A. That's correct. And I have brought that to his attention.
3 But it -- like, once again, the focus was not on the -- me
4 being innocent. The focus was on this is in my best interest.

5 Q. You also had the Plea Agreement well in advance of walking
6 into court January 22nd, didn't you?

7 A. When you say "well in advance," in what time frame because
8 it had changed at some point, the initial plea.

9 Q. Okay. You're talking about the terms of the Plea Agreement
10 and terms of what some of the recommendations would be?

11 A. Correct.

12 Q. But other than that, you had the actual Plea Agreement
13 stating that you would be pleading guilty to a count of
14 conspiracy and a count of possession of device-making
15 equipment at least two weeks before you walked into court,
16 didn't you?

17 A. Yes.

18 Q. And you then later executed those documents before you
19 walked into court as well?

20 A. I signed them when I was in court here that day.

21 Q. You never told Mr. Kritzer: "I don't understand the
22 Statement of Facts," did you?

23 A. No.

24 Q. And you never told him you didn't understand the Plea
25 Agreement, either, did you?

1 A. I never stated I didn't understand. I stated that I'm
2 innocent, and I didn't understand why I had to sign agreeing to
3 being guilty when I'm innocent. But I've been informed that
4 that's my best interest.

5 Q. Did you say to him: "These facts are not true;
6 therefore" --

7 A. Yes.

8 Q. -- "I don't think I should sign this"?

9 A. Yes, I have.

10 Q. When did you say that?

11 A. I said that over numerous occasions in our meetings.

12 Q. Okay. Well, you said you met three times. Were the three
13 times that you had met before or after you actually had the
14 Statement of Facts?

15 A. It was in the process. During the time that Mr. Kritzer
16 was representing me, I met him three times over that period of
17 time.

18 Q. Now, you were placed under oath today before you testified.
19 You recall that?

20 A. You're asking me if I was under oath today or ...

21 Q. Well, you're under oath today, correct?

22 A. Yes.

23 Q. And you obviously were under oath the day you had your plea
24 taken as well?

25 A. Yes.

1 Q. And what's your understanding of the oath?

2 A. The understanding is it binds you, I guess, to what you're
3 saying, of what you're admitting to.

4 Q. Well, do you have a concept or understanding of the oath,
5 which means that you have to tell the truth?

6 A. Yes. I do understand that.

7 Q. Okay. Did you understand that on January 22nd, 2016 when
8 your plea was taken?

9 A. Yes. And I asked Mr. Kritzer, and he stated to me that
10 even though I was innocent I had to accept the plea because it
11 was in my best interest. So it wasn't a matter of me being
12 innocent. It was a matter of: "Do what's best -- in your best
13 interest." So that's what I did.

14 Q. Were you satisfied with his representation?

15 A. From what I thought at that time, yes, that it was in my
16 best interest that he was advising me correctly.

17 Q. No. What I'm asking you was: On January 22, were you
18 satisfied with the representation that Mr. Kritzer had given
19 you to that point?

20 A. Yes. At that point, yes.

21 Q. Okay. So that wasn't a lie to the Court? You actually
22 were satisfied with his services?

23 A. According to what he was advising me, and what I believed,
24 yes.

25 Q. And when the judge asked you whether anyone forced you to

1 plead guilty, and you were asked that at least four to five
2 times, is it a true statement that no one forced you to plead
3 guilty?

4 A. I can't -- I don't want to use the word "force." I was
5 advised that in my best interest that's what I needed to do,
6 and that's exactly what I did.

7 I'm -- I'm scared of this whole situation, so -- I've never
8 been on this side of the court. I'm sorry. But what you're
9 asking me, I understand. But I'm leaving it up to the
10 advisement to tell me to do what's in my best interest. But I
11 cannot sit here and accept pleading guilty to something that I
12 did not do. I was advised that that's my best interest at that
13 time, so of course I accepted it.

14 Q. I asked -- I used the word "forced" because that is the
15 word that Judge Bloom used when she asked you the question:
16 "Did anyone force you to enter the plea?" And you answered:
17 "No." Was that a truthful answer?

18 A. Yes.

19 Q. Now, the statement that -- whether you committed the
20 crimes, and she went over each of the three crimes you were
21 pleading to, when you said that you were pleading guilty
22 because you were guilty, was that a truthful answer?

23 A. No.

24 Q. Isn't it true that Mr. Kritzer never told you you could lie
25 to the Court?

1 A. He never directly told me to lie to the Court.

2 Q. So you took that upon yourself to lie to get through the
3 plea. Is that what you are telling us?

4 A. I didn't take it upon myself. I was advised that I had to
5 accept the plea of guilty in order to fulfill what he told me
6 that was in my best interest.

7 Q. Did anyone, whether it be Mr. Kritzer or another outside
8 party, tell you you would have to lie to go through with the
9 plea?

10 A. Not directly using the word "lie."

11 Q. Who else did you consult about whether you should go
12 through with the plea?

13 A. I didn't consult with anyone prior to the plea.

14 Q. You never consulted with another attorney prior to taking
15 the plea?

16 A. No.

17 Q. Only after the -- you had entered your plea?

18 A. Yes.

19 Q. Now -- so there was no point in this plea colloquy, as you
20 had to continually give untruthful answers, that you turned to
21 Mr. Kritzer and said: "I can't do this"?

22 A. I initially did in the beginning from the first question.

23 Q. Your testimony was earlier you only asked him: "Do I have
24 to plea?"

25 A. Correct.

1 Q. And he said: "Yes"?

2 A. Correct.

3 Q. There was no follow-up to that, was there?

4 A. No.

5 Q. Now, after ending your plea, when was the time that you
6 decided -- when you had changed your mind and decided you
7 wanted to withdraw your plea, when did that begin?

8 A. Immediately after I left the courtroom.

9 Q. Now, during the plea, were you reading your Plea Agreement?

10 A. No.

11 Q. Okay. You had a chance to read your Plea Agreement before
12 you walked into court, correct?

13 A. Which one, the initial one? And then I was given the
14 second one after. But the actual one that I signed, I did not
15 read over, because he stated to me that: "It shouldn't be a
16 problem. The Government is not going to switch things. So
17 it's exactly what it is." So I did not get the chance to
18 completely read over the exact one that I signed. I assumed
19 that it was the correct one that we discussed.

20 Q. So again, that was another false statement you made to the
21 Court when you said that you had a chance to read the Plea
22 Agreement?

23 A. Because I was advised, yes, that it was in my best interest
24 and that what was given to me was correct.

25 Q. Well, no one advised you at the time -- Mr. Kritzer or

1 anyone else -- that you should say you had read something that
2 you had not. Isn't that so?

3 A. Yes.

4 Q. Now, you say you decided after you left the courtroom. You
5 raise in your documents the issue of Paragraph 7f of the Plea
6 Agreement.

7 A. Yes.

8 Q. You entered the plea because you felt it was in your best
9 interest, correct?

10 A. Correct.

11 Q. And when you read 7f, either -- did you read it during the
12 plea or after? How soon after the plea?

13 A. After the -- soon after the plea, I looked over the
14 documents to compare it with what I was given before. And
15 there was a change in 7f that was not brought to my attention.

16 Q. Okay. And when you read 7f, you were concerned that your
17 attorney could not seek a downward variance?

18 A. Correct.

19 Q. Now, when you reached that opinion, was that an opinion
20 that you reached on your own or by consulting another attorney?

21 A. By -- well, number one, I didn't understand what that was.
22 So that was the initial. And then, secondly, I did ask advice
23 of other attorneys, what that meant, because that was something
24 that I didn't know what it was.

25 Q. Was that something you asked Mr. Marcus about?

1 A. Yes.

2 Q. And with regard to 7f, and the idea that somehow either you
3 couldn't seek a downward variance, that made you believe that
4 the plea was no longer in your best interest. Isn't that so?

5 A. No.

6 Q. Now, the issue of 7f that you wrote to the Court in your
7 initial motion on February 3rd says that you thought your Plea
8 Agreement -- "It's not favorable to me and was never brought to
9 my attention. And he never told me agreeing to no other
10 mitigating factor would be inconsistent with asking for a
11 variance at sentence." And you go: "I have now discovered
12 that by agreeing to no other mitigating factors it is
13 inconsistent with fighting for a downward variance." Is that
14 what you discovered through Mr. Marcus or through someone else?

15 A. Through Mr. Marcus.

16 Q. He gave you his opinion that you, pursuant to this Plea
17 Agreement, could not get a downward variance?

18 A. That, in addition to I accepted a plea that I was not
19 guilty to and that there was other factors in it that was not
20 favorable to me.

21 Q. Okay. Let's talk about that. When you went to Mr. Marcus
22 about -- you went to Mr. Marcus because Mr. Kritzer said:
23 "Talk to some other attorneys," didn't he?

24 A. Correct.

25 Q. And when you went to Mr. Marcus about this situation, did

1 you detail the facts of the case against you?

2 A. Yes.

3 Q. Did you have a copy of the charging document with you?

4 A. He had a copy. He looked up a copy of it.

5 Q. And did you discuss with him possible defenses that you had
6 to the case?

7 A. Yes.

8 Q. Did you discuss with him possible defenses to the credit
9 card fraud charge, as well as the tax refund scheme charge?

10 A. We didn't get that far in detail, but we did briefly go
11 over the case and my innocence of the case.

12 Q. Okay. I noticed that you took a polygraph as to the tax
13 refund charges, right?

14 A. Yes.

15 Q. And you took it -- apparently, you took it two different --
16 three different times before it was -- you had that score?

17 A. Yes.

18 Q. You didn't take a polygraph on the issue of whether you
19 knowingly possessed the device-making equipment at the address
20 where you were arrested at. Was that your decision?

21 A. No.

22 Q. Whose decision was it that you wouldn't be polygraphed on
23 that matter?

24 A. It wasn't anyone's decision. I answered whatever questions
25 that was asked. That question was not asked.

1 Q. Okay. Well, you would have to give the information to the
2 polygrapher in order for him to ask you about it, wouldn't you?

3 A. Correct. He had a copy of the Indictment.

4 Q. Did you discuss with him the fact that you were also
5 charged with this other crime?

6 A. Correct.

7 Q. And did you say to him: "Well, even if you find that I'm
8 truthful on these tax refund matters, we're not discussing the
9 credit card scheme"?

10 A. I've never taken a polygraph test before. I don't know
11 what the protocol is of what I'm supposed to be asked or not
12 asked. So whatever questions that was asked, I answered them.
13 I didn't tell him what to ask me.

14 Q. Now, did Mr. Marcus say: "I believe it would be in your
15 best interest to withdraw your plea and proceed to trial"?

16 A. He stated that if I was innocent I should ask to withdraw
17 my plea and that there was stuff -- there was things in the
18 plea that was not favorable to me, and if I was aware of it.

19 Q. Did you have -- did you give him all the discovery that you
20 had in the case?

21 A. No.

22 Q. He never advised you that: "I believe it's not in your --
23 this plea is not in your best interest," did he?

24 A. I'm sorry. Can you repeat the question.

25 Q. He never advised you that the plea was not in your best

1 interests.

2 A. He did advise me the plea was not -- as far as what was in
3 the plea.

4 Q. You said: "I'm innocent." He said to you: "If you're
5 innocent, you should withdraw your plea"?

6 A. Correct.

7 Q. Now, the fact -- now you believe that the Plea Agreement is
8 not in your best interest? Isn't that so?

9 A. Yes.

10 Q. And that's because of the idea that by saying that there's
11 no mitigating or aggravating factors that you wouldn't be able
12 to ask for a downward variance?

13 A. No. The fact that I'm innocent and I'm admitting to
14 something that I didn't do.

15 Q. Well, you took that position well before you had the -- you
16 came into court and plead guilty and told the Court a number of
17 false statements about that. The only thing changed afterwards
18 according to what you have said, is your noticing Paragraph 7f.
19 Isn't that so?

20 A. In addition to the fact that I accepted a plea that I was
21 innocent to, yes.

22 Q. Now, you accused Mr. Kritzer of not trying your case --
23 that he wouldn't try your case?

24 A. Correct.

25 Q. He told you, in fact, he would try your case, didn't he?

1 A. Yes.

2 Q. But despite him telling you that, you wrote in two
3 subsequent emails: "You won't try my case"?

4 A. He would not. He wouldn't even put in the motion to take
5 it to trial.

6 Q. Well, it's two different things. One is you're saying that
7 he told you he would not try your case.

8 A. Correct.

9 Q. He never told you that, correct?

10 A. He never told me what? That he would not try my case or
11 that he will try my case?

12 Q. He never told you that he was refusing to try your case?

13 A. He told me he would not try my case because I would not
14 win.

15 Q. Okay. You know that he's an experienced attorney, don't
16 you?

17 A. That's what he advised me, that he was an experienced
18 attorney.

19 Q. Did you look into his background and how many years he's
20 been an attorney?

21 A. Correct.

22 Q. And how many cases he's actually tried?

23 A. I did not see how many cases he's actually tried.

24 Q. You knew that he was a trial lawyer, whose job it was to
25 try cases in which it was in the best interest of the client,

1 correct?

2 A. Correct.

3 Q. And he told you that he was, in fact, a trial lawyer, who
4 would go to trial if the case was suitable to do?

5 A. Yes. If he felt that the case was suitable.

6 Q. Okay. Well, in terms of -- you said to him -- you said
7 something about he wouldn't believe you because you have a
8 master's degree?

9 A. Correct.

10 Q. You do have a master's degree, don't you?

11 A. Yes.

12 Q. You have a master's degree in business administration?

13 A. Yes.

14 Q. You don't have a master's degree in taxation, do you?

15 A. No.

16 Q. You lied to the revenue agent in 2012 when that agent came
17 out to talk to you about G & G Check Cashing, didn't you?

18 A. I didn't lie. I stated I had an honorary degree.

19 Q. And you had some kind of diploma on the wall from FAU?

20 A. Correct.

21 Q. Was that a true and accurate degree?

22 A. It was a honorary degree. It has a stamp in the back of it
23 that should have stated it was a honorary.

24 Q. Okay. You didn't tell the agent: "I really don't have a
25 degree in taxation. I have some kind of honorary degree"?

1 A. I stated: "I have a honorary degree."

2 MR. KARADBIL: If I can have a moment, Your Honor.

3 THE COURT: Certainly.

4 (Pause in proceedings.)

5 BY MR. KARADBIL:

6 Q. You were arrested at 14754 Southwest 12th Street, in
7 Pembroke Pines, right?

8 A. Yes. Yes.

9 Q. And that's where the credit card making equipment was?

10 A. That's what I was informed, yes.

11 Q. Well, you could see it obviously in very open view within
12 the home, couldn't you?

13 A. No.

14 Q. You lived there on and off, didn't you?

15 A. No. I didn't live there on and off. I came there on and
16 off to visit his son and to take him to school.

17 Q. From August 2015, to your arrest in October, late October
18 of 2015, you were in and out of that residence, weren't you?

19 A. Correct.

20 Q. You slept there many nights?

21 A. No.

22 Q. You slept there the night before you were arrested,
23 correct?

24 A. I was there. I got there very late that night, so that I
25 can give him a ride to the airport that morning and take his

1 son to school.

2 Q. And that house -- by the way, you rented that place with
3 Mr. Godfrey, didn't you?

4 A. No.

5 Q. You rented it in the name of your mother, didn't you?

6 A. He rented it. My mother allowed him to rent the place in
7 his name so he can stay with his son.

8 Q. Did he forge your name on the Comcast bill that was in your
9 name?

10 A. No.

11 Q. You did that?

12 A. Yes. He wasn't able to put the Comcast bill in his name
13 because he didn't have credit.

14 Q. And you also paid the rent for actually the month of
15 October 2015, didn't you?

16 A. No. I didn't pay the rent. I got the check for him.

17 Q. You got a \$2,200 cashier check in your name from your Chase
18 Bank account to pay that rent, didn't you?

19 A. Correct. That he provided the funds to get the check for
20 it.

21 Q. Okay. He gave you cash for that?

22 A. Correct.

23 Q. He had a lot of cash all the time, didn't he?

24 A. No.

25 Q. He had no job -- legitimate job, did he?

1 A. When you say "legitimate job," you mean ...

2 Q. What was his job in October 2015?

3 A. From my understanding, he did workouts and he sold shoes.

4 Q. He had -- he had a closet filled with thousands and
5 thousands of dollars of shoes, didn't he?

6 A. From my understanding, he's always had shoes from the day I
7 met him.

8 Q. He was buying those all along from the day -- when was the
9 day you met him?

10 A. Eleven years ago, 2006.

11 Q. You've basically been boyfriend/girlfriend, since that time
12 haven't you?

13 A. Yes. On and off.

14 Q. And you have been with him pretty much through that time,
15 haven't you?

16 A. Yes.

17 Q. And he's been around the two businesses we've mentioned,
18 correct?

19 A. Yes.

20 Q. And you have lived together?

21 A. Up until prior to him getting this last place in August,
22 yes.

23 Q. You lived together in Miramar for two years before that?

24 A. Yes.

25 Q. And moving out -- he didn't move out to go live by himself,

1 did he?

2 A. He did. He moved out and moved with his son. They got a
3 place together. I didn't move in with him.

4 Q. And during the times you have been with him, he's been
5 arrested a number of times, correct?

6 A. From my recollection, I believe it was, if I recall, one or
7 two times.

8 Q. It was no secret that he was doing identity theft to
9 anyone, was it?

10 A. You're asking me a observation?

11 Q. Yes. Yes.

12 A. I don't know. From what I was told what he got arrested
13 for and what I see that he was is two different things.

14 Q. He said he was innocent when he got arrested for identity
15 theft?

16 A. Correct.

17 Q. And you were arrested for identity theft yourself out of
18 stealing someone's identity in Maryland, didn't you?

19 A. I wasn't arrested. Someone used my identity.

20 Q. They used your identity of Rhonda Gittens to steal a doctor
21 in Maryland's bank account money?

22 A. Correct. I never used that card that they claimed. It was
23 a card that was opened in my name.

24 Q. \$20,000 taken out of that bank account.

25 A. That's what was alleged.

1 Q. Not just alleged. You had -- it was a bank account that
2 money was taken out of and it was traced back to you, correct?

3 A. It wasn't traced back to me. Whatever credit card that was
4 being used in my name, that's what it traced back to.

5 Q. It was traced back to a Target credit card?

6 A. Correct. That was used in my name.

7 Q. And you are saying someone else used that credit card in
8 your name for fraud, obviously, since you -- it wasn't your
9 card?

10 A. The -- yes. Correct.

11 Q. Care to explain to the Court why they would use the bank
12 account of the other person to pay off -- not defraud other
13 people, pay off the balance in your Target credit card?

14 MS. PUGLISI: Objection, calls for speculation.

15 THE COURT: Sustained.

16 MR. KARADBIL: If I can have a moment, Your Honor.

17 THE COURT: All right.

18 (Pause in proceedings.)

19 BY MR. KARADBIL:

20 Q. So it's your testimony that someone opened the credit card
21 fraudulently in your name?

22 MS. PUGLISI: Objection. It calls for speculation.

23 THE COURT: Overruled.

24 THE DEFENDANT: The question?

25

1 BY MR. KARADBIL:

2 Q. Yes. It's your testimony that someone opened the Target
3 credit card fraudulently in your name?

4 A. Yes. They reopened a credit card that was existing on my
5 credit report.

6 Q. And when you found out about that, of course you filed a
7 police report?

8 A. I found out when I found out I had a warrant for my arrest.

9 Q. What happened with that case?

10 A. Nothing happened. It got put on set -- something like
11 that. I don't recall the exact term.

12 Q. Pretrial diversion?

13 A. I don't know the exact term, but it wasn't pursued.

14 Q. Now, with regard to the credit cards, it's your testimony
15 that you never noticed the device-making equipment in the
16 office upstairs?

17 A. No.

18 Q. You walk upstairs, you look to your left, there's an open
19 room, no door. All the equipment is there, isn't it?

20 A. That's what I was told, yes.

21 Q. That's what you knew. Are you telling me you never
22 walked --

23 A. No.

24 Q. -- to an open office next to the bedroom?

25 A. No. I don't reside there, so I didn't wander around the

1 house.

2 Q. Okay. And, in fact, you know that your driver's license
3 and credit cards in your name were scattered about the floor in
4 that room as well, correct?

5 A. No. They were placed there. They were taken out of my
6 wallet that was in my car and put there.

7 Q. Somebody -- so you're saying an agent planted that evidence
8 in that same room?

9 A. I'm stating that someone put it there. It was not me. It
10 was in my wallet, along with the cash that they took in
11 evidence from my wallet. It doesn't make any sense why my ID
12 and my credit cards would be by the machine.

13 Q. Is there any reason why they would be in a Ziplock bag in
14 the ground -- on the ground in that office?

15 A. There's no reason, especially when all my belongings was in
16 my car.

17 Q. Well, items were taken from your car as well, weren't they?

18 A. The cash that was in my wallet.

19 Q. Are you saying that cash was stolen?

20 A. No. The cash was reported as in the discovery -- or in the
21 warrant when they came, as property.

22 Q. Now, in connection with these credit cards, there were a
23 number of credit card -- credit cards, blank, lying around in
24 that office as well. It's your testimony you knew nothing
25 about that?

1 A. I did not know anything about that.

2 Q. And, in fact, is it your testimony you know nothing about
3 first of all, buying anything with those credit cards?

4 A. No, I do not.

5 Q. Or Mr. Godfrey buying anything with those credit cards?

6 A. I'm unaware of that.

7 Q. Isn't it a fact that you communicated with Mr. Godfrey in
8 text format?

9 A. You're asking me if I communicated with him over text, via
10 text? Yes.

11 Q. And the name that you used is "Buddy"?

12 A. What do you mean by what name I use?

13 Q. The name you use when you're texting, "Buddy"?

14 A. No. There's no name that I use. What do you mean by that?

15 Q. Who's "Buddy"?

16 MS. PUGLISI: Judge, I'm just going to renew my
17 objection. This is becoming a trial here. I'm not sure --

18 THE COURT: Where are we going with this?

19 MR. KARADBIL: Judge, I'm actually going to prove --
20 in a sense it would be a mini trial in terms of proving her
21 guilt on the credit card fraud scheme, that she communicated
22 with Mr. Godfrey about stolen identities.

23 THE COURT: I think we're getting a little far afield
24 on the factors that the Court should look to in making a
25 determination as to whether the Defendant should be entitled to

1 withdraw her plea.

2 MR. KARADBIL: Judge, if I could just have a few
3 minutes just to go through my notes so I can be very concise.
4 If I'm not going to -- I won't make this a mini trial, but if I
5 could just take a few minutes.

6 THE COURT: Certainly.

7 (Pause in proceedings.)

8 MR. KARADBIL: Just have a few questions, Judge, and I
9 think I can wind it up.

10 BY MR. KARADBIL:

11 Q. Ms. Godfrey, taking you back to 2012, when the IRS auditor
12 came to check out G & G Check Cashing. You know that -- in
13 fact, you pulled 48 checks that you had cashed, correct?

14 A. You addressed me as Ms. Godfrey. I'm Ms. Gittens.

15 Q. Ms. Gittens -- excuse me. Were you ever considered a
16 common law wife?

17 A. No.

18 Q. Okay. I'm sorry. Ms. Gittens --

19 A. Can you please repeat the question.

20 Q. -- when the IRS auditor came to audit G & G Check Cashing,
21 he pulled -- or you provided him 48 checks that you had cashed,
22 correct?

23 A. That was cashed at my check cashing store, yes.

24 Q. Yes.

25 A. Yes.

1 Q. And what you told him about these -- excuse me -- her --
2 about these checks, the cash refund checks, that: "They were
3 cash refund checks for my tax preparation clients and their
4 referrals." Isn't that what you told her?

5 A. I told her that they were referrals, and in addition,
6 clients of mine is what I opened the check cashing store for.
7 Specifically the checks that was provided to her, I did not
8 state it was only my clients or it was specifically my clients.

9 Q. And what you said also was: "I inspect each driver's
10 license and use a blue light to confirm authenticity"?

11 A. Those are the procedures. That's what I stated to her.

12 Q. And the reason you check with a blue light is because
13 you're checking the hologram on the driver's license, correct?

14 A. Correct. Correct.

15 Q. And, in fact, you had a whole box of holograms -- fake
16 holograms at the place you were arrested. Isn't that true?

17 A. You're stating that I had it. I didn't have it. That's
18 what was found at the place that I was picked up at.

19 Q. You had no idea it was there?

20 A. No, I did not. I did not reside there.

21 Q. And with regard to the checks that you cashed, you later
22 found out -- or maybe you didn't find out -- well, you found
23 out through discovery that every one of the 48 checks was
24 fraudulent. Every one of the 48 identifications were
25 fraudulent?

1 A. You're asking me if I later --

2 Q. Yes.

3 A. Yes. Once I received the discovery, yes. At no other
4 point prior to that was I ever told anything was wrong with any
5 of the checks.

6 Q. So you had thought in 2012 you had gotten off Scot-free
7 from the audit, that everything was fine? Isn't that true?

8 MS. PUGLISI: Same objection.

9 THE COURT: Sustained.

10 BY MR. KARADBIL:

11 Q. You lied to the agent when you told them they were your
12 customers or referrals from your customers, didn't you?

13 MS. PUGLISI: Objection.

14 THE COURT: Overruled. I'll allow that.

15 MR. KARADBIL: Is there an answer?

16 THE DEFENDANT: Are you asking me a question or are
17 you making a statement?

18 THE COURT: It's a question. Do you understand it?

19 THE DEFENDANT: No, I don't. What is the question?

20 BY MR. KARADBIL:

21 Q. Isn't it true that you lied to the revenue agent of the IRS
22 when you told him, handing him these checks, that they were
23 either your customers, a majority of your customers, or
24 referrals from those customers?

25 A. I did not tell him specifically that those checks -- the

1 question that was asked is: "Who do you provide your services
2 to?" And I said: "To my clients and to referrals." I never
3 stated which checks or those checks specifically were my
4 clients and referrals. I was asked a general question as to
5 who I did offer my services to.

6 Q. And all the fees from those checks went into your bank
7 account, didn't they?

8 A. Correct.

9 MR. KARADBIL: I have nothing else at this time,
10 Judge.

11 THE COURT: All right. Any redirect?

12 MS. PUGLISI: Yes, Judge.

13 REDIRECT EXAMINATION

14 BY MS. PUGLISI:

15 Q. The checks that -- those 48 checks he's referring to, were
16 those cashed by you, those fraudulent checks?

17 A. When you say "cashed by me," meaning I processed them?

18 Q. Yes. Did you process them personally?

19 A. No. Mark Brown, when he worked for me, he was the one that
20 worked in the check cashing store for me.

21 Q. At any time, did you process any fraudulent checks?

22 A. As to my knowledge, no.

23 Q. The Government was asking about why you didn't get
24 polygraphed about the access-making equipment. Are you aware
25 that I'm the person who told the polygrapher what kind of

1 questions to ask you?

2 A. That was my understanding.

3 Q. And are you aware the reason that I didn't ask anything
4 about the access --

5 MR. KARADBIL: Judge, I object to the question. If
6 Ms. Puglisi wants to proffer the situation about the polygraph,
7 be happy to hear it, but I think it's just a --

8 THE COURT: The objection is sustained.

9 BY MS. PUGLISI:

10 Q. Do you live at that home that you were arrested at?

11 A. No.

12 Q. Were you ever in the second floor den office?

13 A. No.

14 Q. Did you ever observe the credit card making machine or any
15 credit cards, blank credit cards, in that room?

16 A. No.

17 Q. Was your only purpose for being there that day to take
18 Godfrey to the airport?

19 A. Yes, and to pick up his son to take him to school.

20 Q. And the prosecutor said you had to take the polygraph three
21 times before you got the results you wanted. You took the test
22 two times before. And are you aware of the reason, that it had
23 to do with your physiological reactions and the tests were
24 inconclusive?

25 A. That's correct.

1 Q. And did Mr. Beerman tell you that he didn't believe you
2 were deceptive?

3 A. Correct.

4 MS. PUGLISI: Judge, I've nothing further.

5 THE COURT: All right. Thank you.

6 Thank you, Ms. Gittens.

7 Ms. Puglisi, your next witness.

8 MS. PUGLISI: Judge, I don't have anybody else.

9 THE COURT: On behalf of the Government, Mr. Karadbil?

10 MR. KARADBIL: Judge, I would like to call
11 Mr. Kritzer, who is present. As the Court knows, I haven't had
12 an opportunity to speak to him because of the attorney-client
13 situation. Could I have five minutes to go over with him -- he
14 has been in the courtroom, so he has heard the testimony. So I
15 shouldn't need more than five minutes just to confer with
16 him --

17 THE COURT: Let's take a short recess then.

18 (Recess from 6:43 p.m. to 6:50 p.m.)

19 THE COURT: Go ahead and have a seat.

20 Mr. Karadbil, are we ready to proceed, sir?

21 MR. KARADBIL: Yes, Judge.

22 I know that Mr. Kritzer did want to clarify for
23 purposes of the Florida Bar, among other authorities, that he
24 is able to testify. And, in fact, I subpoenaed him. He's
25 being ordered to testify and he would need essentially an order

1 of the Court for him to testify to protect him with the Bar, in
2 that he's testifying in relation to a client's representation.

3 THE COURT: Yes. Mr. Kritzer, for purposes of
4 complying with the rules of ethics and the code of
5 responsibility, the Court is advising you that you are free to
6 discuss the communications that you had with Ms. Gittens in
7 this case and there is no ethical or professional prohibition.

8 MR. KRITZER: All right. Your Honor, thank you very
9 much. In addition, I should point out that I asked Ms. Puglisi
10 and she said that -- I said I was uncomfortable testifying, was
11 there a waiver of attorney-client privilege, and she said there
12 was anyway. So I think that pretty much covers that.

13 THE COURT: I'm sorry. She said: "There was anyway"?

14 MR. KARADBIL: Yes. She had done that in the email to
15 me. I asked if her client would waive attorney-client
16 privilege, and she said she would.

17 THE COURT: Oh, I'm sorry. I heard -- I
18 misinterpreted.

19 MS. PUGLISI: No issue, Judge.

20 THE COURT: All right. There is no issue and there is
21 no issue for the Court.

22 MR. KRITZER: I don't think there's an issue, but I
23 was -- I'm not comfortable with the situation. I'm not
24 comfortable with being subpoenaed to testify against a former
25 client, if it ends up being against her, but it looks like I

1 have to do this.

2 THE COURT: Of course, Mr. Kritzer. And the Court
3 recognizes that, and all the Court can ask you to do is to tell
4 the truth based on what you recall.

5 So if you will stand, raise your right hand to be
6 placed under oath.

7 GLENN KRITZER, ESQ., GOVERNMENT WITNESS, SWORN

8 COURTROOM DEPUTY: Please state your name, for the
9 record, spelling your first and last name.

10 MR. KRITZER: Glenn Kritzer, G-L-E-N-N, K-R-I-T-Z-E-R.

11 DIRECT EXAMINATION

12 BY MR. KARADBIL:

13 Q. And would you tell us your occupation.

14 A. I'm a lawyer.

15 Q. How long have you been an attorney?

16 A. I was admitted to the New York Bar in 1973, California Bar
17 in 1977, and the Florida Bar in 1980.

18 Q. And did you work at one time with the US Attorney's Office,
19 prior to becoming a defense attorney?

20 A. In 1977, I joined the US Attorney's Office in the Eastern
21 District of New York. In 1979 -- well, actually, January 1980,
22 I joined the US Attorney's Office in the Southern District of
23 Florida.

24 Q. And when did you leave the US Attorney's Office in this
25 district?

1 A. In -- I believe it was April 8th, 1982.

2 Q. And since that time, what has been your specialty, if any,
3 in the practice of law?

4 A. I have been primarily practicing criminal defense.

5 Q. And in regard to that, have -- you represented
6 approximately how many clients since 1982?

7 A. I have no idea.

8 Q. Have -- you've been on the CJA appointment list since what
9 time?

10 A. The earliest voucher that I can find -- and I think it was
11 even before there was a CJA at all -- but the earliest voucher
12 submitted as a court-appointed attorney was 1984.

13 Q. And in that capacity, have you tried cases in the district
14 courts in the Southern District of Florida on behalf of clients
15 you've represented?

16 A. Many.

17 Q. When you say "many," could you give us some kind of
18 ballpark.

19 A. I don't know.

20 Q. More than 50?

21 A. I just don't know how many. But it's -- I've been doing it
22 for -- since 1984. So it's over 30 years. And during that
23 period of time, especially in the old days, we used to try a
24 lot more than we do now. A lot of them now end up in pleas.
25 But many, many cases both as a defense lawyer and as a

1 prosecutor in the US District Court.

2 Q. Okay. Well, I'm asking basically as a defense attorney.

3 A. Right.

4 Q. And under appointment.

5 A. I don't -- I can't give you a number.

6 Q. Okay. With regard to your representation of CJA clients,
7 have you ever been in this position before where a client asked
8 you to remove yourself from their case?

9 A. This is the first for me.

10 Q. And I assume the first time testifying in relation to one
11 of these representations?

12 A. Correct.

13 Q. With regard to your representation of Rhonda Gittens, there
14 were a number of allegations made by Ms. Gittens in a motion
15 and some emails that were attached to the motion. Did you have
16 a chance to review those?

17 A. Yes.

18 Q. With regard to your representation of Ms. Gittens, did you
19 discuss the facts of the case against her?

20 A. Yes.

21 Q. Did you receive discovery in the case?

22 A. Yes.

23 Q. Did you go over discovery with her?

24 A. I went over the facts of the case with her. When I
25 received the discovery, I clearly recall sending her a letter

1 with the Government's discovery response, a copy of the disc,
2 the one disc that was provided by the Government, a copy of
3 each of the two search warrants and affidavits in support
4 thereof, and whatever else the Government had supplied at the
5 time. I gave her absolutely everything -- oh, a copy of the
6 Indictment. And anything else that existed at the time, that
7 was sent to her. And that included the disc and that included
8 the affidavits in support of the search warrant, which included
9 the testimony of the revenue agent that you referred to earlier
10 and his interview of her at her business long before there were
11 any criminal charges.

12 Q. In the motion/letter of February 3rd, 2016, Ms. Gittens
13 writes: "He never went over the discovery with me." Is that
14 true?

15 A. I never opened the disc in her presence; however, I did
16 review very carefully with her each and every statement made by
17 the revenue officer that is set forth in the affidavit, all of
18 which -- which covers a lot of the allegations in the
19 Indictment and what his testimony would be.

20 Q. Now, with regard to the case, did you go over the
21 allegations, as well as the evidence against her, to determine
22 if she had defenses to the charges?

23 A. Would you repeat the question.

24 Q. Did you go over the evidence, the discovery, the
25 Indictment, and all the materials that you had in order to

1 discuss whether she had defenses to the charges?

2 A. We discussed the facts of the case. I remember her saying
3 something like she didn't understand what was on the disc. And
4 I had actually -- when I sent her the disc, I think I sent her
5 an email after, saying: "Look, if you see anything in the disc
6 that gets your attention, let me know," because the disc
7 contained, if I remember correctly -- this was awhile back --
8 the disc contained a lot of bank records, a lot of tax returns,
9 a lot of checks, where, upon careful examination, I'm sure that
10 she would know which of those tax returns she prepared, which
11 of those checks were cashed at her cash -- check cashing
12 agency. So I figured that she was -- pretty much could figure
13 out what's on those -- on the disc because those were the
14 checks and the tax returns that were alleged to have been
15 fraudulent tax returns and checks which were cashed at her
16 check cashing place.

17 Q. Did you have a factual discussion over both the tax charges
18 and the credit card fraud charges?

19 A. I mean, we had three meetings. And essentially I told her
20 that, based upon my review of the evidence, Mark Brown's
21 testimony, and the testimony of this revenue officer, that the
22 evidence was very strong, that there was a second case that was
23 also based upon what was found at the residence that was in her
24 mother's name, and that it looked like very much like the
25 Government had a very strong case and would be able to convict

1 her on at least one of them.

2 Q. Did she tell you she was innocent?

3 A. Yes.

4 Q. And did she always maintain that position?

5 A. Well, she said she was innocent many times. After we got
6 the Plea Agreement, and we discussed it, the -- whether she was
7 guilty or not guilty wasn't explicitly articulated between us.
8 We were just talking about the plea, the terms of the Plea
9 Agreement, your estimation of what the guidelines might be, my
10 estimation of what the guidelines might be, and we went from
11 there.

12 Q. You knew that Mr. Godfrey was claiming that she was
13 innocent?

14 A. I didn't really know that. No. I -- I -- I -- I -- I
15 didn't know that he was claiming that until there was a filing
16 recently; however, she mentions that he came up to me at her
17 bond hearing. And what he said at the bond hearing was that
18 she didn't have anything to do with the items that were found
19 on October 30th, 2015 in the house. He never said to me
20 personally that she wasn't guilty of all the other charges in
21 the case.

22 Q. "He," you're talking about Mr. Godfrey?

23 A. Yeah. He walked up to me. I don't know how he got out of
24 his chair and the marshals let him. But at the bond hearing
25 before -- in Judge Snow's courtroom, somehow he walked up to me

1 and he said she didn't have anything to do with that stuff in
2 the room or in the house or something like that. And of
3 course, I didn't say anything to the judge about that. But
4 that was -- that was -- must be what she's referring to because
5 that's what he said. It had -- he didn't discuss the other
6 charges with me.

7 Q. Now, she writes in her motion of February 3rd: "He
8 repeatedly told me that even though I was innocent that no one
9 would believe me." Did you tell her that?

10 A. Well, I told her -- out of a sense of kindness, I said:
11 "Even though you may believe that you're innocent, it's what a
12 jury's going to believe that counts."

13 Q. With regard to the plea itself, she stated in court today
14 that -- and she actually wrote it as well -- "At the time of
15 pleading guilty in front of you, Judge Bloom, do I still have
16 to plead guilty, and he replied: 'Yes.'" Is that true?

17 A. I have no recollection of that.

18 Q. Is that something that you would tell a client, that you
19 would have to plead guilty at some point?

20 A. No. I mean, I can't imagine that that would be the case
21 because when we got to that point in court, she was very --
22 seemed to be very committed to proceeding. She was very
23 articulate. She didn't -- never looked at me once and asked me
24 about anything that I recall. I don't recall her ever turning
25 to me and asking me anything about the plea. If she did, there

1 may have been some ambiguity in how she asked me the question.
2 Like for example: "Do I have to answer that question,"
3 something like that. But I -- that's speculation. I really
4 don't recall any such conversation.

5 Q. Did you ever tell her you would not try her case?

6 A. No.

7 Q. She also writes in her statement: "The Government does not
8 lie and they indicted me because it is true." Did you make
9 that statement to her?

10 A. No. What happened was as -- I think she's confusing that
11 with -- in reviewing the evidence with her, I found the
12 affidavit in support of the search warrant of her business and
13 the particular part relating to what the testimony of the
14 revenue officer would be to be particularly damning. And I
15 went over it very carefully with her paragraph by paragraph.
16 And at one point she said to me -- I believe she said something
17 like: "Well, he's not telling it the way it was," or, "He's
18 not telling me the truth. He's not stating the truth," or
19 something like that. And it was at that time that I said to
20 her: "Why would this revenue officer make this up?" That's
21 the closest thing I can get to -- I never said to her that the
22 Government doesn't lie or the Government agents don't lie, but
23 I did say that about him. I said: "Why would he make this
24 up?" That may be what she's thinking.

25 Q. Did you have any notice, before coming to court January

1 22nd, 2016, that she had changed her mind about pleading
2 guilty?

3 A. No. To the contrary. The day before, I sent her a
4 reminder email, saying to her: "Okay. Don't forget tomorrow
5 we have to be before the judge at such and such a time. Don't
6 take your cell phone." And she wrote back: "Thank you. I'll
7 be there."

8 Q. The documents, which include the Statement of Facts and
9 Plea Agreement, did you have those in advance of the Plea
10 Agreement, sufficient time to go over with her?

11 A. Yes.

12 Q. And there was testimony from Ms. Gittens about the final
13 draft, not having a chance to read the final draft because it
14 came so close to, I guess, the plea date. What do you recall
15 about that?

16 A. You know, I don't really -- I mean, I heard the testimony
17 here. And my recollection is, first of all, that I would never
18 go through with a plea hearing unless I had read a final of the
19 plea agreement and a final of the statement of facts and had
20 sent it on to my client to read. I -- I -- I know that you
21 made a few changes in the Plea Agreement and I think -- I'm not
22 sure about the Statement of Facts, but I know that we had it in
23 advance. And I know that I soon as I got it I sent it off to
24 her. So I don't believe that what you handed me in court was
25 any different from the last version that I had seen, unless you

1 were playing some kind of trick, which I know you didn't.

2 So ...

3 Q. In her statement/motion letter of February 3rd, she says:

4 "There's a portion of Paragraph 7F of my Plea Agreement that is
5 not favorable to me and was never brought to my attention." Is
6 that correct, that there were provisions in the Plea Agreement
7 not brought to her attention?

8 A. Well, prior to making that motion, the first time I heard
9 of her not being happy with what was in the Plea Agreement was
10 on Saturday because it's in the emails that are right before
11 the Court. On that email of Saturday, January 30th -- she
12 wrote me an email in the afternoon. And in the email -- it
13 speaks for itself. Everybody's seen it -- she mentions the
14 fact that, you know, "I never would have plead guilty.
15 Paragraph 7F, you know, says that there should be no mitigating
16 or aggravating factors, and I never would have agreed to that
17 because you said that" -- something about we had discussed that
18 I would go ahead and make a motion for a downward variance, do
19 my best. I promised that I would do my best on that.

20 And after reading that, I called her Saturday night,
21 January 30th, and had a long conversation with her about that.
22 That seemed to be the issue that bothered her, that she
23 believed that because the Plea Agreement said that there would
24 be no aggravating or mitigating factors that for some reason I
25 wouldn't be able to file a motion for a downward variance.

1 What the Plea Agreement said, if I remember correctly, is
2 that there is no aggravating or mitigating factors in terms of
3 calculating the guidelines. And so I asked her to -- I asked
4 her if she had a computer in front of her, and she did. And I
5 said: "Go ahead and pull up on your computer Section 3B1.1,
6 which has to do with aggravating factors and pull up Section
7 3B1.2, which has to do with mitigating factors. As you can
8 see, the Government is doing you a favor by not adding any
9 aggravating factors. Certainly, they could have. If they
10 wanted to make that argument, there would be an argument that
11 since you supervised Mr. Brown that there might be a two-point
12 enhancement under 3B1.1. So by not having that in there it's
13 to your advantage.

14 "The other side of the coin is that since -- the way this
15 case plays out and your charges, there was no way that you
16 would ever be eligible for a mitigating role and therefore
17 you're not giving anything up." And then I further stated to
18 her: "Notwithstanding that paragraph, that just has to do with
19 the calculation of the guidelines and that would not preclude
20 me from filing a motion for downward variance."

21 Q. So, she writes: "I have now discovered that by agreeing to
22 no other mitigating factors it is inconsistent with fighting
23 for a downward variance." She further testified that it was
24 David Marcus that gave her this information. Do you agree with
25 Mr. Marcus' assessment --

1 A. Well, I don't recall --

2 Q. -- if, in fact -- excuse me a second. If, in fact -- let
3 me ask, first of all, do you agree with that assessment of the
4 law, whether it was given by Mr. Marcus or not?

5 A. Well, as I said, I told her on January 30th that that
6 wasn't the case.

7 Q. So you disagree with the -- with that. And, in fact, she
8 could ask for a downward variance?

9 A. And I told her specifically that one -- they, you know,
10 were not inconsistent. But then she -- it looked like in
11 subsequent emails and in her motion she still maintained that
12 that was the case.

13 Q. In other words, this was -- this conversation was before
14 February 3rd, 2016?

15 A. January 30th.

16 Q. Excuse me. February 3rd.

17 A. January 30th is when we had the conversation on the phone
18 and I had her pull up both sections in front of her and
19 explained in great detail -- I was on the phone with her for at
20 least an hour trying to allay her fears that that paragraph
21 would not preclude me from making a motion for a downward
22 variance.

23 Q. If I can have just --

24 A. When she spoke to another attorney, I don't know --
25 whatever the other attorney told her, I don't know. But I had

1 that conversation with her on January 30th, which I think from
2 her testimony was -- had to be before she -- if she sought the
3 advice of another attorney, it would have been subsequent to
4 January 30th. And I kept saying to her: "Why don't you seek
5 the advice of another attorney." But she never, in her email,
6 said: "I did." So I'm finding this out for the first time
7 today, actually.

8 MR. KARADBIL: Thank you. If I could just have one
9 moment.

10 THE COURT: Certainly.

11 (Pause in proceedings.)

12 MR. KARADBIL: That's all I have.

13 THE COURT: All right. Cross-examination.

14 CROSS-EXAMINATION

15 BY MS. PUGLISI:

16 Q. Good evening. She told you that she was innocent of the
17 charges filed against her, right?

18 A. Correct.

19 Q. At some point, the conversation turned to -- once the Plea
20 Agreement was given to you from the Government, conversation
21 turned to the plea being in her best interest; is that right?

22 A. I don't know if I used those words, but yes.

23 Q. You believed that this plea was in her best interest,
24 right, after reviewing the evidence?

25 A. Absolutely.

1 Q. And she ended up taking the plea because it was in her best
2 interest, right?

3 A. You're asking me whether she took the plea, whether --

4 Q. Yes. She didn't tell you -- she said to you: "I'm going to
5 take this plea." She didn't say: "Because I'm guilty." She
6 said: "Yes. Okay. That's in my best interest." She felt --

7 A. I don't think we had that conversation at all. I inferred
8 that after discussing with her -- discussing the strength of
9 the evidence, discussing the favorability of the plea,
10 discussing the fact that there were two cases now consolidated
11 into one and therefore it was a very favorable Plea Agreement
12 in terms of the second charge, which would actually only add
13 about two points, instead of being a whole second charge, which
14 would -- I told her that, you know, if there's a second charge,
15 a second indictment, you might get arrested on that indictment.
16 You might also -- because -- if you got convicted on the first
17 one, it would change your criminal history. And so I gave her
18 all the reasons why this was a very favorable Plea Agreement,
19 and she seemed to accept them.

20 Q. So it wasn't as if she said to you: "You know what? I am
21 guilty. I want to plead because I'm guilty"?

22 A. She never said that. Never said that.

23 Q. And you have been an attorney a long time. You would agree
24 that some defendants take pleas because it's in their best
25 interest, for convenience or best interest sake, not because

1 they are necessarily guilty?

2 A. I don't know that. I don't know that. I know that I have
3 had -- I have had numerous clients in the past say to me, when
4 they first met with me, "I'm innocent," and later on take a
5 guilty plea.

6 Q. Now, you reviewed the questions that the Court would ask of
7 her at a change of plea; is that right -- the plea colloquy,
8 the types of questions the judge is going to ask her.

9 A. Right. Absolutely. I prepare -- I tried to prepare her as
10 well as I could for the plea colloquy.

11 Q. So she understood what she would need to say in order to be
12 able to have the Court accept her plea, right?

13 A. Absolutely.

14 Q. She knew that she would have to go in and say: "Yes. I'm
15 guilty to those offenses," if she wanted to take the plea, even
16 if it was in her best interest?

17 A. I explained to her what the -- the questions that the Court
18 would ask. And I also explained to her that unless -- the
19 Court would go into great detail, and I even asked her some of
20 those very -- I told her: "Here are some of the very questions
21 the Court is going to ask you," and that, "The Court doesn't
22 have to accept your plea and you -- here are the questions that
23 you're going to be asked." I mean, essentially that's what I
24 did.

25 Q. And after -- Mr. Karadbil referred to an email that you

1 responded to Ms. Gittens on -- sorry -- on -- is it April? I
2 don't have it in front of me -- April 30th? Hold on.

3 A. No. What are you referring to? The first one she sent on
4 January 30th?

5 Q. Yes. Excuse me. On January 30th, she had sent you an
6 email stating that, you know, she had repeatedly told you that
7 she was innocent, right?

8 A. Correct.

9 Q. And in your February response, you don't deny that she had
10 repeatedly told you she was innocent, right?

11 A. And I don't now.

12 MS. PUGLISI: Very good. I have nothing further.

13 THE COURT: All right. Anything further?

14 MR. KARADBIL: No redirect, Your Honor.

15 THE COURT: Any redirect?

16 MR. KARADBIL: No.

17 THE COURT: Thank you, Mr. Kritzer.

18 (Witness excused.)

19 THE COURT: Mr. Karadbil, anything further, sir?

20 MR. KARADBIL: Has the case shifted -- yes. It has
21 shifted.

22 THE COURT: You called Mr. Kritzer.

23 MR. KARADBIL: Yes. Judge, I'm not sure what the
24 Court wants to hear in terms of -- we've just heard the name
25 Mr. Marcus being invoked as to advice she had obtained.

1 Obviously, I just heard this for the first time. I don't know
2 what Mr. Marcus is going to say. I kind of have an idea what
3 he might say. I'm not sure if the Court wants to hear from him
4 on this.

5 MS. PUGLISI: Judge, I can tell you --

6 MR. KARADBIL: I certainly would like to explore
7 whether she was telling the truth about that conversation.

8 MS. PUGLISI: Judge, I can tell you I spoke to
9 Mr. Marcus. You know he's an attorney in my office suite. He
10 did, in fact, speak with her and he did, in fact, tell her to
11 withdraw her plea if she was innocent.

12 I think we're getting a little far afield into the
13 rest of these, and it doesn't really go to the prongs and what
14 the Court needs to determine.

15 I think it seems as if the Government is trying to
16 focus on this variance argument. But at the end of the day,
17 our argument is that she has maintained she's innocent from the
18 beginning and she is seeking to withdraw this based upon
19 innocence.

20 MR. KARADBIL: Judge, I think it's apparent from the
21 record that the only thing that changed from January 22nd
22 forward was this idea that 7F didn't give her the plea
23 agreement that she thought she had, and that she wasn't going
24 to be able to argue for a downward variance, and she's claiming
25 that Mr. Marcus agreed with that, that that would be true,

1 after she consulted with Mr. Kritzer about it.

2 While I have no doubt that Mr. Marcus said: "If you
3 believe you're innocent, you should try to withdraw your plea,"
4 as to the second aspect, as to whether -- the reason -- one of
5 the reasons she thinks -- and I believe that's become paramount
6 in the case based on her pleading and her testimony, that she
7 thought it was no longer in her best interest because her
8 sentence would be higher.

9 THE COURT: So we need to know, Mr. Karadbil, if
10 you're going to be calling any other witnesses.

11 MR. KARADBIL: Judge, I don't want to delay too much.
12 I would ask for a recess to be able to speak to Mr. Marcus to
13 see what his answer to that question is and whether he gave
14 that particular advice or not. I would ask permission of the
15 Court to do that and present his testimony in some form,
16 whether it's an affidavit or otherwise, to supplement the
17 record.

18 MS. PUGLISI: Judge, the reason it's not relevant is
19 because the motion to withdraw plea was not filed by Mr. Marcus
20 based on that. It was filed by myself, and I can tell the
21 Court the reason I filed the motion to withdraw is because she
22 stated she was innocent. I have advised her that she has the
23 basis to argue a variance motion. That is not precluded from
24 her Plea Agreement. I advised her that. That is why in the
25 two months -- almost two months I have had this case, I have

1 been working many, many hours reviewing everything because I
2 wanted to make sure before we did a motion to withdraw --
3 although she had advised me from the beginning she was
4 innocent, I wanted to make sure it was in her best interest and
5 that she should not remain with her plea despite that.
6 Because, as Your Honor knows, you know, there are defendants --
7 I always find it strange that in state court you can ask a
8 person: "Are you taking the plea because it's a plea of
9 convenience or it's in your best interest," but in federal
10 court they want you to admit to guilt.

11 I don't think we can doubt that there are defendants
12 who take pleas in federal court because it's in their best
13 interest, which, obviously, it seems -- even Mr. Kritzer would
14 agree -- at no time did she say: "I'm guilty." She continued
15 to say innocent. I think we can infer she took the plea
16 because it was in her best interest and decided after she had
17 made a mistake.

18 So it's not really relevant what Mr. Marcus may or may
19 not have told her. Because at the end of the day, I would have
20 corrected any error and the basis for the motion is for
21 innocence.

22 THE COURT: I think we can all agree that with regard
23 to Ms. Gittens' conversation with Mr. Marcus, it was to the
24 extent that she asked him what she should do, and he told her
25 that if she feels she's innocent she should file an appropriate

1 motion. I don't think we need to delay the proceedings merely
2 because Mr. Marcus would come before the Court and tell the
3 Court that.

4 MR. KARADBIL: I don't want to do that, either. In
5 fact, I'd accept a stipulation that, in fact, Paragraph 7F
6 doesn't preclude her from filing a for a downward variance.

7 THE COURT: Well, I think we left off with whether you
8 needed an opportunity to bring in an affidavit or testimony
9 from Mr. Marcus, and I don't believe that necessary.

10 Would there be any other witnesses, Mr. Karadbil?

11 MR. KARADBIL: No, Your Honor.

12 THE COURT: Anything further Ms. Puglisi?

13 MS. PUGLISI: Just argument, Judge.

14 THE COURT: Yes. And since the Defendant bears the
15 burden, if you would like to proceed.

16 MS. PUGLISI: Judge, we are proceeding based upon her
17 claim of innocence.

18 What supports this claim? Well, we have the
19 Defendant's testimony. Ms. Gittens got up there and she told
20 you she was innocent. We have Mr. Kritzer who stated that she
21 repeatedly advised she was innocent and at no time told him,
22 you know, that she had committed the charges. We have the
23 email back and forth between them where she documents her
24 claims of innocence, and he obviously agrees that he didn't
25 deny because that is what she has claimed. And we have a

1 polygraph examination that was taken in support that showed no
2 deceptiveness.

3 Judge, as far as the polygraph goes, I focused it on
4 the issues of knowledge with respect to the tax fraud because
5 those were the main ones. And I don't know if the Court's
6 aware, but polygraphers have a hard time if you put too many
7 different issues into an exam. They tell you you need to try
8 to focus it on only a couple of things because otherwise it
9 gets too much.

10 And I specifically decided not to ask anything about
11 the house because I believe the evidence clearly shows that
12 none of that was in her possession. She doesn't live there, no
13 evidence that she was in that room at all or had knowledge of
14 it in that room.

15 I've offered the charts of the polygraph to the
16 Government for their expert to review. I offer Ms. Gittens up
17 to the Government for any expert they have that would like to
18 polygraph her.

19 You know, as far as the cases go, the Government has
20 filed a response, but there really -- their cases don't address
21 innocence. And there is one, and I'll talk to it. But as far
22 as the case of United States v. Buckles, that was an individual
23 who, three years later, came trying to vacate his plea. And
24 the reason for the vacation was, he said: "It was a plea under
25 duress. I was forced by my CJA counsel. I had some mental

1 impairment." You know, basically the Court was saying: "Look,
2 you don't get to have buyer's remorse."

3 Well, this is not really buyer's remorse. The talk in
4 this court about Buckles is time period. Obviously, very
5 important because that has to go to the prejudice that the
6 Government faces. The longer period of time you delay after,
7 the harder it is for the Government to find witnesses and
8 investigation.

9 But clearly we don't have that here. This is a person
10 who has claimed innocence throughout. The second that she took
11 the plea, she immediately felt she had made the mistake and she
12 shouldn't have done it. She contacted -- she met with two
13 different attorneys, one of them being David Marcus, who
14 advised her that she should withdraw. A week later, she
15 contacted Mr. Kritzer and said to him: "Please immediately
16 file this motion to withdraw. I don't want it delayed." And
17 then the week after, on February 3rd, she decided to go ahead
18 herself and inform the Court that she wanted to change counsel
19 so that she would be able to file this motion.

20 Again, the only reason I delayed for these last couple
21 of months, Judge, was so that I could review all the evidence
22 and be prepared. I did advise Mr. Karadbil from the very
23 beginning that this may be a potential and I needed to review
24 the evidence and I would get back to him as soon as I knew. So
25 he was aware that this was out there, this motion.

1 And the one case that I think is important that the
2 Government does cite to -- because there's really no Eleventh
3 Circuit case. I mean, obviously, it's tough because, you know,
4 with innocence, if the courts have vacated it, then we don't
5 really see those appeals. The one case they cited, United
6 States v. Barker, it's a DC case from 1975. But what's
7 interesting about what the Court says in that case, Judge,
8 is -- let me just find it. You know, the Government's right
9 that, you know, just a mere declaration of innocence does not
10 entitle a defendant to withdraw their plea. But the Court very
11 much talks about how -- it says here: "On the other hand,
12 where the motion does assert legal innocence, presentence
13 withdrawal should be rather freely allowed. While some
14 decisions have come close to suggesting that a mere assertion
15 of innocence is enough to merit withdrawal, each of these cases
16 involved the additional and obviously important consideration
17 that the guilty pleas at issue had been entered under
18 highly-questionable circumstances." That was one portion.

19 But then the Court goes on later to say that: "A
20 swift change of heart is itself strong indication that the plea
21 was entered in haste and confusion. Furthermore, withdrawal
22 shortly after the event will rarely prejudice the Government's
23 legitimate interests."

24 Judge, I can tell you that I myself filed a motion to
25 vacate last year in front of Judge Scola. I put it in my

1 pleadings. It was granted. It was based on innocence. I will
2 say that the Government agreed to the motion in that case
3 because I was able to show innocence, and they were fine with
4 withdrawing it.

5 I have two additional cases. Ana Jimenez, that case
6 was -- hold on -- 04-20817, Judge Moore -- at the sentencing.
7 And I have another case with Judge Moore, Keith Devon Adams,
8 08-21159. Both of those were at sentencing. The Defendant was
9 not admitting or agreeing to facts, and the Judge said: "Well,
10 we should vacate." And the Government -- or the defense
11 attorney says: "Yes. We would like to vacate and go to
12 trial," and the Court agreed and ordered that they be vacated.
13 And of course, those are based upon claims of innocence.

14 So this circuit itself, there is a precedent for
15 vacating cases. It's obviously in Your Honor's discretion.
16 But based upon prior precedence in this circuit, and the fact
17 that a person who has clearly demonstrated -- who has said that
18 they're innocent from the beginning -- you know, we have a
19 system of justice for a reason, we have a jury system for a
20 reason, and she should be able to present her case and let a
21 jury decide.

22 THE COURT: Thank you.

23 Mr. Karadbil?

24 MR. TORTELLA: Your Honor, I'll address the issue.

25 THE COURT: And perhaps you can address -- and I

1 understand that prongs 3 and 4 are not addressed until the
2 Defendant establishes the first and second prong, but I would
3 be interested in the prejudice that is being claimed.

4 MR. TORTELLA: Well, in terms of -- Judge, I know that
5 at least one witness in this case has already been advised that
6 the case has been resolved, they wouldn't have to testify about
7 the identity theft that's involved here. The other
8 consideration is that several of our witnesses, they are spread
9 out in the Bureau of Prisons system. So then we would have to
10 locate them and take the time to get them up to speed again to
11 prepare for trial.

12 We've obviously had several hearings on this matter
13 already, Your Honor. The concern here, Your Honor, there has
14 been at least a brief passage of time, but not the years that
15 occurred with some of these cases cited in our response.

16 In terms of the other -- the other -- the fourth
17 factor, Your Honor, with respect to whether or not judicial
18 resources would be conserved, we're going to have two trials as
19 a result, if the Court were to grant the motion. The credit
20 card scheme, the device-making equipment charge, is wholly
21 separate from the tax fraud scheme. It was only added for the
22 convenience of the parties and the Court to bring the plea
23 before Your Honor.

24 We do believe, Your Honor, based on the testimony,
25 number one, and the perplexing issue with the Court, now that

1 it will have to wrestle with, is: Do you believe her now or do
2 you believe her previously? Her credibility certainly is
3 called into question when she sat there testifying, Your Honor,
4 that -- in response to multiple questions -- "Are you pleading
5 guilty because you are guilty?" She -- at least at the
6 colloquy, she said: "Yes," a resounding yes. She had an
7 opportunity to review the seven-page Plea Agreement. She had
8 an opportunity to review the four-page Statement of Facts. She
9 had an opportunity to listen to and review the Superseding
10 Information. And she said she understood them. She didn't
11 have any questions with regard to any of those pleadings. She
12 had no questions with regard to any questions of her attorney.

13 I think the Court -- I think on four occasions, at
14 least four occasions, Your Honor asked if this was knowing and
15 voluntary, was she being coerced, was she being made any
16 promises or were there any undo influences on her. Each time
17 she responded: "No."

18 So Your Honor, certainly I think the Defendant had
19 close advice of counsel. And I think that it's clear, based on
20 the 57-page transcript of a plea hearing that lasted one hour
21 and 13 minutes, the Court was satisfied that the standards of
22 Rule 11 were met by this Defendant and that the plea was
23 knowing and voluntary and it was intelligently made.

24 That's basically our argument, Your Honor.

25 THE COURT: All right. Thank you.

1 Ms. Puglisi, is there anything further?

2 MS. PUGLISI: No, Your Honor.

3 THE COURT: Let me say first and foremost that the
4 Defendant has a heavy burden. Our federal rules, specifically
5 Rule 11(d), requires that the Defendant show a fair and just
6 reason for requesting the withdrawal of a plea of guilty. And
7 in determining whether, Ms. Gittens, you've met your burden,
8 the Court looks at the totality of the circumstances
9 surrounding the plea.

10 I've read over this 57-page plea hearing that occurred
11 on January 22nd, 2016, when you were placed under oath, the
12 same oath that you took this evening in this courtroom. A plea
13 hearing is not a mechanical event. It's not where you're asked
14 questions and you mechanically answer yes or no. That plea
15 hearing was unique because Mr. Godfrey sat right next to you,
16 along with your counsel and Mr. Godfrey's counsel, when you
17 each were asked questions about your attorneys, about your
18 Statement of Facts, about your specific Plea Agreements, as to
19 whether you understood the Indictment, as to whether you
20 understood the maximum penalties that could be imposed, whether
21 you understood the rights that you were giving up, the
22 consequences of your plea, including the privileges that you
23 would lose of voting, possessing a firearm.

24 The Court went on very extensively in asking you
25 specific questions about your case. You had the benefit of

1 hearing the questions not once, but twice, because the same
2 questions were asked of Mr. Godfrey in your presence.

3 As to the specific counts to which you plead guilty,
4 Count 1, Count 11, and Count 16, the Court asked you four times
5 whether you were pleading guilty to that offense, whether
6 anyone forced you or threatened you to enter your plea of
7 guilty, whether anyone made any promises or assurances to you,
8 other than what was contained in the Plea Agreement, to
9 persuade you to plead guilty.

10 "Are you a entering a plea of guilty on your own free
11 will?" And then the Court specifically focused on the actual
12 count to which you were pleading.

13 I listened very carefully to your testimony here in
14 court, and the one critical statement you made was the
15 following -- you were asked whether Mr. Kritzer forced you to
16 plead guilty, and your answer was: "I don't want to use the
17 word 'force.' I was advised."

18 Mr. Kritzer did what every ethical attorney should do,
19 advised you of the weaknesses and the strengths of your case,
20 advised you of the lawful defenses that could be asserted, and
21 advised you of the implications of the evidence that the
22 Government has either in your favor or against you. But in the
23 end it has to be your decision, Ms. Gittens.

24 And looking at the cases that have been presented to
25 the Court, Ms. Puglisi, the Garay case that you cited in your

1 motion, in that case, the facts bore out that that defendant,
2 Mr. Garay, had a legitimate freight forwarding business and
3 there was no evidence of any money laundering. And as a result
4 the Government not only agreed that the evidence substantiating
5 Mr. Garay's innocence was present, but it was present as to six
6 of the counts that he plead guilty to and a new plea agreement
7 was then prepared and signed.

8 Here, you've cited to the Court the Buckles opinion.
9 And the Buckles case is the case that the Court looks to, which
10 is a requirement that there be four factors reviewed. One is
11 whether you had close assistance of counsel that was available.
12 In this case -- and the Court specifically asked you during the
13 plea hearing whether you were satisfied with the services of
14 Mr. Kritzer. You stated: "Yes." The Court specifically asked
15 Mr. Kritzer what evidence he reviewed with you, and he stated
16 that he met with you three times, reviewed the elements of the
17 offenses, and reviewed the discovery with you. And I asked you
18 whether that was accurate, and you said: "Yes." The Court
19 certainly finds that you had close assistance of counsel and it
20 was available to you.

21 The second prong is whether the plea was knowing and
22 voluntary. And that's why the Court looked specifically to the
23 colloquy as to whether there was anything within that plea
24 hearing that the Court asked you that could have been
25 interpreted to show that your plea was not knowingly and

1 voluntarily made as to each of the three counts.

2 Protestations of innocence are not enough. As
3 Ms. Puglisi noted to the Court in the other case that she
4 cited, the guilty plea had been entered under
5 highly-questionable circumstances. Here, I find no
6 questionable circumstances. This Court has had a full
7 opportunity to assess your credibility and the weight to be
8 given to your assertions. And in looking at the factors of
9 Buckles, I don't believe that the Court even gets to the
10 factors of whether judicial resources would be conserved or
11 whether the Government would be prejudiced because I find that
12 there must be integrity in the proceeding where you were before
13 the Court on January 22nd.

14 The record is very clear, Ms. Gittens, with regard to
15 the questions and your answers. But I do want to make mention
16 of the three questions asked during the polygraph examination.
17 The Court certainly has considered the fact that you submitted
18 to three examinations, one in which three questions were noted
19 to the Court, and the conclusion by this examiner. But I note
20 that the questions that were asked were very broad, and the
21 facts that you agreed to were extremely specific.

22 Not only were these Statement of Facts read in open
23 court by the prosecutor, I then asked you whether you heard
24 those facts, whether you agreed with them, whether they were
25 true. And then I asked you about the signature on the fourth

1 page of the Statement of Facts, whether you read this
2 completely, whether you understood it, whether Mr. Kritzer
3 answered all of your questions.

4 These facts are extremely specific in terms of what
5 you did and what you agreed that you did. The facts even focus
6 on a time period, the number of tax returns that were filed,
7 the precise account number, the money that was deposited, all
8 facts to which you agreed were true.

9 So when I look to whether there is another factor
10 other than a change of heart, I don't find it, Ms. Gittens. I
11 don't find a basis to allow you to withdraw your
12 previously-entered pleas of guilty to the charges that are
13 before the Court. I do not find that the Defendant has met its
14 burden. And Ms. Gittens, your motion to withdraw your pleas of
15 guilty are denied.

16 The sentencing hearing on April 15th remains and I
17 will see the parties at that time.

18 MS. PUGLISI: Judge, I -- at this time, I'm asking for
19 a continuance. I am not prepared. I have not filed any
20 objections to the PSI. I have been focused on preparing for a
21 trial and this motion. I need additional time because now I
22 will need to call witnesses to present -- it will be like a
23 mini trial -- to present for mitigation as to Ms. Gittens. So
24 I would be requesting a 30-day extension to be able to file
25 objections and a mitigation motion.

1 THE COURT: Mr. Karadbil, does the Government have any
2 objection to that?

3 MR. KARADBIL: No, Your Honor.

4 THE COURT: If we can have another date, Toniann.

5 COURTROOM DEPUTY: Friday, May 13th.

6 THE COURT: What time?

7 COURTROOM DEPUTY: At 11:30 a.m.

8 THE COURT: Friday, May 13th, at 11:30 a.m.

9 MS. PUGLISI: If I may just check my calendar real
10 quick, Judge, just to make sure that I don't have anything on
11 that date.

12 THE COURT: Ms. Puglisi, if it works better, let's do
13 it in the afternoon so we have more than the time that would
14 normally be allotted. Let's say 1:30.

15 MS. PUGLISI: Judge, the only thing, I have career day
16 that day at my kids' school. I can miss it. It's okay.

17 THE COURT: I don't want you to miss it.

18 MS. PUGLISI: Could we do the 20th? I don't have
19 anything that day.

20 THE COURT: All right. How is May 20th at 4:00 p.m?

21 MS. PUGLISI: Perfect.

22 MR. KARADBIL: Judge, we have the case agent,
23 Ms. Watson -- apparently, if we're going to have testimony, we
24 may need testimony, and she's in India as of May 15th through
25 the 31st.

1 COURTROOM DEPUTY: Judge, what about May 10th at 2:00?

2 MS. PUGLISI: Perfect.

3 MR. KARADBIL: May 10th?

4 MS. PUGLISI: Is that enough time for you, Neil?

5 MR. KARADBIL: Yes.

6 THE COURT: All right. So we're back to May 10th at
7 2:00. Does that work for everyone?

8 MS. PUGLISI: Yes, Your Honor.

9 MR. KARADBIL: That's fine. Thank you.

10 THE COURT: We'll see you at that time.

11 MS. PUGLISI: The other thing -- just one last thing,
12 and I'll put it in a motion, but I just wanted to warn the
13 Court that I will be doing a renewed motion to get an
14 investigator. I definitely tried to conserve the costs for the
15 panel. But in light of the fact of what I'm going to need to
16 present, I do need some help on an investigator in trying to
17 locate and speak to witnesses. So I'll present that send it to
18 you. I just wanted to warn you.

19 THE COURT: It has to be submitted in writing anyway.

20 MS. PUGLISI: I will, Your Honor.

21 THE COURT: Okay. Thank you. Okay. Have a good
22 evening.

23 (Proceedings concluded at 7:48 p.m.)
24
25

1 UNITED STATES OF AMERICA)

2 ss:

3 SOUTHERN DISTRICT OF FLORIDA)

4 C E R T I F I C A T E

5 I, Yvette Hernandez, Certified Shorthand Reporter in
6 and for the United States District Court for the Southern
7 District of Florida, do hereby certify that I was present at
8 and reported in machine shorthand the proceedings had the 13th
9 day of April, 2016, in the above-mentioned court; and that the
10 foregoing transcript is a true, correct, and complete
11 transcript of my stenographic notes.

12 I further certify that this transcript contains pages
13 1 - 83.

14 IN WITNESS WHEREOF, I have hereunto set my hand at
15 Fort Lauderdale, Florida this 5th day of August, 2016.

16
17 /s/Yvette Hernandez
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