

No. _____

IN THE UNITED STATES SUPREME COURT

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ALAINA MARIE GARCIA,

Applicant,

vs.

UNITED STATES OF AMERICA,

Respondent.

=====

**ON APPLICATION TO THE HONORABLE ELENA KAGAN,
JUSTICE OF THE UNITED STATES SUPREME COURT,
FOR BAIL/RELEASE PENDING APPEAL**

=====

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SUBSTANTIAL QUESTIONS OF LAW OR FACT
LIKELY TO RESULT IN REVERSAL

Applicant, Alaina Marie Garcia, raised the following questions before the Ninth Circuit:

1. Should Garcia's guilty pleas for bank fraud and money laundering be vacated for the magistrate's failure to inform her of, and to ensure she understood, the nature of each of the charges during the change of plea hearing as required under Fed. R. Crim. P. 11(b)(1)(G)?
2. Should Garcia's guilty plea pleas be set aside for lack of a factual basis as required under Fed. R. Crim. P. 11(b)(3)?
3. Did the district court err in allowing Garcia to represent herself after she informed the court she intended be represented by counsel and preferred to have counsel on her motion to withdraw her guilty pleas, after the district court permitted her retained counsel to withdraw as Garcia's counsel moments before the motion and sentencing hearing?
4. Did the district court abuse its discretion in denying Garcia's motion to withdraw from her guilty pleas by refusing to accept all of Garcia's evidence she claimed supported her motion, and by denying her request for a continuance to obtain additional evidence?

LIST OF THE PARTIES AND RELATED CASES

The parties to this Application for Bail are the Applicant, Alaina Marie Garcia; and the Respondent, United States of America.

There are no related cases to this application.

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IN THE UNITED STATES SUPREME COURT

ALMA ROSA SANCHEZ,

Applicant,

vs.

UNITED STATES OF AMERICA,

Respondent.

**ON APPLICATION TO THE HONORABLE ELENA KAGAN,
JUSTICE OF THE UNITED STATES SUPREME COURT,
FOR BAIL/RELEASE PENDING TRIAL**

I. APPLICATION

Pursuant to Supreme Court Rule 22, ALAINA MARIE GARCIA (“hereinafter Garcia”), makes application to the Honorable Elena Kagan, Circuit Justice, to review the Ninth Circuit’s Order entered on September 25, 2026, denying Garcia’s release pending appeal. Appendix (App. 1). Garcia requests Circuit Justice Kagan grant her release pending appeal on same conditions of release that were entered pending her guilty plea and sentence before the United States District Court for the District of Montana, *United States v. Garcia*, DC No. 2:24-cr-025-DLC. App. 2-4.

II. RELEVANT STATUTORY PROVISION & RULES

The Bail Reform Act States in pertinent part:

(b) Release or detention pending appeal by the defendant.--(1)
Except as provided in paragraph (2), the judicial officer shall order

that a person who has been found guilty of an offense and sentenced to a term of imprisonment, and who has filed an appeal or a petition for a writ of certiorari, be detained, unless the judicial officer finds—

(A) by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released under section 3142(b) or (c) of this title; and

(B) that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in—

(i) reversal,

(ii) an order for a new trial,

(iii) a sentence that does not include a term of imprisonment, or

(iv) a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process.

If the judicial officer makes such findings, such judicial officer shall order the release of the person in accordance with section 3142(b) or (c) of this title, except that in the circumstance described in subparagraph (B)(iv) of this paragraph, the judicial officer shall order the detention terminated at the expiration of the likely reduced sentence.

(2) The judicial officer shall order that a person who has been found guilty of an offense in a case described in subparagraph (A), (B), or (C) of subsection (f)(1) of section 3142 and sentenced to a term of imprisonment, and who has filed an appeal or a petition for a writ of certiorari, be detained.

18 U.S.C.A. § 3143(b).

Rule 11 of the Federal Rules of Criminal Procedure state in pertinent part:

(b) Considering and Accepting a Guilty or Nolo Contendere Plea.

(1) **Advising and Questioning the Defendant.** Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following:

....

(G) the nature of each charge to which the defendant is pleading;

....

(3) **Determining the Factual Basis for a Plea.** Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.

Fed. R. Crim. P. 11(b)(1)(G) and (3).

III. INTRODUCTION.

The Ninth Circuit did not find that Garcia failed to meet her burden by clear and convincing evidence that she “is not likely to flee or pose a danger to the safety of any other person or the community if released” pending appeal.¹ App. 1; *see*, 18 U.S.C. § 3142(b)(1)(A). Nor did the Ninth Circuit conclude that Garcia sought appeal for the purpose of delay. App. 1; *see*, 18 U.S.C. § 3143(b)(1)(B).²

¹ Garcia was released on conditions pending trial. App. 2-5. She appeared for her change of plea hearing on January 21, 2026, about a year and a half after her release pending on September 5, 2024. (2-ER-105); App.2-4. Garcia then appeared for the motion and sentencing hearing in May 20, 2026. (2-ER-29). *See*, footnote 3, *infra*.

Garcia did not violate the terms of her release. Garcia swore under oath that she will not flee due to her family responsibilities and is “committed to resolving [her] legal issues...” App. 7, 9; *see*, *Truong Dinh Hung v. United States*, 439 U.S. 1326 (1978) (Brennan, J., in chambers) (“Applicant faithfully complied with the terms of his pretrial bail and affirmed his faith in his eventual vindication and his intention not to flee if released on bail.”).

² The district court denied the original motion for release pending appeal. (DktEntry 8 at 1-3. The district court concluded Garcia did not meet any of the criteria in 3143(b). *Id*.

Instead, the Ninth Circuit denied release pending appeal solely on the conclusion that Garcia failed to meet the criterium set out in 18 U.S.C. § 3143(b)(1)(B)(i), stating, “Appellant has not shown that the appeal raises a ‘substantial question’ of law or fact that is ‘fairly debatable,’ and that if the question is decided in the defendant’s favor, the likely result is either reversal or a new trial.” App. 1; *see*, 18 U.S.C. § 3143(b)(1)(B)(i). This application focuses solely on the question of whether Garcia’s appeal “raises a substantial question of law or fact likely to result in ... reversal.” 18 U.S.C. § 3143(b)(1)(B)(i).

IV. STATEMENT OF THE CASE.

Statement of Facts:

On September 5, 2024, Garcia appeared for arraignment on a multi-count indictment charging two counts of bank fraud in violation of 18 U.S.C. § 1344, one count of wire fraud in violation of 18 U.S.C. § 1343, and nine counts of engaging in monetary transactions in criminally derived property from specified unlawful activity (money laundering) in violation of 18 U.S.C. § 1957. (2-ER-162-72).³ On January 21, 2026, Garcia pleaded guilty pursuant to a plea agreement before a magistrate to one count of bank fraud (Count 1), and one count of money laundering (Count 5).⁴ (2-ER-105-61, 167-78).

³ This application uses citations to the record before the Ninth Circuit. “1-ER” refers to the Excerpts of Record, Volume 1 of 2, in the Ninth Circuit Docket at DktEntry 11.1. “2-ER” refers to the Excerpts of Record, Volume 2 of 2, in the docket at DktEntry 11.2.

⁴ 18 U.S.C. § 1344 (Bank Fraud) states:

Whoever knowingly executes, or attempts to execute, a scheme or artifice--

(1) to defraud a financial institution; or

The magistrate accepted Garcia's guilty pleas, finding (1) Garcia "is aware of the nature of her charge[s] against her...;" and (2) Garcia's "plea[s] of guilty to the criminal offense[s] charged against her ... are knowingly and voluntarily entered, and supported by independent factual grounds sufficient to prove each of the elements of the criminal offense[s] charged..." (1-ER-23). The district court adopted the magistrate's findings, concluding there was "no clear error in ... [the magistrate's] Findings and Recommendations..." (1-ER-21). The magistrate's findings and the district court's conclusions are the subject of questions 1 and 2.

Before the sentencing hearing, Garcia's counsel filed a motion to withdraw her guilty

(2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;

shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. § 1957 (Money Laundering) states, in pertinent part:

(a) Whoever, in any of the circumstances set forth in subsection (d), knowingly engages or attempts to engage in a monetary transaction in criminally derived property of a value greater than \$10,000 and is derived from specified unlawful activity, shall be punished as provided in subsection (b).

....

(d) The circumstances referred to in subsection (a) are--

(1) that the offense under this section takes place in the United States or in the special maritime and territorial jurisdiction of the United States; or

(2) that the offense under this section takes place outside the United States and such special jurisdiction, but the defendant is a United States person (as defined in section 3077 of this title, but excluding the class described in paragraph (2)(D) of such section).

pleas based on newly discovered evidence. Garcia believed this new evidence supported a defense that she did not intend to defraud the bank. (2-ER-100). On the day of the motion and sentencing hearings, the district court permitted Garcia's counsel to withdraw, then the district court concluded Garcia would represent herself. (1-ER-10). The district court's order allowing Garcia to represent herself is the subject of question 3.

The district court then heard Garcia's argument and received evidence supporting her motion to withdraw her guilty pleas. (2-ER-44-62). The district court refused to accept all evidence proffered by Garcia that she maintained supported her motion and denied a continuance to permit Garcia to obtain additional information. (1-ER-14,17,19). The district court denied Garcia's motion to withdraw her guilty pleas. (1-ER-16). The district court's refusal to accept additional evidence and subsequent denial of her request for a continuance are the subject of question 4.

The district court imposed a 30-month term of incarceration followed by five years of supervised release. (1-ER-2-3). Garcia is currently serving the 30-month term in the custody of the Bureau of Prisons, Carswell FMC, Fort Worth, Texas. Her projected release date is June 5, 2028.⁵

1. Garcia's guilty pleas should be vacated for the magistrate's failure to inform her of, and to ensure she understood, the nature of each of the charges during the change of plea hearing as required under Fed. R. Crim. P. 11(b)(1)(G).

During Garcia's change of plea hearing, the prosecutor outlined four elements for the bank fraud in Count 1. (2-ER-145-46). The fourth element requires the bank be insured by the FDIC or other federal deposit insurance. *Id.*

⁵ <https://www.bop.gov/inmateloc/>

The magistrate asked only defense counsel if he agreed “that those are the elements.” (2-ER-46). He responded, “yes.” *Id.* The magistrate did not ask Garcia if she understood the elements of bank fraud, nor did the magistrate inquire of counsel whether he believed Garcia understood the elements of bank fraud. *Id.*

The prosecutor then outlined four elements for Count 5 from the offer of proof for “engaging in monetary transactions in property derived from specified unlawful activity (money laundering).” *Id.* The magistrate asked defense counsel if he agreed “those are the elements of Count 5.” Counsel informed the magistrate that “there’s a slight discrepancy ... [t]he plea agreement has ... six elements - - this agreement has four.” *Id.*

The magistrate suggested, “it might be cleaner if we just modify the offer of proof to reflect what the plea agreement says.” (2-ER-147). The prosecutor had no objection and agreed to that modification. (2-ER-148).

The magistrate asked defense counsel if he agreed that “the six elements found in the plea agreement that are now incorporated into the offer of proof are the accurate elements?” Defense counsel agreed. *Id.* The magistrate never asked Garcia if she understood the difference between the six elements set out in the plea agreement from the four elements in the offer of proof.⁶ *Id.* Defense counsel never informed the magistrate that Garcia understood the elements of Count 5, neither before nor after the modification. *Id.*

2. Garcia’s guilty plea pleas should be set aside for lack of a factual basis as required under Fed. R. Crim. P. 11(b)(3).

The prosecutor recited the facts from the filed offer of proof for the factual basis on both

⁶ Compare, (2-ER-164) (offer of proof elements) (2-ER-170) (plea agreement elements).

counts. (2-ER-149-50, 165-66). Neither the recitation of facts, nor offer of proof, establish Celtic Bank was federally insured at the time of the bank fraud alleged in Count 1. *Id.* Significantly, the government relied on the federal bank fraud in Count 1 as the “specified unlawful activity” to support the money laundering conviction in Count 5. (20ER-166). *See*, footnote 3, *supra*. Therefore, the evidence required to support a conviction for Count 5 also relied on whether Celtic Bank was FDIC-insured.

The presentence investigation report (PSR) does not establish that Celtic Bank had federal deposit insurance at the time of the bank fraud. (PSR at 7-17, ¶¶ 20-63) (“Offense Conduct”) (filed under seal at DktEntry 12). The PSR merely states the jurisdictional requirement is alleged in the indictment, that Celtic Bank was “a financial institution insured by the Federal Deposit Insurance Corporation” for Counts 1 and 2. (PSR at 4, ¶¶ 2 and 5) (“Charge(s) and Conviction(s)”).

3. The district court erred in allowing Garcia to represent herself after she informed the court she was intending to have counsel and preferred to have counsel on her motion to withdraw her guilty pleas, after the district court permitted retained counsel to withdraw as Garcia’s counsel moments before the motion and sentencing hearing.

At the start of Garcia’s motion and sentencing hearing, the district court permitted her counsel to withdraw. (2-ER-33). The district court then asked Garcia, “[d]o you want a lawyer, or do you want to represent yourself, or where are we?” (2-ER-33-34). Garcia answered, “with my counsel, we’ve had to submit a motion to withdraw” ... and reiterating, “we submitted a motion to withdraw my guilty plea.” (2-ER-34). Garcia did not initiate a request for self-representation.

The district court responded, “we’ve got to address ... your representation ... whether you’re going to be represented by a lawyer or whether you’re going to represent yourself.” *Id.*

Garcia responded, “[s]o currently I will be representing myself.” *Id.* The Court proceeded to conduct a *Faretta* hearing.⁷ (2-ER-35-42). After the *Faretta* colloquy, Garcia equivocated on self-representation.

When the district court asked Garcia if she wanted to represent herself, she answered, “I am prepared to represent myself. The intent was to have my legal counsel represent me through the evidentiary hearing.” (2-ER-42). The district court responded, “[w]ell, so you want to have a lawyer - - you don’t - - I mean, do you want to represent yourself now or you don’t?” *Id.* Garcia said, “I do have the case law and the material evidence to move forward with withdrawing the guilty plea. ... and so my intent was to have legal counsel present at that step.” (2-ER-42-43).

The district court responded, “I’ve already let your legal counsel withdraw. You don’t have legal counsel right now.” (2-ER-43). Garcia responded,

As you know, I have no legal background, so *I would prefer to have legal counsel* for this one step, although I am prepared to represent myself if that what the Court requires in order to not obstruct the process.

Id. (emphasis added). The district replied, “I am trying to digest what you have just said to me. And what I did not get from you is an unequivocal answer to my question, so I am going to ask again. Do you wish to represent yourself in this matter from this point forward?” *Id.* Garcia answered, “[y]es, Your Honor.” *Id.* The district court ruled Garcia would represent herself. *Id.*

4. The district court abused its discretion in denying Garcia’s motion to withdraw from her guilty pleas by refusing to accept all of Garcia’s evidence she claimed supported her motion, and by denying her request for a continuance to obtain additional evidence.

In the offer of proof supporting the factual basis for Garcia’s guilty pleas for Count 1 and

⁷ *Faretta v. California*, 422 U.S. 806 (1975).

5, the government claimed that Garcia falsified her Paycheck Protection Plan (PPP) loan application by claiming her company, Bluebird Property Rentals, LLC, had a number of employees and paid a significant amount in employee payroll expenses per month. (2-ER-165-66). The government claimed, “none of these statements were true.” *Id.*

Defense counsel filed a memorandum supporting Garcia’s motion to withdraw her guilty pleas, stating,

Prior to pleading guilty, Ms. Garcia asserted that she was business partner with Christopher Fanuzzi. Mr. Fanuzzi was adamant that he was at no time a business partner with Alaina Garcia in any business venture, thus she had no right to treat any of Mr. Fanuzzi’s employees as shared employees. On March 12, 2026, Gallatin County Sheriffs Deputy John Fricke notified Ms. Garcia that the Gallatin County Sheriffs Office had sent to the Gallatin County Attorney’s Office a Request for Prosecution of Christopher Fanuzzi for Perjury under Montana Code Annotated §45-7-201. Please see email attached as Exhibit “A.” Said perjurious conduct touches and concerns the issue of the business relationship and shared employees between Ms. Garcia and Mr. Fanuzzi, an issue which is material in this federal criminal matter. Evidence showing that Mr. Fanuzzi has lied about Ms. Garcia’s role as a business partner could impact how a jury weighs whether Ms. Garcia intended to defraud the United States of America.

2-ER-99-100).

After the district ruled Garcia would represent herself, Garcia provided argument on the motion to withdraw her guilty pleas. (2-ER-44-62). She argued that former business partner, Fanuzzi, was referred for prosecution for perjury when he falsely claimed he was never a business partner with her. (2-ER-44-45). By establishing Fanuzzi as a business partner, Garcia argued she could prove that they “shared 144 employees with approximately \$4.3 million payroll as of 2019 annually.” (2-ER-45). She claimed this new evidence showed she was “fully

compliant with the SBA PPP program.” *Id.*

She maintained this newly discovery evidence showed she was “innocent of all 12 counts.” *Id.* Garcia explained, “we have intervening evidence that came after the change of plea, that I absolutely would not have taken the plea if I knew about them during the change of plea, and that I do believe that I am not guilty on all 12 counts.” (2-ER-48).

Garcia submitted three email exhibits, B, C and D, at the hearing containing new evidence. (2-ER-58,93,95,97). Garcia maintained that these exhibits related to her defense because they contained evidence that showed that the local sheriff’s office referred Fanuzzi for prosecution for perjury for denying having a business relationship with her. (2-ER-45). After receiving Garcia’s exhibits and argument, the district court told Garcia, “I’m try to figure out why Exhibits B, C, or D bolster your argument.” (2-ER-59).

Garcia responded, “[t]hat’s why I have the entire case summary here for what those emails are based on.” “[I]t shows that the statements were made under oath during official proceedings, the statements were false, Chris Fannuzzi (sic) knew the statements were false, and the statements concern material matters affecting the proceedings.” (2-ER-60).

Garcia asked to provide the case summary, however, the district court inquired, “[w]ho prepared the case summary.” (2-ER-61). Garcia indicated she prepared the summary which included “the official transcript ... bank statements and the contradictory information for the county attorney in order to build the case....” *Id.* Since Garcia said she prepared the summary, the district court did not allow her to admit it to buttress her motion. *Id.*

The prosecution’s position was that all of Garcia’s exhibits were irrelevant and wholly unrelated to the case. (2-ER-52-53,62); *United States v. Garcia*, 401 F.3d 1008, 1011 (9th Cir.

2005) (“evidence wholly unrelated to a defendant’s case would surely not entitled [her] to withdraw [her] guilty plea”). The district court agreed, concluding all of Garcia’s exhibits were wholly unrelated to the case. (2-ER-63).

Before the sentence was imposed, Garcia told the district court, “I also do have a summary written by federal investigators, that outlines the backing to the perjury case along with the employees that were shared, that I feel like is very relevant to this case to be on the record....” (2-ER-72). The district court responded, “Ms. Garcia, that ship has sailed. I’m about to pronounce sentence.” *Id.* Garcia asked, “[i]s this something that I’ll be able to provide in the appeal, then?” *Id.* The district court said, “[w]ell, you’ve certainly mentioned it, and it’s certainly a matter of record.” *Id.*

Just before imposition of the sentence, Garcia also asked for a continuance “to have time to forensically audit this case with [her] hired IRS principal auditor.” (2-ER-67-68). The Court denied the motion. (2-ER-68).

V. REASONS FOR GRANTING THIS APPLICATION FOR RELEASE

Contrary to the Ninth Circuit’s conclusion, Garcia’s appeal does “raise[] substantial question[s] of fact or law likely to result in ... reversal” as set out in 18 U.S.C. § 3143(b)(1)(B)(i), App. 1. The Court has yet to determine what constitutes a “substantial question of law or fact likely to result in ... reversal” within the meaning of § 3142(b)(1)(B)(i). Circuit courts that have addressed the question have universally adopted a two-part test from the Third Circuit in *United States v. Miller*, 753 F.2d 19 (3d Cir. 1985). *See, United States v. Affleck*, 765 F.2d 944, 952 (10th Cir. 1985) (listing circuit decisions, *United States v. Powell*, 761 F.2d 1227, 1230-34 (8th Cir. 1985); *United States v. Handy*, 761 F.2d 1279, 1280 (9th Cir. 1985); and *United States v.*

Giancola, 754 F.2d 898, 900-01 (11th Cir. 1985)).

The two-part test requires the appellate court to determine whether the appeal “raises a ‘substantial’ question of law or fact, and then determine if the substantial question is determined ‘favorably to defendant on appeal, that decision is likely to result in reversal or a new trial of all counts on which imprisonment was imposed.’” *Affleck*, 765 F.2d at 952 (quoting *Miller*, 753 F.2d at 24). “[A] ‘substantial question’ is one of more substance than would be necessary to a finding that it was not frivolous. It is ‘a close’ question or one that very well could be decided the other way.” *Id.* (quoting *Giancola*, 754 F.2d at 901).

The law relating to issuance of a certificate of appealability (COA) pursuant to 28 U.S.C. § 2253(c)(2) offers guidance on what constitutes a “substantial question.” Under § 2253, a “[COA] may issue ... only if the applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2).

Issuing a COA “does not require a showing that the appeal would succeed.” *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003). “[A] court of appeals should not decline the application of a COA merely because it believes the applicant will not demonstrate entitlement to relief.” *Id.* “It is consistent with § 2253 that a COA will issue in some instances where there is no certainty of ultimate relief.” *Id.* Thus, “a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case received for full consideration, that petitioner will not prevail.” *Id.* at 338.

Thus, the Ninth Circuit has held that a COA is authorized “‘if the applicant has made a substantial showing of the denial of a constitutional right.’” *Turner v. Calderon*, 281 F.3d 851, 864-65 (9th Cir. 2002) (quoting *Sassounian v. Roe*, 230 F.3d 1097, 1100 (9th Cir. 2000) (quoting

28 U.S.C. § 2253(c)(2)). “A ‘substantial showing ... includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.’” *Turner*, 281 F.3d at 865 (quoting *Slack v. McDaniel*, 529 U.S. 473, 481-82 (2000)). “Where a district court has rejected the constitutional claims on the merits ... [t]he petitioner must demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” *Id.*

The Ninth Circuit relied on its prior *Handy* decision to conclude Garcia “has not shown that the appeal raises a ‘substantial question’ of law or fact that is ‘fairly debatable.’ and this if the question is decided in the defendant’s favor, the likely result is either reversal or a new trial.” App. 1 (citing *Handy*, 761 F.2d at 1283). *Handy* held a “‘substantial question’ is one that is ‘fairly debatable.’” *Handy*, 761 at 1281-82 (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n. 4 (1983) (the petitioner “must demonstrate that the issues are debatable among jurists of reason”). “In short, a ‘substantial question’ is one of more substance than would be necessary to a finding of not frivolous.” *Handy* 761 F.2d at 1283 (quoting *Giancola*, F.2d at 901). *Handy* adopted the two-part test from the Third and Eleventh Circuits, stating,

Like the Third and Eleventh Circuits, we find that the word “substantial” defines the level of merit required in the question raised on appeal, while the phrase “likely to result in reversal” defines the type of question that must be presented.

Handy, 761 F.2d at 1281.

Garcia maintains she raised four substantial questions on appeal and if any one of the questions are decided in her favor, a reversal would likely result. (DktEntry 10 at 7).

Substantial Questions Likely of Law of Fact to Result in Reversal:

1. Should Garcia's guilty pleas be vacated for the magistrate's failure to inform her of, and to ensure she understood, the nature of each of the charges during the change of plea hearing as required under Fed. R. Crim. P. 11(b)(1)(G)? (DktEntry 10 at 23-28).

Garcia concedes that the standard of review for this question is plain error. (DktEntry 10 at 23). Garcia must first establish that the magistrate erred in failing “inform her of, and determine that she understands the nature of each charge to which to defendant is pleading” as required under Rule 11(b)(1)(G).⁸ *United States v. Olano*, 507 U.S. 725, 732 (1993). Next, the error must be “plain,” meaning the error is “‘clear’ or equivalently, ‘obvious.’” *Id.* at 734. A plain error must then “‘affec[t] substantial rights.’” *Id.* That is the error “must have affected the outcome of the district court proceedings.” *Id.* Lastly, an appellate court need not grant relief, unless “a plain forfeited error affecting substantial rights ... seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.” *Id.* at 736.

The record at the change of plea hearing establishes that, after the prosecutor set out the elements of each offense, the magistrate ask Garcia if she understood those elements. (2-ER-46). The magistrate simply asked defense counsel if those elements were correct. *Id.*

Then defense counsel disclosed “a slight discrepancy” between the elements set forth in the plea agreement and the elements in the offer of proof, as recited by the prosecutor for Count 5. *Id.* As a result, the magistrate incorporated the elements for Count 5 from the plea agreement into the elements recited by the prosecutor as set out in the offer of proof. (2-ER-147-48); and *compare*, (2-ER-164) (elements on offer of proof), *with* (2-ER-170) (elements in plea

⁸ The Court holds that Fed. R. Crim. P. 52(b), the plain error standard, applies to claims that the lower court violated Rule 11 during a change of plea colloquy. *United States v. Vonn*, 535 U.S. 55 (2007).

agreement). The magistrate did not inquire of Garcia if she understood the elements of the money laundering charged in Count 5, neither before nor after the magistrate modified the elements and incorporated the elements from the plea agreement into the change of plea proceedings. (2-ER-147-48).

The Court has long held that a “[guilty] plea [can]not be voluntary in the sense that it constitutes an intelligent admission that [a defendant] committed the offense unless the defendant received ‘real notice of the true nature of the charge against him, the first and most universally recongnized requirement of due process.’” *Henderson v. Morgan*, 426 U.S. 637, 645 (1976) (quoting *Smith v. O’Grady*, 312 U.S. 329, 334 (1941)). Rule 11(b)(1)(G) tracks two components from *Henderson* needed for a voluntary guilty plea; and that is, the defendant must have “adequate notice” and the defendant must understand the charge to which he is pleading.

Henderson noted:

A plea may be involuntary either because the accused does not understand the nature of the constitutional protections that he is waiving, see, *E. g.*, *Johnson v. Zerbst*, 304 U.S. 458, 464-465, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461, or because he has such an incomplete understanding of the charge that his plea cannot stand as an intelligent admission of guilt. Without adequate notice of the nature of the charge against him, or proof that he in fact understood the charge, the plea cannot be voluntary in this latter sense. *Smith v. O’Grady*, 312 U.S. 329, 61 S.Ct. 572, 85 L.Ed. 859.

Henderson, 426 U.S. at 645 n.13.

Due process requires, not just that the defendant is informed of the charge during a guilty plea colloquy, but also be informed of and understands the elements of the charge. *Bradshaw v. Stumpf*, 545 U.S. 175 (2005). In *Stumpf*, the Court recognized that a defendant’s guilty plea is not valid “if [the defendant] had not been aware of the nature of the charges against him, *including*

the elements of the ... charge to which he pleaded guilty.” Id. at 182-83 (emphasis added). The Court further explained, “the constitutional prerequisites of a valid plea may be satisfied where the record accurately reflects that the nature of the charge and the elements of the crime were explained to the defendant by his own, competent counsel.” *Stumpf*, 545 U.S. at 183.

In *McCarthy v. United States*, the Court instructed:

A defendant who enters such a plea simultaneously waives several constitutional rights, including his privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers. For this waiver to be valid under the Due Process Clause, it must be “an intentional relinquishment or abandonment of a known right or privilege.” *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). Consequently, if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void. Moreover, because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts.

394 U.S. 459, 466 (1969).

The circuit court’s, including the Ninth Circuit are consistent, bank fraud is not a federal offense unless “the bank was federally insured at the time of the offense.” *United States v. Ali*, 266 F.3d 1242, 1243-44 (9th Cir. 2001) (“Proof of federally-insured status of the affected institution is, for [bank fraud under] § 1344 ..., a jurisdictional prerequisite as well as an element of the substantive offense.”) (quoting, *United States v. Key*, 76 F.3d 350, 353 (11th Cir. 1996)); *see also*, *United States v. Perez-Ceballos*, 907 F.3d 863, 867 (5th Cir. 2018) (same); *United States v. Lindsay*, 184 F.3d 1138, 1141 (10th Cir. 1999) (“proof” the victim bank is insured by the FDIC “is an essential element of bank fraud”).

The magistrate did not inquire of Garcia whether she understood the elements of bank

fraud in Count 1, including whether she understood the requirement that Celtic Bank be FDIC-insured as the time of the bank fraud. (2-ER-146). The magistrate did not inquire whether she understood that requirement in relation to Count 5. (2-ER-148) The magistrate did not inquire of Garcia's counsel whether he believed Garcia understood the elements of each of the charges to which she was pleading guilty. *Id.*

The very essence of federal bank fraud rests upon proof that Celtic Bank had federal deposit insurance at the time of the offense. The record does not establish that Garcia understood when she entered her guilty pleas that bank fraud requires proof that the bank was federally insured. The record does not establish that defense counsel explained to Garcia that federal bank fraud required the government to prove Celtic Bank was FDIC-insured.⁹

⁹ The Court in *Henderson* also observed:

Normally the record contains either an explanation of the charge by the trial judge, or at least a representation by defense counsel that the nature of the offense has been explained to the accused. Moreover, even without such an express representation, it may be appropriate to presume that in most cases defense counsel routinely explain the nature of the offense in sufficient detail to give the accused notice of what he is being asked to admit.

Henderson, 426 U.S. at 647.

In this case, it is not appropriate to presume that defense counsel explained the nature of federal bank fraud to Garcia. After all, the offer of proof submitted by the government did not contain any facts that established Celtic Bank was FDIC-insured at the time of the bank fraud. (2-ER-165-66). Furthermore, the prosecutor's recitation of the factual basis at the change of plea hearing did not include any facts establishing Celtic Bank was FDIC-insured at the time of the bank fraud. (2-ER-149-50). When asked, defense counsel indicated to the magistrate that he did not disagree with the facts as outlined by the prosecutor in the "offer of proof." (2-ER-150-51). Since neither the offer of proof nor the prosecutor's recitation establish Celtic Bank was FDIC-insured, and defense counsel expressed no disagreement with the facts, it cannot be assumed that counsel explained to Garcia the need for FDIC insurance to support a conviction for federal bank fraud.

Both the decisions from the Court and the requirements in Rule 11 are clear. The record at a guilty plea hearing must establish the defendant was informed of, and understands, the nature of the charge to which the defendant is pleading guilty, including the elements of the charge. *Henderson*, 426 U.S. at 645; *Stumpf*, 545 U.S. at 183; and Fed. R. Crim. P. 11(b)(1)(G).¹⁰ The magistrate's failure to determine if Garcia understood the nature of each charge in Count 1 and Count 5 constitutes plain error.

The question then becomes whether the magistrates plain error affected Garcia's substantial rights. *Olano*, 507 U.S. at 734. The government relies on *United States v. Dominguez Benitez*, 542 U.S. 74, 83 (2004). (DktEntry 14 at 11-12). There, the Court held that to establish plain error from an "omitted warning" under Rule 11 during a guilty plea colloquy, the defendant "must show a reasonable probability that, but for the error, he would not have entered the plea." *Dominguez Benitez*, 542 U.S. at 83. The alleged Rule 11 violation in *Dominguez Benitez* is quite different from the Rule 11 violation in this case.

Dominguez Benitez involved an "omitted warning," *i.e.*, the district court's failure to

¹⁰ Ninth Circuit's case law mirrors these requirements. *See, United States v. Portillo-Cano*, 192, F.3d 1246, 1250 (9th Cir. 1999) (quoting *United States v. Longoria*, 113 F.3d 975, 977 (9th Cir.1997)); Fed. R. Crim. P. 11(b)(1)(G)) ("[Before accepting a plea of guilty, the 'court must address the defendant personally ... and inform the defendant of, and determine that the defendant understands ... (1) the nature of the charge to which the plea is offered'"); and *United States v. Pena*, 314 F.3d 1152, 1156 (9th Cir. 2003) ("Merely asking Pena whether he read the plea agreement and asking the attorney whether the attorney, *not* Pena, understood and agreed with the elements of the offense is insufficient."). Thus, the Ninth Circuit holds, "[a] trial judge fails to satisfy his obligation when ... he does not fully inform the defendant of the meaning and application 'of the legal argot and other legal concepts that are esoteric to an accused....'" *Id.* (citing *United States v. Bruce*, 976 F.2d 552, 559 (9th Cir. 1992) (quoting *United States v. Coronado*, 554 F.2d 166, 172 (5th Cir. 1977)). Both the Ninth Circuit and the Court's decisions establish the magistrates failure to determine if Garcia understood the elements of the charges is plain error.

warn the defendant “that he could not withdraw his guilty plea if the court did not accept the Government's recommendation.” *Id.* at 80. The Court instructed, “[t]he point is to enquire whether the *omitted warning* would have made a difference [under] a standard of reasonably probability.” *Id.* (emphasis added).

Significantly, the Court noted that omitting a warning during a change of plea colloquy is a “point of contrast with the constitutional question whether a defendant's guilty plea was knowing and voluntary.” *Dominguez Benitez*, 542 U.S. at 84 n. 10. *Dominguez Benitez*, therefore, leaves open for debate the question of whether a failure to advise the defendant of, and determine the defendant understands, the nature of the charge satisfies the third prong of the plain error standard of review because such failure affects a criminal defendant’s substantial right to due process under *Henderson* and *Stumpf*. *Henderson*, 426 U.S. at 645 n.13; *Stumpf*, 545 U.S. at 183.

Olano recognized that “[t]here may be a special category of forfeited errors that can be corrected regardless of their effect on the outcome...” 507 U.S. at 735. This case presents one such special category.

Garcia’s guilty pleas are involuntary and in violation of due process. *Henderson*, 426 U.S. at 645 n.13; *Stumpf*, 545 U.S. at 183. The magistrate completely failed to determine whether she understood the nature of her the charges, including the elements of the offenses during the guilty plea colloquy. *Id.*

Garcia presented the Ninth Circuit with a substantial question of law and fact. If she prevails, her convictions on Count 1 and 5 would be reversed. *Handy*, 761 F.2d at 1281.

2. Should Garcia’s guilty plea pleas be set aside for lack of a factual basis as required under Fed. R. Crim. P. 11(b)(3)?. (DktEntry 10 at 28-24).

Again, Garcia did not object and the standard of review before the Ninth Circuit is plain error. *See*, Question 1, *supra*.

“Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.” Fed. R. Crim. P. 11(b)(3); *see also*, *United States v. Bain*, 925 F.3d 1172, 1177 (9th Cir. 2019) (same). The Ninth Circuit holds that the reviewing court “must look to the entire record and not to the plea proceedings alone” to determine if a factual basis for a guilty plea is established. *Bain*, 925 F.3d at 1176. The district court “may rely on presentence reports in determining the factual basis for a plea...” *United States v. Jauregui*, 918 F.3d 1050, 1065 (9th Cir. 2019) (quoting *United States v. Reyna-Tapia*, 328 F.3d 1114, 1120 n.5 (9th Cir. 2003) (internal citation omitted)). The district court need not make “an express finding of a factual basis during the plea colloquy.” *Jauregui*, 918 F.3d at 1065 (quoting *In re Ellis*, 356 F.3d 1198, 1205 (9th Cir. 2004) (en banc) (quotation marks, internal citation and alteration omitted)). Instead, the record must establish “sufficient evidence to support the conclusion that the defendant is guilty, and the court must make the determination before entering judgment.” *Id.*

In *Perez-Caballo*s, the Fifth Circuit distinguished between the requirement that an indictment allege that the victim bank was insured by the FDIC to establish federal jurisdiction from the requirement that the government prove that the victim bank was, in fact, FDIC-insured as an essential element federal bank fraud. 907 F.3d at 867. The Fifth Circuit stated, “when reviewing bank fraud convictions, ‘proof of FDIC insurance is not only an essential element’ of the crime, ‘but it is also essential for the establishment of federal jurisdiction.’” *Id.*

The defendant argued that the government had not established federal jurisdiction. The Fifth Circuit dismissed that argument because “[b]oth the indictment and jury instructions

indicate that [the defendant] was charged with defrauding Chase Bank, an FDIC insured institution.” *Id.* The Fifth Circuit went on to conclude that the government had not met its burden of proving the defendant defrauded Chase Bank because the material false statements underlying the alleged bank fraud were made to companies that were not FDIC-insured. *Id.* at 868.

Similarly, in *Ali*, the Ninth Circuit concluded that proof was insufficient to establish the victim bank was FDIC-insured at the time of the bank fraud. 266 F.3d at 1243-44. The bank fraud occurred in 1997. *Id.* at 1243. The government produced an FDIC insurance certificate dating back to 1985. At trial, a bank employee testified, “[w]e’re insured by the FDIC...” and identified the 1985 certificate of insurance. *Id.* The Ninth Circuit held that the government failed to prove “beyond a reasonable doubt that the bank was federally insured at the time of the offense.” *Id.*

Garcia raises a substantial question of whether her guilty pleas to both counts should be vacated due to an insufficient factual basis establishing Celtic Bank was federally insured at the time of the bank fraud. The record only establishes that the indictment alleged Celtic Bank was insured by the FDIC. (2-ER-5-7); (PSR at 4, ¶¶ 2 and 5). In relation to the factual basis, the record is insufficient to establish a factual basis for Garcia’s guilty pleas on both counts.

Nothing in the entire record of the proceedings, including the offer of proof, the change of plea hearing and the PSR, establishes a factual basis. The “Anticipated Evidence” in the government’s “Offer of Proof” does not contain any facts establishing Celtic Bank had FDIC insurance at the time of the bank fraud. (2-ER-165-66). Likewise, the “Offense Conduct” in the PSR does not contain any facts that establish that Celtic Bank had federal deposit insurance at the time of the bank fraud. (PSR at 7-17, ¶¶ 20-63) (filed under seal). Garcia’s guilty pleas on

Counts 1 and 5 are not supported by a sufficient factual basis, contrary to the requirement in Rule 11(b)(3) and in violation of due process.

Without the magistrate determining that Garcia understood that existence of federal deposit insurance is essential to a federal bank fraud her guilty pleas were not voluntary. *Ali*, 266 F.3d at 1243-44. As the Ninth Circuit held the failure to advise the defendant of the law and facts that make up the “legal argot” of an offense is insufficient to establish a guilty plea is voluntary. *Pena*, 314 F.3d at 1156.

In *Henderson*, the defendant pleaded guilty to second degree murder which required the state to prove he intended to kill the victim. 426 U.S. at 645. The Court concluded that by merely admitting he killed the victim, the defendant did “not necessarily also admit that he was guilty of second-degree murder.” *Id.* at 646. The Court went on to state:

There is nothing in this record that can serve as a substitute for either a finding after trial, or a voluntary admission, that [the defendant] had the requisite intent. Defense counsel did not purport to stipulate to that fact; they did not explain to him that his plea could be an admission of that fact; and he made no factual statement or admission necessarily implying that he had such intent. In these circumstances it is impossible to conclude that his plea to the uncharged second degree murder was voluntary.

Id. *Henderson* involved a guilty plea to an uncharged second degree murder, reduced from a first degree murder charge, *Id.* at 642-43.

The bank fraud in this case was charged in the indictment and alleged that Celtic Bank was FDIC-insured. (2-ER-184). However, the offer or proof, the recitation of facts at the change of plea hearing, and the PSR lack the facts necessary to establish Celtic Bank, was federally insured at the time of the bank fraud.

Garcia raised a substantial question of whether the magistrate and the district court's acceptance of her guilty plea, without a sufficient factual basis, as required under Rule 11(b)(3), constitutes plain error. The rule itself and case authority establish that it is. The plain error also affects Garcia's substantial rights.

The Court has previously recognized, "essential of the due process guaranteed [is] that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof—defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense." *Jackson v. Virginia*, 443 U.S. 307, 316 (1979). Without facts supporting the element that Celtic Bank was insured by the FDIC at the time of the bank fraud, Garcia's guilty plea based on federal bank fraud violates due process and should not stand. The plain error affects Garcia's substantial right to due process, affecting the fairness, integrity and public reputation of the judicial proceedings.

3. Did the district court err in allowing Garcia to represent herself after she informed the court she intended be represented by counsel and preferred to have counsel on her motion to withdraw her guilty pleas, after the district court permitted her retained counsel to withdraw as Garcia's counsel moments before the motion and sentencing hearing? (DktEntry 31-32).

In *Faretta*, the Court recognized the constitutional right of self-representation. 422 U.S. at 836. In *Faretta*, the defendant "clearly and unequivocally" informed the trial judge "that he wanted to represent himself and did not want an attorney." *Id.* at 835. The record established that the defendant "was exercising his informed free will." *Id.* And, the trial judge "warned Faretta that he thought it was a mistake to represent himself." These three components of *Faretta* are important to this question.

In line with *Faretta*, the Ninth Circuit has held, "[b]ecause the exercise of the right to

self-representation cuts off the exercise of the right to counsel, often to individual detriment, [court's] recognize the right only when it is asserted without equivocation.” *United States v. Mendez-Sanchez*, 563 F.3d 935, 945 (9th Cir. 2009). This Court stated, “[i]f [the defendant] equivocates, he is presumed to have requested assistance of counsel.” *Id.* (quoting *Adams v. Carol*, 875 F.2d 1441, 1444 (9th Cir. 1989)).

In *Mendez-Sanchez*, during a *Faretta* hearing, the defendant told the district court, “I think [it] would be better if a lawyer will help me[,] ... [b]ut I hope that would be a good lawyer, not like these guys.” 563 F.3d at 946. These remarks did not qualify as an unequivocal demand for self-representation. *Id.*

The record here establishes that it was the district court, and not Garcia, who raised the idea of self-representation. (2-ER-33). The district court asked Garcia, just moments after allowing retained counsel to withdraw, “[d]o you want another lawyer, or do you want to represent yourself.” *Id.* at 33-34. Garcia did not seek self-representation, and responded, “with my counsel, we’ve had to submit a motion to withdraw ... the guilty plea.” *Id.* at 34. The district court said, but we’ve got to address, first of all, your representation,” inquiring “whether you’re going to be represented by a lawyer, or whether you’re going to represent yourself.” *Id.* Garcia said, [s]o currently I will be representing myself.” *Id.*

Rather than attempting to dissuade Garcia from representing herself or cautioning her that it was a mistake to do so, the district court proceeded to a *Faretta* hearing *Id.* 34-42. After the *Faretta* colloquy, the district court inquired whether Garcia “wanted to represent [herself] in this matter as we proceed forward.” *Id.* at 42. The district court did not ask Garcia if she wanted lawyer representation. *Id.* Garcia responded, “I am prepared to represent my self,” but then

qualified that response. She informed the district court that “[t]he intent was to have my legal counsel represent me through the evidentiary hearing.” *Id.*

The district court responded, “so you want to have a lawyer....” (2-ER-42). Without a response, the district court immediately asked, “I mean, do you want to represent yourself now or don’t you?” *Id.* Garcia responded, “I do feel like we have the case law and the material evidence to move forward with withdrawing the guilty plea ... and so my intent was to have legal counsel represent me at that step. *Id.* at 42–43.

The district court said, “I’ve already let your legal counsel withdraw ... [y]ou don’t have legal counsel right now.” *Id.* at 43. Garcia then responded, “[m]y intent is not to be an obstruction to the Court, and that is not what I’d like to do at all ... [a]s you know, I have no legal background, so I would prefer to have legal counsel for this one step, although I am prepared to represent myself if that’s what the Court requires in order not to obstruct to the process.” *Id.*

The district court reacted, “Ms. Garcia, I am trying to digest what you have just said to me. And what I did not get from you is an unequivocal answer to my question, so I’m going to ask it again ... [d]o you wish to represent yourself in this matter from this point forward?” *Id.* Garcia responded, [y]es, Your Honor.” *Id.*

The record establishes it was the district court who raised with Garcia the question of self representation, Garcia did not request or express a clear and unequivocal desire to represent herself. Instead, she expressed twice her intent to have legal counsel to present to argue the motion to withdraw her guilty pleas. *Id.* at 42-43. She also expressed her preference to have counsel assistance on her motion to withdraw her guilty pleas due to her lack of legal background. (2-ER-43). The record establishes that Garcia capitulated to the Court’s question in

order to do “what the Court requires in order to not obstruct the process.” *Id.*

Garcia did not make an unequivocal demand or request to represent herself. The district court did not attempt to steer Garcia away from representing herself, nor did the court advise Garcia that self-representation was a mistake. *Faretta*, 422 U.S. at 835. The record establishes Garcia was not “voluntarily exercising [her] free will.” *Id.* The record establishes that she wanted to avoid being viewed as obstructing the district court by continuing to indicate her intent to have legal representation on her motion to withdraw her guilty pleas. (2-ER-42-43).

Whether the district court erred in allowing Garcia to represent herself after she indicated her intent and preference for counsel during the *Faretta* hearing is a substantial question. It is a question that is likely to result in reversal if she prevails on this question on appeal.

4. Did the district court abuse its discretion in denying Garcia’s motion to withdraw from her guilty pleas by refusing to accept all of Garcia’s evidence that supported her motion, and by denying her request for a continuance to obtain additional evidence? (DktEntry 32-39).

The Federal Rules of Criminal procedure permit a defendant to withdraw from a guilty plea before imposition of a sentence if the defendant to offers a “fair and just reason for requesting the withdrawal.” *Garcia*, 401 F.3d 1008, 1011 (9th Cir. 2005) (quoting Fed. R. Crim. P. 11(d)(2)(B)). “Fair and just reasons for withdrawal include inadequate Rule 11 plea colloquies, newly discovered evidence, intervening circumstances, or any other reason for withdrawing the plea that did not exist when the defendant entered [her] plea.” *Id.* (citing *Ortega-Ascanio*, 376 F.3d at 883).

A court should grant a motion to withdraw a guilty plea when a fair-and-just reason “could plausibly have motivated a reasonable person in [the defendant’s] position not to have pled guilty.” *Untied States v. McTiernan*, 546 F.3d 1160, 1168 (9th Cir. 2008). The standard for

granting a motion to withdraw from a guilty plea is “generous and must be applied liberally.” *McTiernan*, 546 F.3d at 1167.

Evidentiary hearings on motions to withdraw guilty pleas should be “routinely” granted. *United States v. Redig*, 27 F.3d 277, 280 (9th Cir. 1994). Likewise, the Seventh Circuit holds evidentiary hearings should be “liberally granted” on a motion to withdraw from a guilty plea brought before sentencing. *United States v. Fountain*, 777 F.2d 351, 358 (7th Cir. 1985).¹¹

In this case, Garcia maintained that newly discover evidence regarding Fanuzzi’s lie, that he never had a business relationship with her, would prove her innocence. (2-ER-45). The Ninth Circuit has held:

the generous “fair and just reason” standard does not require that the defendant show that the new evidence exonerates him or that there is a reasonable probability he would not have been convicted had the case gone to trial. *See United States v. Morgan*, 567 F.2d 479, 493 (D.C.Cir.1977) (“Where the accused seeks to withdraw his plea of guilty before sentencing, on the ground that he has a defense to the charge, the District Court should not attempt to decide the merits of the proffered defense, thus determining the guilt or innocence of the defendant.”) (citation omitted)).

Garcia, 401 F.3d at 1011.

A more complete evidentiary hearing was necessary before the court determined whether or not to grant Garcia’s motion to withdraw her guilty pleas. Garcia asserted that newly

¹¹ *Fountain* also notes that the D.C. Circuit holds an evidentiary hearing on a motion to withdraw filed prior to sentencing “should be freely granted as a matter of course.” *Id.* at 358 n.3 (citing *United States v. Russell*, 686 F.2d 35, 38 (D.C. Cir.1982)).

The Second Circuit recognizes that “the standard to be applied for granting an evidentiary hearing is less rigorous than the standard for granting a motion to withdraw the plea.” *United States v. Gonzalez*, 970 F.2d 1095, 1100 (2d Cir. 1992). A hearing is not needed only if the motion’s allegations “merely contradict the record, are inherently incredible, or are simply conclusory.” *Id.* (citing *United States v. Crooker*, 729 F.2d 889, 890 (1st Cir. 1984)).

discovered evidence came to light after her guilty pleas, establishing that Fanuzzi, her former business partner, was referred for prosecution for perjury for falsely claiming he was never a business partner with her. (2-ER-45). She indicated that establishing Fanuzzi as a business partner, she could prove that they “shared 144 employees with approximately \$4.3 million payroll as of 2019 annually.” *Id.* She claimed this new evidence showed she was “fully compliant with the SBA PPP program.” *Id.* She maintained this showed she was “innocent of all 12 counts.” *Id.*

Garcia submitted three email exhibits, B, C and D, at the hearing containing new evidence that demonstrated Fanuzzi was being consider for a perjury prosecution for denying he had a business relationship with her. (2-ER-56-58). The district court told Garcia, “I’m try to figure out why Exhibits B, C, or D bolster your argument.” (2-ER-59). The district court ultimately agreed with the government Garcia’s exhibits were wholly unrelated to the case. (2-ER-52-53,62, 63). *Garcia*, 401 F.3d at 1011 (“evidence wholly unrelated to a defendant’s case would surely not entitled [her] to withdraw [her] guilty plea”). The district court denied the motion. (2-ER-63).

During the hearing, Garcia informed the district court she had “the entire case summary here for what those emails [Exhibits B and C] are based on.” “[I]t shows that the statements were made under oath during official proceedings, the statements were false, Chris Fannuzzi (sic) knew the statements were false, and the statements concern material matters affecting the proceedings.” (2-ER-60).

Garcia sought to provide the case summary to support her motion. *Id.* After learning it was Garcia who prepared the summary, the district court did not allow Garcia to present the

summary. (2-ER-61).

During the sentencing phase of the hearing, Garcia informed the district court, “I also do have a summary written by federal investigators, that outlines the backing to the perjury case along with the employees that were shared, that I feel like is very relevant to this case to be on the record....” (2-ER-72). The district court responded, “Ms. Garcia, that ship has sailed. I’m about to pronounce sentence.” *Id.* Garcia asked, “[i]s this something that I’ll be able to provide in the appeal, then?” *Id.* The district court said, “[w]ell, you’ve certainly mentioned it, and it’s certainly a matter of record.” *Id.*

Garcia also asked for a continuance “to have time to forensically audit this case with [her] hired IRS principal auditor.” (2-ER-67). The Court denied the motion. (2-ER-68).

The record demonstrates, in Garcia’s view, the newly discovered evidence established a fair and just reason for having her plea withdrawn and was related to her case. In the government’s view, the information was wholly unrelated. Garcia was seeking to provide the Court with additional information she believed related to a defense, *i.e.*, she did not intend to defraud the bank because her business partnership with Fanuzzi provided her with 144 shared employees and annual salary expense for employees supporting her PPP loan. (2-ER-45) Garcia also explained, “we have intervening evidence that came after the change of plea, that I absolutely would not have taken the plea if I knew about them during the change of plea, and that I do believe that I am not guilty on all 12 counts.” (2-ER-48).

Because the district court ruled Garcia would represent herself, as a *pro se* defendant, her arguments should be liberally construed. *United States v. Eateringer*, 902 F.2d 1383, 1385 (9th Cir. 1990); *see also, Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (*pro se* defendant pleadings are to be

liberally construed). Garcia's request to offer into evidence her prepared summary, offer into evidence the report from the federal investigator, and her request for time to conduct an audit, should have been construed as her request for a full evidentiary hearing before the Court concluded the documents and her position that Fanuzzi's pending perjury were wholly unrelated to her case.

In *McTiernan*, the Ninth Circuit vacated the judgment of the district court and remanded the case "for a full evidentiary hearing" on a motion to withdraw his guilty plea. 546 F.3d at 1169. This court also directed: "[i]n preparation for the evidentiary hearing, the parties may utilize such methods of discovery as may by law be available to them, subject to the supervision of the district court." *Id.*

The circumstances here justify a remand to the district court to give Garcia an opportunity for a "full evidentiary hearing." *Id.* Garcia was not allowed to submit her case summary, nor was she permitted to provide a summary of a federal investigator she claimed supported her motion. The district court denied Garcia's request for a continuance to obtain a forensic audit of her records. (2-ER-67-68).

Whether the district court erred in denying Garcia, a pro se defendant, a full evidentiary hearing, in denying to accept additional documentation in support of her motion to withdraw, in denying Garcia's request for a continuance to gather additional evidence to support her motion, is a substantial question. If Garcia prevails on this question, her appeal would likely result in a reversal.

VI. CONCLUSION

With this application for bail pending appeal, Garcia requests Circuit Justice Elena Kagan to order her release on conditions pending appeal, consistent with those conditions entered in the district court when released pending trial. App. 2-5.

Dated this 19th day of October, 2026.

Respectfully Submitted,



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