

Mr. Eliyahu Weinstein
Register # 62465-050
Federal Detention Center - Philadelphia
700 Arch St
Philadelphia, PA 19105

February 18, 2014

Clerk, U.S. District Court
District of New Jersey
Clarkson S. Fisher Federal Building
and Courthouse
402 E. State Street, Room 2020
Trenton, New Jersey 08608

Re: United States v. Eliyahu Weinstein
Criminal Docket # 11-CR-701 (JAP)

To the Clerk:

Herewith for filing, please find Defendant's Supplemental Motion for Withdrawal of Guilty Plea Induced by Misrepresentation, Conflict of Interest and Ineffective Assistance of Prior Counsel. Please docket same and refer to Judge Pisano for consideration by the Court.

Copies are being sent to the U.S. Attorney and present counsel.

Thank You.

Very Truly Yours,

A handwritten signature in black ink, appearing to be 'Eliyahu Weinstein', with a long horizontal line extending to the right.

ELIYAHU WEINSTEIN

cc: AUSA Zach Intrater
Eric Creizen, Esq.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF TRENTON

UNITED STATES OF AMERICA :: CRIMINAL ACTION

v. ::

ELIYAHU WEINSTEIN :: DOCKET #11-CR-701 (JAP)

DEFENDANT'S MOTION TO WITHDRAW GUILTY PLEA
INDUCED BY MISREPRESENTATIONS, CONFLICT OF INTEREST
AND INEFFECTIVE ASSISTANCE OF PRIOR COUNSEL

Defendant Eliyahu Weinstein hereby files this motion to withdraw his guilty plea (by way of Fed.R.Cr.P. 11 and 32), based on evidence developed at the hearing on November 25, 2013, on Weinstein's motion asserting a Rule 11 violation.

In light of new evidence - the Court's denial of participating in plea discussions with Weinstein's then counsel - those attorneys provided ineffective assistance of counsel to Weinstein by misrepresenting to him that the judge had promised a reduced sentence to obtain Weinstein's guilty plea. As a result, Weinstein's guilty plea was not voluntary; he was deprived of his Sixth Amendment right to effective assistance of counsel and his Fifth Amendment right to Due Process and a Fair Trial.

The issue for this Honorable Court to resolve is whether prior counsel induced Weinstein to plead guilty by misrepresenting to him that the judge promised, during a telephone call on January 2, 2013, that he would sentence Weinstein more favorably if he pled guilty. If so, Proskauer rendered ineffective assistance of counsel; and, as a result, Weinstein's guilty plea should be withdrawn as involuntarily made.

A. Introduction

1. There are several district grounds which not only support but mandate that Defendant's Motion to Withdraw Guilty Plea be granted, as follows:
2. Prior counsel misrepresented to Defendant that the Court had assured them that, if Defendant pled guilty and made restitution, "all doors would be open," and the Court "would remember" that the Government had originally offered Defendant a negotiated plea for a 5-10 year stipulated sentence pursuant to F.R.Cr.P. 11(c)(1)(C).
3. Prior counsel further represented to Defendant that the Court had also said that, if Defendant went to trial and was convicted on even a single count, "all doors would be closed."
4. In addition, Defendant's prior counsel had serious conflicts of interest that made it impossible for them to act in his best interests rather than their own in inducing him to plead guilty in this matter; as follows:
5. The conflict of interest arose when the Jencks Act material provided by the Government on December 31, 2012 revealed that at least one of Proskauer firm counsel had been an active participant in a transaction which gave rise to one of the charges against Defendant, and would likely be a witness for either the Prosecution or Defense at trial.
6. The said conflict of interest created a situation in which prior counsel's interests were best served by inducing Defendant to plead guilty rather than go to trial, since the latter course would have required them to withdraw from representing Defendant and require a refund of the One Million Dollar fee they had received less than two weeks earlier.
7. To support Weinstein's claim that his guilty plea was not voluntarily entered into, and to support his timely request for this Honorable Court to withdraw his involuntary guilty plea -

so that he can proceed to trial as he intended prior to being incorrectly advised by Proskauer - Weinstein respectfully incorporates herein by reference his declaration attached hereto as Exhibit A:

B. Facts from the Record

8. From November 2012 until Weinstein hired Proskauer to represent him in late December 2012, Weinstein made it perfectly clear to his attorneys that he was going to trial; Weinstein rejected all three of the government's plea offers. (See Judge Pisano's comment at November 25, 2013, Hearing tr., p. 12, ln. 17-25; p. 13, ln. 1-2; p. 14, ln. 11-14).
9. On December 20, 2012, Weinstein paid Proskauer's demand for a fee of One Million Dollars to represent him at trial. (See Weinstein's complaint of May 13, 2013, p. 1-4, 15); and on December 31, 2012, Proskauer entered an initial appearance as counsel in Weinstein's case, (see Judge Pisano comment at Nov. 25, 2013, Hearing tr. P. 14, ln. 15-20).
10. When Proskauer made their initial appearance on December 31, 2012, the Government provided Proskauer 3500 material which included the government's 302 information and a handwritten memo from one of the government's witnesses showing that Proskauer was connected to an insurance transaction charged in Weinstein's indictment; Proskauer reviewed the government's 3500 material. (See Creizman's Affidavit of Dec. 26, 2-13, para. 6; See also Govt's 3500 material and 302 info.).
11. On January 2, 2013, Weinstein had a meeting with Proskauer in New York, during which Proskauer informed him that they had a conversation with Judge Pisano and that the Judge said, in sum and substance, that he would remember and consider the Government's original plea offer (of 5 to 10 years) if Weinstein pled guilty and made restitution.
12. That same day, on January 2, 2013, in response to Proskauer's wish, the government "furiously" worked to draft a plea agreement and memorandum for Weinstein to sign. (See

Nov. 25, 2013 Hearing tr., p. 15, ln. 21-25; See also Proskauer's Jan. 2, 2013 email to Weinstein at 6:16 p.m. and 10:06 p.m.).

13. Even though Weinstein had previously rejected three more favorable plea offers from the government, and had just paid Proskauer One Million Dollars less than two weeks earlier, to represent him at trial, on January 3, 2013, he pled guilty on the advice of Proskauer. (See Nov. 25, 2013 Hearing tr., p. 9, ln. 12-20; See Weinstein's guilty plea colloquy tr. of Jan. 3, 2013, p. 11, ln. 15-19).
14. Thereafter, in May of 2013, Proskauer attorneys and Klingeman asked to be removed as counsel for Weinstein's case, due to a conflict of interest, and this court granted their application. (See May 14, 2013 Hearing tr., p. 15, ln. 3-16; and Documents filed # 86 - 87).
15. Around August 15, 2013, Weinstein hired new counsel, Creizman, to represent him. (See Judge Pisano's comment at Nov. 25, 2013, Hearing tr., p.2, ln. 13-15).
16. On November 13, 2013, Weinstein's new counsel, Creizman, filed a motion alleging a Rule 11 violation on the ground that Proskauer had told Weinstein that Judge Pisano said he would impose a sentence that would be more favorable if Weinstein pled guilty versus the sentence Weinstein would receive if he went to trial. (See Judge Pisano's comment at November 25, 2013, Hearing Tr., p. 6, ln. 10-14).
17. On November 25, 2013, Judge Pisano made the record clear that he did not engage in plea discussions with Proskauer at any time; which was the ground upon which the Court denied Weinstein's Rule 11 motion. (See Judge Pisano's comments at Nov. 25, 2013 Hearing tr., p. 14, ln. 18-25; p. 15, ln. 1-24; p. 16, ln. 1-3).
18. Based on this Honorable Court's pronouncement at the hearing on Weinstein's Rule 11 motion (on Nov, 25, 2013), that no plea discussions occurred between the Court and Proskauer, Weinstein now submits that the Court has developed a new judicial fact

previously unknown - that Proskauer's representations, that promises had been made by the Judge, to induce an involuntary guilty plea from Weinstein, were false.

19. Weinstein has requested prior counsel at the Proskauer firm to acknowledge the representations made by them to induce him to plead guilty, and has received the responses attached as Exhibit B hereto, which, although contradictory to each other, lend support to Weinstein's allegations as to the representations made.
20. Weinstein has also requested, and anticipates receipt of, supporting declarations from other of his prior counsel, to whom his former Proskauer counsel personally confirmed Weinstein's allegations as to the representations made by Proskauer counsel which induced him to accept a plea agreement the terms of which were ostensibly far more onerous than the several prior plea offers he had previously rejected. Those declarations will be submitted to the Court as supplemental exhibits hereto when received, and will be further supported by testimony under oath at an evidentiary hearing.

C. Legal Argument

As an initial matter, although ineffective assistance of counsel claims are generally raised in 2255 collateral proceedings whenever a hearing is needed to develop facts regarding questions about an attorney's conduct that has occurred outside the purview of the district court, in cases where the ineffective counsel has been removed as counsel and an objection has been properly made in the trial court to support a factually developed claim on the record, it has been held that, district courts should consider a defendant's ineffective assistance of counsel claim before sentencing and the Court "need not follow the preference" of deferring ineffective assistance of counsel claims to 2255 collateral proceedings.

In such circumstances, as in this case, "a full consideration of the issue is appropriate." See Virgin Islands v. Zepp, 748 F.2d 125 at 133, 134 (3rd Cir.); See also, U.S. v. Brown, 623 F.3d 104 (2nd Cir.)

Prior to this court's decision to deny Weinstein's Rule 11 motion on November 25, 2013, Weinstein had absolutely no reason to doubt the misrepresentations made to him by Proskauer, i.e., that the Judge promised to remember the 5 to 10 year sentence originally agreed to by the Government if Weinstein pled guilty. With no offense intended to this Honorable Court, in good faith reliance upon Proskauer's depiction of what took place, Weinstein filed his Rule 11 motion without knowing that the Rule 11 motion was mistaken until this Court's ruling on November 25, 2013; which was a conclusive determination that no plea discussion had ever occurred between Judge Pisano and Proskauer. (See Nov. 25, 2013 Hearing tr., p. 14, ln. 18-25; p. 15, ln. 1-25).

With gratitude to this Honorable Court, its finding of facts at the hearing on November 25, 2013, proves that Proskauer provided ineffective assistance of counsel for inducing Weinstein to accept the most unfavorable plea offer in the long history of his case through falsely misrepresenting to him that the Judge would impose a lighter sentence in return for his guilty plea. See U.S. v. Day, 969 F.2d 39 (3rd Cir.).

Accordingly, the factual ground underlying Weinstein's claim that Proskauer was constitutionally deficient is now ripely developed for this Honorable Court to consider, and, thus, "a full consideration of the issue is appropriate." See, Zepp and Brown, *supra*.

In addition, Weinstein's motion to withdraw his guilty plea was timely filed with due diligence allowing the new qualifying fact of this Court's November 25, 2013 decision, which has developed previously unknown evidence to support the basis of Weinstein's ineffective assistance of counsel/involuntary guilty plea claims simultaneously under the recognized doctrine of the AEDPA of 1996.

Even without the undisturbed statement in Weinstein's affidavit forementioning that Proskauer had misrepresented to him that the Judge said he would remember the original plea offer if Weinstein pled guilty (See Weinstein's Rule 11 affidavit of November 13, 2013, p.2, ln. 11; p. 3, para. 11-14), Weinstein submits that the following evidence from the record, genuinely and generously,

demonstrates that Weinstein has met his burden of showing a “fair and just reason” for withdrawing his guilty plea under the Third Circuit’s three-prong test in U.S. v. King, 604 F.3d 125, at 139 (3rd Cir.). See also, U.S. v. Huff, 873 F.2d 709, 711 (3rd Cir.)

Prong I. Weinstein asserted his innocence

- (a) At a hearing a few days before Proskauer entered the case, Judge Pisano stated that Weinstein and his attorneys had made it perfectly clear that he was going to trial. “Everyone was placed on notice that the case was going to need a trial, there wasn’t going to be any plea, counsel [for Weinstein] made that perfectly clear to all of us.” (See Nov. 25, 2013, Hearing tr., p. 12, ln. 12-23; p. 13, ln. 1-2).
- (b) Again, Judge Pisano reaffirmed, “we were told that there was going to a trial.” (Nov. 25, 2013 Hearing tr., p. 14, ln. 11-14).
- (c) December 18, 2012, correspondence from defense attorney Klingeman, to Weinstein shows Weinstein had expressed his desire to go to trial in discussions with Klingeman and that Weinstein was trial attorney-shopping less than a week before Proskauer came into the case. “As we discussed, I...prefer not to try this case by myself,...that was not my understanding or plan when David Schoen was co-counsel. I recommended...we add...Comisky to the defense team immediately and that she try the case with me.” (See Klingeman’s Dec. 18, 2012 email to Weinstein at 4:07 p.m.).
- (d) Instead of Weinstein hiring Anna Cominsky to assist Klingeman at trial for \$300,000, a few days later, Weinstein paid Proskauer’s One Million Dollar demand to represent him at trial. (See Weinstein’s complaint of May 13, 2013, p. 14, 15).

Prong II: Weinstein has proffered strong reasons justifying withdrawal of his guilty plea

- (a) Attorney Creizman states in an affidavit and is willing to testify, that on October 22, 2013,

Proskauer admitted to Creizman that Proskauer did, in fact, tell Weinstein that Judge Pisano said he would sentence Weinstein more favorably if Weinstein pled guilty versus the sentence he would have received if he went to trial; which is proof that Weinstein's guilty plea was not voluntarily made. (See Creizman's affidavit of Dec. 26, 2013, para. 3-6).

- (b) Rabbi Goldman has prepared an affidavit and is willing to testify that, before Weinstein pled guilty, Proskauer informed Rabbi Goldman that the Judge indicated he would give Weinstein favorable consideration in exchange for Weinstein's guilty plea; which is proof that Weinstein's guilty plea was involuntarily induced by false representations that Judge Pisano made such promise. (See Rabbi Goldman's affidavit of Dec. 25, 2013, para. 3).
- (c) Weinstein's wife, Rivky Weinstein, will testify that Proskauer informed her that Judge Pisano said he would impose a favorable sentence if Weinstein pled guilty.
- (d) Attorney Klingeman has agreed to testify that he heard Proskauer say to Weinstein that Judge Pisano had said that he would "remember" the Government's earlier offer of a negotiated plea for a 5 to 10 year sentence; if Weinstein pled guilty; as well as the remarks referenced in para. A.2 and A.3 above; which proves Weinstein's guilty plea was not voluntary. (See Klingeman's testimony on witness stand).
- (e) During the guilty plea colloquy on January 3, 2013, the Judge asked Klingeman whether Weinstein voluntarily signed the plea agreement, although the Judge addressed Klingeman and Proskauer separately, however, Klingeman remained silent; which is proof that Klingeman could not co-sign that Weinstein's guilty plea was voluntarily made. (See Weinstein's guilty plea colloquy tr., Jan. 3, 2013, p. 9, ln. 12-16).
- (f) Michael Burnbaum, who assisted Proskauer and Klingeman pursuant to a "Kovel Agreement", has confirmed to Weinstein that he would testify that he was present on January 2, 2013, and heard Proskauer counsel make the representations referenced in para. A.2 and A.3, and subparagraph II(d) hereof, above.

- (g) Attorney Howard Brownstein, who previously acted as CJA counsel for Weinstein in this matter has acknowledged to Weinstein that he personally heard Proskauer counsel make representations similar to those referenced in para. A.2 and A.3, and subparagraph II(d) hereof, above, including representations that the Court had promised to remember and consider that the Government had originally been willing to agree to a sentence of not less than 5 years or more than 10 years in return for Weinstein's guilty plea

Prong III: The government would not be prejudiced by withdrawal of Weinstein's guilty plea

- (a) Because Weinstein's guilty plea was induced by a violation of his Sixth Amendment right to effective assistance of counsel, any prejudice suffered by the government would not outweigh the prejudice of Weinstein's being deprived of his constitutional rights to due process and a fair trial; a trial at which the government will have a fair opportunity to present the prosecutions case and evidence. Where there is a violation of Weinstein's substantial constitutional rights, "the question of prejudice to the prosecution [does] not encompass the prosecution's facility in retrying [Weinstein]." See U.S. v. Nahodil, 36 F.3d 323 (3rd Cir.).

Based on the fact Weinstein had rejected three much more favorable plea offers than the plea agreement Proskauer advised him to accept, in addition to the above referenced facts in the record demonstrating that Weinstein has carried his burden of showing a "fair and just reason" for withdrawing his guilty plea under the 3 prong criteria of Third Circuit case law, it is impossible to believe that Weinstein's intentions were not to maintain his presumption of innocence and proceed to trial prior to Proskauer's entry as counsel.

The record is evidence that something unbelievably worthwhile had to have happened in the very small window of three days after Proskauer formally entered their appearance as Weinstein's case, on December 31, 2012, to convincingly and impulsively induce Weinstein to do an about-face and accept on January 3, 2013 the most unfavorable plea deal the government had ever offered him. Especially after: (1) Weinstein paid Proskauer's \$1 million dollar trial fee demand on or about

December 26, 2012 (See Weinstein's complaint of May 13, 2013, p. 14, 15); (2) Proskauer's pre-paid arrangement in Weinstein's case was that there was going to be a trial until, on December 31, 2012, Proskauer received the Government's 3500 material which included evidence of Proskauer's own involvement with advising one of the government's witnesses to engage in an insurance transaction that is charged in Weinstein's indictment. Even though this Court recently ruled there was no conflict of interest based upon Proskauer's connection to the insurance transaction, Proskauer did not have the benefit of hindsight to see that back then, and Weinstein will raise the conflict of interest issue for review by the Third Circuit Court of Appeals.

However, it is now transparent that Proskauer's motive to "furiously work on getting a plea agreement" from the government (see Nov, 25, 2013 Hearing tr., p. 15, ln. 21-25), and suddenly induce Weinstein to sign and accept the plea offer through making Weinstein a false promise from the Judge was the only way Proskauer could have kept the \$1 million dollar trial payment without risking the chance of being implicated by a conflict of interest from the information in the government's 3500 material.

D. Case Law Analysis

The facts in Weinstein's case are identical to the situation in U.S. v. Mogavera, 588 F.2d 395 (3rd Cir.). In Mogavera, the defendant pled guilty and, as required by Rule 11, he declared in open court that his attorney nor anyone else had made promises to him to induce his guilty plea. Years later, the defendant in Mogavera filed papers requesting the withdrawal of his guilty plea on the ground that it was not voluntary because his attorney induced him to plead guilty through false representation of promises by the Judge.

In addition to Mogavera's assertion, he obtained an affidavit from a different lawyer who previously represented him, but was removed from Mogavera's case because of an alleged conflict of interest. In removed counsel's affidavit, he stated that he had been present when Mogavera's new attorney promised Mogavera that he would receive a certain sentence if he pled guilty. On review to the Court of Appeals. After the district court denied Mogavera relief, the Third Circuit pointed to the

following key factors:

- (a) that “[&} the crucial affidavit came from” counsel who was removed from Mogavera’s case due to conflict.” at 398.
- (b) that “[a] careful reading of the affidavits [in Mogavera’s case] indicated that [Mogavera’s attorney] may have led him to believe...he had a special relationship with the ... judge and had ‘fixed’ the sentence.” at 398.
- (c) citing the holding of U.S. Supreme Court precedents, the Third Circuit reasoned that, “the defendant was entitled to credit his attorney’s representations as to ... such an agreement [with the judge].” at 398.
- (d) And finally, in rejecting the government’s view that Mogavera’s guilty plea was voluntary because the record shows that he stated under oath that no promises has been made to induce his guilty plea when questioned by the judge under the Rule 11 voluntariness colloquy, the Third Circuit relied on decisions in earlier precedents to conclude that Mogavera said yes to the Judge’s questions during the colloquy because, “[Mogavera] may have been led to believe ... the judge...before whom the Rule 11 colloquy took place was...involved in the ‘impropriety’”. at 399.

Thus, based on factors (a) through (d) in Mogavera, the Third Circuit held that, “[the] defendant was entitled to ... a hearing on the voluntariness of his guilty plea [because] ... the affidavits indicated [the] defendant’s attorney ... led him to believe ...he had a special relationship with the district court and had ‘fixed’ the sentence.” Following a remand back to the district court for a hearing, the defendant in Mogavera was allowed to withdraw his guilty plea.

In applying Mogavera to the facts in Weinstein’s case, attorney Creizman’s affidavit, in addition to the other affidavits that have been submitted as exhibits, are “crucial” evidence showing that Proskauer’s misrepresentations more than likely led Weinstein to believe that Proskauer had a special relationship with [Judge Pisano] and had obtained the sentence commitment as presented.

After all, the fact that Weinstein believed in Proskauer enough to pay One Million Dollars for Proskauer to represent him at trial bolsters his credibility on the point that Proskauer had no problem inducing Weinstein to plead guilty by false promises from the Judge. Even the government validates Proskauer's powerful influence of persuasion:

“[Proskauer][is] one of the most prominent lawyers in the nation and a two-time [U.S.] Attorney”. (See, Gov. Opposition Motion of Nov. 21, 2013, p. 14).

“When you get a call from [Proskauer], you answer the phone, obviously, and hear what he has to say.” (See, Hearing tr., Jan. 17, 2012, p. 23, ln. 23-25).

Mogavera also makes clear that Weinstein was entitled to credit Proskauer's misrepresentations about the Judge saying he would remember to fix Weinstein's sentence if he pled guilty to the extent that Weinstein's answers during the Rule 11 guilty plea colloquy cannot be particularly deemed reliable in showing Weinstein's guilty plea is voluntary because, if Weinstein believed that the Judge was in on the deal, Weinstein is presumed to have went along with the Judge's question as part of the false promise that he would be regarded by the Judge for pleading guilty. In support, the record of Weinstein's guilty plea colloquy shows:

- (a) That Proskauer counseled Weinstein four times “off the record” to instruct Weinstein how to answer the Rule 11 colloquy. (See Weinstein's guilty plea colloquy of Jan. 3, 2013, p. 18, ln. 3-5; p. 19, ln. 4-9; p. 20, ln. 7-13; p. 20, ln. 16-23).
- (b) Proskauer, instead of Weinstein, filled out Weinstein's 45 question Rule 11 voluntariness plea form. (See Weinstein's colloquy of Jan. 3, 2013, p. 8, ln. 5-25; p. 9, ln. 1-3).

With all respect, Weinstein would never have found out that Proskauer's promise from the Judge was false if not for this Honorable Court denial of the accusation in Weinstein's motion for a Rule 11 violation on November 25, 2013. In light of the newly discovered fact that there were no plea discussion between this Court and Proskauer, Proskauer was clearly ineffective for misrepresenting to Weinstein that the Judge promised to “remember” a lenient sentence in exchange for Weinstein

guilty plea. As in Mogavera, Weinstein's guilty plea was not voluntarily entered and should therefore be withdrawn.

Conclusion

Wherefore, for all the aforementioned reasons, Movant respectfully requests that this Honorable Court grant him an evidentiary hearing to prove the aforesaid allegations and then permit him to withdraw his guilty plea so that he can proceed to trial as he intended to do, but for Proskauer's ineffective assistance of counsel during plea negotiations.

Respectfully submitted,



ELYAHU WEINSTEIN

DECLARATION OF ELIYAHU WEINSTEIN

Eliyahu Weinstein, Defendant in the above matter, hereby makes the following Declaration in support of his Motion to Withdraw his guilty plea to which this Declaration is attached as **Exhibit A**. **The handwritten original version of the Declaration is attached.**

1. Sometime in 2011, prior to the instant Indictment, Attorneys Klingeman and Schoen showed me (Mr. Weinstein) a 15 year plea offer from the Government; I rejected it because I was innocent of the charges in the Complaint.
2. In November of 2012, Attorneys Klingeman and Schoen informed me the Government made a plea offer for a 5-10 year sentence. These attorneys begged me to sign the plea offer before it expired; I rejected it because I was innocent of intentionally defrauding any investors.
3. On or about December 13, 2012, Attorneys Klingeman and Schoen brought me two plea offers from the Government for 5 - 15 years and 0 - 20 years; I rejected both plea offers and insisted on going to trial to prove my innocence.
4. A few days after I rejected the Government's last two plea offers, I began preparing for trial by retaining Proskauer for their \$1 million dollar trial fee, by asking the Judge to ease my curfew restrictions for trial preparation, and by attending various meeting with my attorneys for prepare a trial defense, which included voir dire and jury instructions. (DI 67, 68, 70, 71)
5. On January 2, 2013, I arrived at Proskauer's office for daily trial preparation. Moments later, Mark Harris came into the trial preparation room where I had begun trial preparation with Michael Burnbaum. A few minutes later Bob Cleary entered the room and said he had just hung up the phone with Judge Pisano and that Judge Pisano said, if I (Mr. Weinstein) pled guilty, all doors would be open to me, but if I went to trial and was convicted of even one count, all doors would be closed. Mr Cleary continued by saying the Judge said that restitution would go a long way and he assured me (Mr. Weinstein) that he would get me under 5 years because the judge said he would remember the original 5 - 10 year plea offer if I pled guilty. That day, Mr. Cleary made it clear to me (Mr. Weinstein) that the judge wanted me to plead guilty.
6. Later that night, we scheduled a conference call for 8 p.m. between Mr. Harris, Mr. Cleary, Mr. Burnbaum, Rabbi Barkin, my wife and myself (Mr. Weinstein). (See Mr. Cleary's email of January 2, 2013 at 7:42 p.m. to Burnbaum, Harris and myself (Weinstein).
7. During the above mentioned conference call, Mr. Cleary and Mr. Harris indicated that Judge Pisano had sent a message that he (the Judge) would be displeased if I didn't plead guilty.
8. The next day on January 3, 2013, I pled guilty because of Cleary and Harris' advice about the message from the Judge. Mr. Cleary told me to go along with the Judge's questions during the guilty plea.

9. In May of 2013, Mr. Cleary and Mr. Harris were removed from my case due to conflict. At that time, the Court appointed Howard Brownstein as new Counsel on my case.
10. The following week, Mr. Brownstein and Mr. Harris came to visit me at Hudson County Jail, New Jersey. At that visit, Mr. Harris repeated in front of Mr. Brownstein that they (Harris and Cleary) promised me (Weinstein) a 5 - 10 year sentence based on the phone call from the Judge.
11. In late July 2013, I hired Eric Creizman, Esq.
12. On October 22, 2013, Mr. Creizman confirmed with Mr. Harris during a phone conversation that Mr. Cleary had a phone conversation with Judge Pisano on January 2, 2013, and that the Judge expresses that I (Weinstein) would be sentenced more favorable if I pled guilty versus if I was convicted at trial and that they (Mark and Bob) communicated the Judge's message to me (Weinstein).
13. Based on the above referenced phone conversation between Mr. Creizman and Mr. Harris, Creizman filed a Rule 11 violation motion on or around November 14, 2013. (DI 123)
14. On November 25, 2013, the Judge conducted a hearing on the Rule 11 violation motion. During the Rule 11 motion hearing is when I first learned that Mr. Harris and Mr. Cleary lied when Judge Pisano denied having guilty plea discussions during a phone call with Cleary; particularly the guilty plea discussions which Harris and Cleary conveyed to me, asserted in the Rule 11 Motion. (See November 25, 2013 transcript, p. 14, ln. 18 - 25; p. 15, ln. 1 - 24; p. 16, ln. 1 - 3).
15. Because this Court never sent me a message that all doors would be open and that the 5 - 10 year plea offer would be remembered in exchange for my guilty plea, I would like to withdraw my guilty plea because I am innocent. I would have rejected this guilty plea offer as I rejected all previous plea offers, but for Mr. Cleary and Mr. Harris misrepresenting that they made a phone call promising me a more favorable sentence in exchange for my guilty plea.


Elyahu Weinstein

Dated Feb-18-14

1. Some time in 2011, prior to the instant indictment, Attorneys Klingeman and Schoen showed me (Mr. Weinstein) a 15 year plea offer from the government; I rejected it because I was innocent of the charges in the complaint.
2. In November of 2012, Attorneys Klingeman and Schoen informed me that the government made a plea offer for a 5-10 year sentence. These attorneys begged me to sign the plea offer before it expired; I rejected it because I was innocent of intentionally defrauding any investors.
3. On or about December 13, 2012, Attorneys Klingeman and Schoen brought me two plea offers from the government for 5-15 years and 0-20 years; I rejected both plea offers and insisted on going to trial to prove my innocence.
4. A few days after I ~~rejected the last two plea offers~~ from the government's last two plea offers, I began preparing for trial by retaining Proskauer for ~~the~~ ^{their} \$1 million dollar trial fee, by asking the judge to ease my curfew restrictions for trial preparation, and by attending various ^{meetings} with my attorneys to prepare a trial defense, which included voir dire and jury instructions. (DI 67, 68, 70, 71)
5. On January 3, 2013, I arrived at Proskauer's office for daily trial preparation. Moments later Mark Harris came into the trial preparation room where I had begun trial preparation with Michael Burnbaum. A few minutes later Bob Cleary entered the room and said that he had just

hung up the phone with Judge Pisano and that, ~~among~~ Judge Pisano said, if I (Mr. Weinstein) pled guilty, all doors would be open to me, but if I went to trial and was convicted of even one count, all doors would be closed. Mr. Cleary continued by saying the judge said that restitution would go a long way and he assured me (Mr. Weinstein) that he would get me under 5 years because the judge said he would remember the original 5-10 year plea offer if I pled guilty. That day, Mr. Cleary made it clear to me (Mr. Weinstein) that the judge wanted me to plead guilty.

6. Later that night, we scheduled a conference for ~~8 p.m.~~ call for 8 p.m. between Mr. Harris, Mr. Cleary, Mr. Burnbaum, ~~and myself (Mr. Weinstein)~~. Rabbi Barkin, my wife, and myself (Mr. Weinstein). During the call myself (Mr. Weinstein). (See Mr. Cleary's email of Jan. 2, 2013 at 7:42 p.m. to Burnbaum, Harris, and myself (Weinstein)).

7. During the above mentioned conference call, Mr. Cleary and Mr. Harris indicated that Judge Pisano had sent a message and that he (the Judge) would be displeased if I didn't plead guilty.

~~8. The next morning, The next day, Mr. Cleary at the Fred Courthouse in Treton.~~

8. The next day, on January 3, 2013, I pled guilty because of my attorney's of Cleary and Harris advise about the message from the Judge. Mr. Cleary told me to go along with the judge's questions during the guilty plea colloquy.

9. In May of 2013 Mr. Cleary and Mr. Harris were removed from my case due to conflict. At that time the court appointed Howard Brownstein as new counsel on my case.

10. The following week, Mr. Brownstein and Mr. Harris came to visit me at Hudson County Jail, New Jersey. At that visit, Mr. Harris repeated in front of Mr. Brownstein that they (Harris and Cleary) promised me (Weinstein) a 5-10 year sentence based on the phone call from the Judge.

11. In late July of 2013, I hired Eric Creizman, ~~to help me withdraw my guilty plea.~~

12. On October 23, 2013, Mr. Creizman confirmed with Mr. Harris during a phone conversation that Mr. Cleary had a phone conversation with Judge Pisano, ~~on~~.

~~January 2, 2013, indicated~~

on January 2, 2013, and that the judge express that I (Weinstein) would be sentenced more favorably if I pled guilty versus if I was convicted at trial. And that they (Mark & Bob) communicated the judges message to me (Weinstein).

13. Based on the above mention phone conversation between Mr. Creizman and Mr. Harris, Creizman filed a Rule 11 violation motion on or around November 14, 2013. (See D I 123)

14. On November 25, 2013, the Judge conducted a hearing on the Rule 11 violation motion. During the Rule 11 motion hearing, is when I first learned that Mr. Harris and Cleary lied when Judge Pisano denied having ~~any~~ ^{during a phone call with} guilty plea discussions ~~with Cleary and~~ Cleary ~~and Harris~~; particularly the guilty plea discussions which Harris and Cleary conveyed to me, asserted in the Rule 11 motion. (See November 25, 2013 tr. p. 14, ln. 18-25; p. 15, ln. 1-24; p. 16, ln. 1-3)

15. Because this Court never ~~promised me that~~ sent me a message promising that all doors would be open and that the 5-10 year plea offer would be remembered in exchange for my guilty, I would like to withdraw my guilty plea because I am innocent, and I would have rejected this guilty plea offer, as I rejected all previous plea offers, but for Mr. Cleary and Mr. Harris misrepresenting ~~that make a phone call promising me a more favorable sentence to me that the Judge preferred my guilty plea in exchange for a better sentencing conditions.~~ ~~for my guilty plea~~

TRULINCS 62465050 - WEINSTEIN, ELIYAHU - Unit: PHL-E-N

FROM: Creizman, Eric
TO: 62465050
SUBJECT: RE: Memo to File re Mark Harris and Bob Cleary
DATE: 02/04/2014 03:36:15 PM

Yes, here it is:

I, MARK D. HARRIS, hereby declare under penalty of perjury pursuant to 28 U.S.C. § 1746:

1. I have prepared this declaration because my former client, Eliyahu Weinstein, asked me to do so to describe certain events preceding his plea of guilty in this matter. This declaration supplements the information contained in the annexed Draft Affidavit of Robert J. Cleary, Esq. Mr. Weinstein has authorized me to make the disclosures contained herein.
2. On or about December 31, 2012, Proskauer Rose LLP entered an appearance for Mr. Weinstein in this matter. Mr. Weinstein's trial was scheduled to commence on January 14, 2013.
3. On or about January 2, 2013, my partner, Mr. Cleary, reported to me that he had had a short telephone conversation with Judge Pisano. My understanding is that during the call, Mr. Cleary mentioned that the parties in this case were having discussions about the possibility of resolving it without a trial. My understanding is that Judge Pisano told Mr. Cleary words to the effect that if Mr. Weinstein accepted responsibility and made restitution, all doors would be open to him, but if he went to trial and was convicted of any counts, all doors would be closed. Based on my recollection of my conversation with Mr. Cleary, I believe that Judge Pisano also told Mr. Cleary words to the effect that accepting responsibility and making restitution would "go a long way" with him.
4. Later that day, Mr. Cleary and I communicated the substance of his conversation with Judge Pisano to Mr. Weinstein. I hereby declare the foregoing is true and correct to the best of my knowledge and belief.

Dated: February 4, 2014
New York, New York

MARK D. HARRIS

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA)

)

)

Plaintiff,)

v.)

)

ELIYAHU WEINSTEIN,)

)

)

)

Crim. No. 11-701 (JAP)

Honorable Joel A. Pisano United States District Judge

AFFIDAVIT OF ROBERT J. CLEARY

Defendant.)

Exhibit B

Exh. B, Pg. 1

TRULINCS 62465050 - WEINSTEIN, ELIYAHU - Unit: PHL-E-N

ROBERT J. CLEARY declares, under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the following is true and correct:

1. I have prepared this affidavit because my former client, Eli Weinstein, asked me to do so to describe certain events preceding his plea of guilty in this matter. I was his counsel at the time of the guilty plea. Mr. Weinstein has authorized me to make the disclosures contained herein.
2. On approximately December 31, 2012, Proskauer entered an appearance for Mr. Weinstein in this matter. Mr. Weinstein's trial was scheduled to commence on January 14, 2013.
3. I had many conversations with Mr. Weinstein about a possible disposition of his case. These conversations continued up until the day he entered his plea of guilty.
4. As these discussions were on-going, I had a brief telephone call with the Court. While I do not remember the precise circumstances, I believe I had called chambers to speak to a law clerk or to the courtroom deputy to address a scheduling issue or some other ministerial matter. At one point, Judge Pisano got on the phone.
5. The Judge and I exchanged pleasantries and had a brief personal discussion. I have known and respected Judge Pisano for many years and we had not spoken in a while. In the course of that short conversation, the Judge asked me about the status of the case. I told him that

the parties were having discussions to resolve the case. The Court did not inquire about the status of those discussions and I did not otherwise disclose the status. The Judge then stated, in substance, the unremarkable proposition that demonstrations of remorse through a guilty plea and the payment of restitution are important sentencing factors to the Court. This part of the conversation was extremely brief and consisted of only a few sentences. It was also completely consistent with my view of the Court.

6. The Judge never articulated any preference for how the case should proceed or be resolved. The Judge never gave any guarantee that a plea and restitution would in fact affect the sentence in this case. The Judge never made any promise or prediction as to what the sentence would be, whether with or without a guilty plea and whether with or without the payment of restitution.
7. Shortly thereafter, as part of my continuing conversations with Mr. Weinstein about a possible disposition of his case, I communicated to Mr. Weinstein the substance of the Judge's comments about remorse and sentencing. In doing so, I was careful to explain to Mr. Weinstein that the Court had made no comments, promises, or predictions about the outcome in this case.

Executed this _ day of December 2013.

DRAFT
Robert J. Cleary, Esq.

ELIYAHU WEINSTEIN on 2/4/2014 12:52:22 PM wrote
Please confirm if you have received the affidavits from Mark
----Creizman, Eric on 2/3/2014 11:21 PM wrote:

>
n't get Harris's affidavit yet. I think it's a good idea to wait for Harris's affidavit before I ask for the call. He won't participate in this. Howard hasn't confirmed yet what he will do next. He may want to come into the City and meet with Steven and Richard as well so I don't know. I'm working on the sentencing memorandum and would like to make a lot more headway before I come down because time is running short.

ELIYAHU WEINSTEIN on 2/3/2014 8:54:40 PM wrote
Did you get it? Did you confirm call with Mark? Are you and Eric heading tomorrow? Please respond.
Exhibit B, Pg. 2