UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X

UNITED STATES OF AMERICA

-against-

00-cr-1078(ERK)
03-cr-315(ERK)

JOSE PASTRANA,

Defendant.

----------X

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO ENFORCE COOPERATION AGREEMENT OR TO WITHDRAW GUILTY PLEA, AND FOR A HEARING

This memorandum of law and annexed affirmation of Stacey Richman, Esq. are in support of Jose Pastrana's motion, in the alternative, to (1) require the government to file a motion under 18 U.S.C. § 3553(e) and U.S.S.G. § 5K1.1 (referred to collectively as a "§ 5K1.1 motion"), consistent with the cooperation agreement he and the government executed; or (2) withdraw his guilty plea in Indictment 03-CR-315. We respectfully request an evidentiary hearing upon these requests unless the government agrees to appropriate relief.

Three principal arguments are advanced. First, the government refuses to afford Pastrana the benefits of cooperation based on Pastrana's uncounseled admission that he withheld information from the government regarding two murders. Pastrana, however, did not waive the presence of counsel at the sort of interview at which the admission was extracted. The remedy for the violation of Pastrana's right to counsel is to deny the government the use of the uncounseled admission. This relief, in turn, would require the government to grant Pastrana § 5K1.1 relief, since the government has acknowledged that

Pastrana's withholding of information is the sole basis upon which it has refused to file a § 5K1.1 motion. See Gov. letter of June 15, 2005, annexed as Exhibit 1, at 3 n.1.

Second, the government should be compelled to file a § 5K1.1 motion on Pastrana's behalf because it continued to elicit Pastrana's cooperation after the breach and without telling him it would not file the § 5K1.1 motion.

Third, should the court determine it is without authority to compel the government to file a § 5K1.1 motion, we respectfully request that Pastrana be permitted to withdraw his guilty plea under Fed.R.Crim.P. 11(d)(2)(B) for fair and just reasons.

Statement of Facts

On April 22, 2002 Pastrana pleaded guilty in 00-cr-1078, pursuant to a plea agreement, to conspiring to distribute heroin in violation of 21 U.S.C. § 846, an offense that requires imposition of a minimum sentence of ten years and a maximum sentence of life imprisonment. (Plea agreement annexed as Exhibit 2).

On July 15, 2003, Pastrana pleaded guilty to a one count Information in 03-cr-315, charging him with violating 18 U.S.C. § 1959 by participating in the July 8, 1997 murders of John Vanages and Leonor Cruz Simmons for the purpose of maintaining or increasing his position in a racketeering enterprise (Superseding Information annexed as Exhibit 3). The prescribed sentence for a violation of § 1959 is "death or life imprisonment, or a fine under this title, or both."[1] The plea was entered pursuant to a

[1] The quoted language suggests that a fine in lieu of life imprisonment may be authorized, but the Second Circuit has held otherwise, even while finding this language to be "deeply problematic". United States v. James, 239 F.3d 120 (2d Cir. 2000). Without further addressing the issue, we respectfully urge that the Second Circuit's interpretation is wrong and that the plain meaning of the language should prevail no less than it did in United States v. Pabon-Cruz, 391 F.3d 86 (2d Cir. 2004) (interpreting analogous language in 18 U.S.C. § 2251(d)).

cooperation agreement signed by the parties (Exhibit 4). The agreement obliged Mr. Pastrana, *inter alia*, to "be fully debriefed and to attend all meetings at which his presence is requested..." (Par. 4(a)); and "to furnish to the Office all documents and other material that may be relevant to the investigation and that are in the defendant's possession or control..." (Par. 4(b)). The government, for its part, agreed that it would file a motion pursuant to U.S.S.G. § 5K1.1 and 18 U.S.C. § 3553(e) "[i]f the Office determines that the defendant has cooperated fully, provided substantial assistance to law enforcement authorities and otherwise complied with the terms of this agreement." (Par. 7). However, the agreement states, "it is understood that a good faith determination by the Office as to whether the defendant has cooperated fully and provided substantial assistance and has otherwise complied with the terms of this agreement, and the Office's good faith assessment of the value, truthfulness, and completeness and accuracy of the cooperation, shall be binding on him."

The agreement stated, with respect to meetings with the government:

> The defendant agrees that the Office may meet with and debrief him without the presence of counsel, unless the defendant specifically requests counsel's presence at such debriefings and meetings. Upon request of the defendant, the Office will endeavor to provide advance notice to counsel of the placed and time of meetings and debriefings, it being understood that the Office's ability to provide such notice will vary according to time constraints and other circumstances. The office may accommodate requests to alter the time and place of such debriefings. It is understood, however, that any cancellations or reschedulings of debriefings or meetings requested by the defendant that hinder the Office's ability to prepare adequately for trials, hearings or other proceedings may adversely affect the defendant's ability to provide substantial assistance. Matters occurring at any meeting or debriefing may be considered by the Office in determining whether the defendant has provided substantial assistance or otherwise complied with this agreement and may be considered by the court in imposing sentence regardless of whether counsel was present at the meeting or debriefing.

Exhibit 4 at Par. 6.

On May 18 and 19, 2004, Pastrana testified as a government witness at the trial of Roderick Soto and Luis Angel Ramos (aka J-Rock), United States v. Soto, 03-cr-315 (ERK), and gave testimony the government later acknowledged was critical to the government's success in obtaining the convictions that ensued. This appearance, however, also precipitated the instant proceedings, for defense counsel cross-examined Pastrana regarding two murders about which he apparently had not previously informed the government -- a murder that occurred at a bodega and the murder of a person named "Jeff."

The bodega murder allegedly occurred in May 1994 in a bodega on the corner of Fulton Street and New Jersey Avenue in the East New York area of Brooklyn. Pastrana testified he did not recall being at the corner of Fulton Street and New Jersey Avenue on May 29, 1994 and denied either committing the murder or bragging about having done so.

Second, Pastrana was questioned on cross-examination about driving an individual named Jeff to a location on Linden Street at which Jeff was murdered. He denied playing a role in the murder, but acknowledged that he dropped Jeff off at a location where he was soon thereafter murdered.

On May 24, 2006 the government brought Pastrana to its offices from the MDC and questioned him regarding these two murders "to determine whether he committed perjury at trial or whether he intentionally withheld information from the government." See Gov. correspondence of June 15, 2005 (Exhibit 1) at pp. 2-3. Defense counsel, Stacey Richman, had not been told of the meeting and was not present when it occurred.

According to the government's June 15th correspondence, during the ensuing questioning, Pastrana acknowledged that "in May 1994 he accompanied trial defendant Ramos and an individual named Lazaro Garcia to a location near the corner of Fulton Street and New Jersey Avenue" and that Pastrana and Ramos "waited up the block while Garcia went into the bodega on the corner of Fulton Street and New Jersey Avenue and shot and killed someone inside." Ramos later told Pastrana the wrong person had been killed. Id. at 3.

Regarding the murder of "Jeff" Pastrana acknowledged knowing that Jeff dated his ex-girlfriend and that he had, on occasions, committed home robberies with him. He had been obliquely warned by Woodbine Crew leader Daniel Hernandez that Jeff might be killed. On the day of the murder Pastrana and Jeff were "scouting out potential locations for future home robberies." Id. Jeff asked Pastrana to drop him at the Linden Street location where Jeff was murdered. Pastrana acknowledged knowing that Jeff might be killed that night, but said he neither participated in its planning nor had he been asked to drop Jeff at this location.

Pastrana further explained at this meeting that he withheld information regarding the bodega murder because he did not want to further implicate his close friend Luis Angel Ramos. And he said that he did not tell the government about the murder of Jeff because he at first had not recalled it at all, and when he finally did remember it he was "afraid that agents and prosecutors would not believe that his initial failure to disclose his knowledge of that murder was inadvertent." Id. at 4-5.

The government, in correspondence bearing the same date as the interview with Pastrana (May 24, 2004) informed defense counsel in United States v. Soto of the interview. The government took the position that Pastrana had not perjured himself at

trial and that the government therefore was not going to recall Pastrana. It therefore declined to turn over the related 3500 material.

During a conference on May 27, 2004, the government was ordered by the court to provide the defense the relevant 3500 material and was told if the government did not recall Pastrana he would be recalled as a court witness. The government then decided it would, in fact, recall Pastrana and did so, on June 1, 2004. During Pastrana's ensuing testimony the government elicited from Pastrana that he had called the government following his earlier testimony to clarify the false accusations, made during cross-examination, that he had been involved in two murders (Exhibit 8, Tr. 2690). The government then elicited testimony from Pastrana regarding the "Jeff" and "bodega" murders (Tr. 2691 et seq.), and he testified consistently with his May 24, 2004 proffer. He acknowledged that he understood "that by having withheld that information from the government, that [he was] in potential breach of your cooperation agreement" and agreed "[i]t's possible that [that the government would not] write the 5K1 motion for me." (Tr. 2709). Pastrana responded "No" to the question, "Has anybody made you any promises about whether or not you're going to be – your cooperation agreement is going to be torn up?" (Tr. 2709).

On cross-examination, Pastrana agreed he was "still hoping to get" a § 5K1.1 letter (Tr. 2718). Additionally, asked about his direct testimony that he had contacted the government following his first stint on the witness stand, Pastrana explained that although he had endeavored to contact the government he had been unsuccessful in his efforts, but that the government had independently brought him in for another interview (Tr. 2726). On redirect examination the government asked Pastrana, "Why did you want

to come back to testify?" Pastrana responded, "I still want to try to get my letter from you and vindicate myself from them two murders" (Tr. 2743).

In the aforementioned letter from AUSA Kavanaugh to Pastrana's lawyer, Stacey Richman, dated June 15, 2005 (written a full year after Pastrana's testimony), the government advised the defense that "our Office is considering holding Jose Pastrana in breach of his cooperation agreement and, as a consequence, not submitting a section 5K1.1 motion on his behalf to Chief Judge Edward R. Korman." (Exhibit 1). The government recounted that before agreeing to plead guilty pursuant to the cooperation agreement, and during trial preparation, Pastrana, while stating he might not recall all the crimes of which he had knowledge "adamantly told the government that he was certain that he had not forgotten any murders." Id. at 1. Then, when he was called as a trial witness against Soto and Ramos he "gave extensive and important testimony about the Woodbine Crew, the racketeering enterprise of which both he and the trial defendants were members and associates." Id. at 2. He also gave "valuable testimony about the trial defendants' racketeering activities, including many violent crimes committed by them and others." Id.

However, continued the government in its June 15th letter, Pastrana was then questioned on cross-examination regarding two murders "about which the government had no knowledge." The government's letter then described the ensuing events, including Pastrana's admission, during its interview with Pastrana, that he had intentionally withheld from the government information regarding these murders and that, as a consequence, the government informed Pastrana that "he violated his

cooperation agreement by withholding information about the murders and that the ultimate decision about whether to breach him would be made at a later date." Id. at 2-3[2]

The government's letter of June 15, 2005 goes on to explain that the government "informed defense counsel for trial defendants Soto and Ramos of the substance of its meeting with Pastrana." Id. at 3. Defense counsel wanted the government to recall Pastrana so the defense could reopen cross-examination, but the government "responded by defending Pastrana's testimony as truthful and attempted to avoid recalling Pastrana." Id. at 3-4. The court, however, required the government to disclose the agent's notes of the above-described debriefing, and the government then recalled Pastrana to "explain this."

Pastrana's lawyer, Stacy Richman, replied in a letter dated September 29, 2005 (Exhibit 5). Ms. Richman recalled both Mr. Pastrana's initial reluctance to provide details of the crimes of which he had knowledge and the critical importance of Mr. Pastrana's eventual disclosures, including providing information about murders, such as those of John Vanages and Leonor Cruz-Simmons which the government "candidly stated that without Mr. Pastrana ... would have gone unsolved." (Id. at 1). He also provided a wealth of additional information regarding "numerous robberies and leads to other murders" that "represented far more than substantial cooperation and assistance to the Government."

Ms. Richman, in her letter, objected that the government did not inform her of the mid-trial debriefings of Mr. Pastrana: "I was as counsel extremely surprised and frankly a

---

[2] The government's letter notes in footnote 1, inserted at this point in the text, that there had been other "problems with Pastrana's cooperation," but "because the government became aware of these issues prior to trial, we are not considering them as a basis for breaching Pastrana's cooperation agreement."

bit shocked that as trial debriefings commenced no attempt was made to contact me." (Id. at 2). Counsel also expressed dismay that the government "was aware throughout of the many stumbles and the evolution of Mr. Pastrana's testimony," and remained tolerant "as long as he was coming along toward the Government's goals..," but that it was now prepared to discard him in the face of the most recent disclosures, and notwithstanding that "he was instrumental in assisting the Government in ultimately achieving its goals through the prosecution in which Mr. Pastrana testified." Id.

In a letter from AUSA Kavanaugh to Ms. Richman dated February 1, 2006, the government stated, "our Office will not be submitting a motion under U.S.S.G. Section 5K1.1 on behalf of your client." (Exhibit 6)

When the parties appeared before the court on June 23, 2006 the government acknowledged it "would have been nearly impossible to get the convictions we did without Pastrana's testimony" (Exhibit 9, Tr. 13). Defense counsel pointed out that another cooperator, Telly Concepcion "implicated someone in a homicide that was not responsible for that homicide and he still receive[d] a 5K1 letter" (Tr. at 15). The government also agreed that Pastrana solved "many outstanding crimes" which would not have been solved without his cooperation (Tr. 15-16). The critical point to the government however, was that Pastrana did not reveal his knowledge of the murders before trial: "if Mr. Pastrana had revealed these murders on the eve of his testimony, he would be getting a 5K1 letter" (Tr. 16). The court suggested that compromise along the lines suggested by the Probation Department[3] would be appropriate, but the government

[3] The suggested compromise was not set out in the record at this appearance but was read into the record at the conference held August 7, 2006, and was that the government file section 3553(e) and 5K1 motions that authorize a sentence reduction that

said it rejected any such compromise and insisted that Pastrana be sentenced to life without parole (Tr. 19-21). The court noted that the government appears to act inconsistently with respect to violations of the cooperation agreements, and suggested that if the government needed Pastrana for another case the government and Pastrana would reconcile (Tr. 25). The court concluded the appearance by stating its opinion that Pastrana provided substantial cooperation and that "since this is not a situation where he deserves to get no credit... serious consideration should be given" to the suggestion of the Probation Department" (Tr. 27).

The parties next appeared before the court on August 7, 2006. See Exhibit 7. In the face of the government's continued refusal to file a § 5K1.1 motion the court said there was "nothing I can do here unless he wants to withdraw his plea and I will consider that" (Tr. 8). Going over certain of the facts, Pastrana's attorney, Stacy Richman said the government did not contact her prior to the proffer sessions conducted following Pastrana's initial testimony (Tr. 10) and Pastrana said he would not have willingly returned to the stand had he not been told he could still receive the 5K1 letter (Tr. 9). AUSA Kavanaugh said that they called Pastrana in to speak with him after his initial testimony to "satisfy ourselves that Mr. Pastrana hadn't perjured himself and that there was no Brady material that we needed to be concerned with..." (Tr. 11). The government then wrote to defense counsel in United States v. Soto stating its intention not to recall Pastrana and its position that the government therefore did not have to turn over the notes of their interview with him, but that they changed their mind and recalled him after the court, at a May 27, 2004 conference said that if the government did not call

---

would not result in a sentence less than a stated number of years (Proceedings of 8/7/06, Exhibit 7, herein at p.7).

Pastrana the court would recall him (Tr. 12, 14). Responding to Mr. Pastrana's insistence that he was told everything would work out alright, and that he would not have otherwise returned to the stand voluntarily, the court said "If you want, I will hold a hearing on whether they made you any promises before you went back to testify after you went back and admitted to them that you hadn't told them about everything you knew" (Tr. 17).

Discussing whether the government should have interviewed Pastrana after his initial testimony in the absence of his attorney, the court observed that this interview was not for the purposes for which the cooperation agreement was executed: "Essentially what is happening here is the government wants to talk to him and determine at that stage whether he's breached a plea agreement, the cooperation agreement. I mean, this is no longer everybody is all working together like brother and sister ... the relationship has taken a potential[ly] adversarial turn" (Tr. 24).

Undersigned counsel was thereafter appointed to serve as Pastrana's co-counsel with Ms. Richman.

ARGUMENT

Point One

THE COURT SHOULD REQUIRE THE GOVERNMENT TO HONOR ITS COMMITMENT UNDER THE COOPERATION AGREEMENT AND FILE A MOTION UNDER 18 U.S.C. § 3553 AND U.S.S.G. § 5K1.1 BECAUSE ITS REFUSAL TO DO SO IS BASED ON ITS WRONGFUL RELIANCE ON PASTRANA'S UNCOUNSELED ADMISSION THAT HE WITHHELD INFORMATION FROM THE GOVERNMENT

All agree that Mr. Pastrana's course of cooperation has resembled the proverbial rocky road. He was slow to come to the table and along the way had several missteps, but eventually he provided cooperation that the government acknowledges to have been substantial. Nonetheless the government has refused to file a motion under 18 U.S.C. §

3553 and U.S.S.G. § 5K1.1 because Mr. Pastrana withheld information from the government regarding two murders about which he was cross-examined at trial in United States v. Soto et al., 03-cr-315(ERK). The government's conclusion that Pastrana withheld such information is based on Pastrana's admission, made during questioning by the government at a meeting that occurred after his initial testimony. This admission, however, was made during an interview with the government at which Pastrana was not represented by counsel and at which he did not waive counsel. For this reason the government should not be permitted to use this admission as a reason to deny Pastrana the benefits of his substantial cooperation. Because the government has acknowledged it would not have withheld these benefits based on any other of Mr. Pastrana's asserted violations, the court should order the government to file a § 5K1.1 motion on Pastrana's behalf.

The cooperation agreement between Pastrana and the government required Pastrana to "be fully debriefed and to attend all meetings at which his presence is requested..." (Par. 4(a)); and "to furnish to the Office all documents and other material that may be relevant to the investigation and that are in the defendant's possession or control..." (Par. 4(b)). The agreement also provided that "the Office may meet with and debrief him without the presence of counsel, unless the defendant specifically requests counsel's presence at such debriefings and meetings." This provision was inserted into cooperation agreements following the Second Circuit's decision in United States v. Ming He, 94 F.3d 782 (2d Cir. 1996) in which the court held, contrary to then-current practice in this district, that cooperators were entitled to assistance of counsel at debriefing sessions. The court in Ming He also said, however, that this right could be waived and

that "waiver can be set forth expressly in the cooperation agreement" but that "[s]ince the issue is not before us, we express no view on the precise extent of what can be waived or the form that such a waiver might take." 94 F.3d at 794.[4]

We do not assert that such a waiver provision is, in general, unenforceable. We do assert, however, that, like all plea agreements, it must be strictly construed against the government (see United States v. Vaval, 404 F.3d 144 (2d Cir. 2005) ("we construe plea agreements strictly against the government and do not hesitate to scrutinize the government's conduct to ensure that it comports with the highest standard of fairness" [internal quotes omitted]), and tempered where required by other constitutional and jurisprudential imperatives. Cf. United States v. Ming He, supra (counsel requirement imposed in exercise of court's supervisory authority; court therefore does not address constitutional issues). Additionally, as the court observed in Ming He, "As in the context of the right to counsel, a waiver is valid only when 'it can be shown from the record that the waiver was made knowingly and intelligently,' United States v. Purnett, 910 F.2d 51, 54-55 (2d Cir.1990), and we must 'indulge in every reasonable presumption against waiver,' Brewer v. Williams, 430 U.S. 387, 404 (1977)." 94 F.3d at 794. In addition, "[b]ecause the government ordinarily has certain awesome advantages in bargaining power, any ambiguities in the agreement must be resolved in favor of the defendant." United States v. Hamdi, 432 F.3d 115, 123 (2d Cir. 2005), quoting United Statcs v. Lenoci, 377 F.3d 246, 258 (2d Cir. 2004).

---

[4] In contrast to the instant case, the government in Ming He wrote a 5K1 letter on the defendant's behalf notwithstanding that his "initial reluctance to acknowledge his role in a murder conspiracy and his effort to minimize his criminal involvement" were deemed so damaging to his value as a witness that the government declined to elicit his testimony a the multi-defendant extortion trial at which he otherwise would have been called. 94 F.3d 786.

Thus three questions are raised by the instant facts: (a) whether the counsel waiver provision in Pastrana's cooperation agreement was intended to cover the May 24, 2004 meeting between the government and Pastrana held to determine whether Pastrana committed perjury and/or withheld information; (b) if the attorney waiver provision was, in fact, intended to cover this meeting, whether the language used sufficiently establishes that Pastrana waived his right to counsel "knowingly and intelligently"; and (c) if in fact the government violated Pastrana's right to counsel, whether the proper remedy is to require the government to file a § 5K1.1 motion.

A. The counsel waiver provision was not intended to apply to a meeting such as that conducted May 24, 2004. The waiver provision in Pastrana's cooperation agreement should not be construed to cover the government's May 24, 2004 interview of Pastrana because it was not for the purpose for which the cooperation agreement was executed and to which the waiver necessarily related, i.e., debriefings for the purpose of facilitating cooperation between the government and Pastrana. On the contrary, the purpose of the May 24, 2004 meeting was to determine whether Pastrana had committed perjury and/or withheld information from the government, and whether the cooperation agreement should therefore be abrogated.

A reasonable way to analyze the question presented is to consider the likely understandings of the parties when the agreement was executed. Had defense counsel and Pastrana been asked at that time whether they intended to waive Pastrana's right to counsel during an interview conducted not to facilitate Pastrana's cooperation but rather to determine whether Pastrana had breached the agreement and committed a new crime,

would they have answered in the affirmative? Quite obviously not (see annexed Affirmation of Stacey Richman, Esq.), and we doubt the government would have either.

Indeed, the rationale offered by the government in Ming He for downplaying the importance of counsel at proffer sessions suggests that, even from the government's point of view proffers that are conducted within the scope of a cooperation agreement are essentially non-adversarial, and that the defendant can only help himself at such a proffer by telling the truth:

> The government believes counsel's role to be minimal because the defendant need only answer questions truthfully. If he answers truthfully, the government avers, defendant need not fear any negative consequences...
>
> Essentially, the prosecutor's position is that a debriefing session is a minor event and that defense counsel would of necessity be limited to giving advice principally about matters of fact.

94 F.3d at 789. Certainly it cannot be said with respect to the May 24, 2004 questioning of Pastrana, that "If he answer[ed] truthfully... defendant need not [have] fear[ed] any negative consequences." On the contrary it was precisely Pastrana's honest answers to the government's questioning that yielded the admissions it now uses to deny Pastrana a 5K1.1 motion and require the imposition of a life sentence.

The government's view of what constitutes a proffer session within the scope of a cooperation agreement demonstrates that the May 24th interview was not such a session. Rather it fell outside the scope of the cooperation agreement. As such the counsel waiver provision did not apply to this interview. This, we suggest, is apparent from the language of the agreement, it's purpose, the reasonable understandings of the parties, and the government's own view of typical "proffers." Yet to the extent there is ambiguity, the rule that such agreements must be strictly construed against the government militates

strongly against applying the counsel waiver provision to the interview. United States v. Hamdi, supra; cf. United States v. Oladimeji, 463 F.3d 152, 156-157 (2d Cir. 2006) (although restitution is part of a defendant's sentence, appeal waiver provision providing that defendant would "not file an appeal or otherwise challenge the conviction or sentence... in the event that the court imposes a total term of imprisonment of 114 months... or below" did not bar a challenge to restitution order; court reiterates "we apply appeal-waiver provisions 'narrowly' and construe them 'strictly against the Government,' in recognition of the fact that prosecutors' bargaining power generally exceeds that of defendants and that the government typically drafts such agreements.").

For these reasons the court should hold that the counsel waiver provision of the cooperation agreement did not apply to the May 24, 2004 interview and that the interview therefore was conducted in violation of Pastrana's right to counsel.

B. If the counsel waiver provision were found nominally to cover the May 24, 2004 interview, such a waiver should not be enforced because it was not made "knowingly and intelligently." Although the court in Ming He stated in dicta that the right to counsel at proffer sessions could be waived if such waiver is "set forth expressly in the cooperation agreement," it declined to provide further clarification, saying, "[s]ince the issue is not before us, we express no view on the precise extent of what can be waived or the form that such a waiver might take." 94 F.3d at 794. Should this court interpret the counsel waiver provision to nominally apply to the May 24, 2004 interview, the question then becomes whether the language used was sufficient to establish that Pastrana "knowingly and intelligently" waived his right to have counsel present at such an

adversarial interview. Ming He, 94 F.3d at 794, quoting United States v. Purnett, 910 F.2d 51, 54-55 (2d Cir.1990).

The Ming He court's adoption of the "knowingly and intelligently" requirement and its citation to United States v. Purnett are instructive. In Purnett the court granted a new trial to a defendant who represented himself at trial where his waiver of counsel was accepted by the court before the court determined the defendant's competency. Along the way to its decision the court reiterated, "The federal courts of appeals have consistently held that a defendant's waiver of counsel is valid only when it can be shown from the record that the waiver was made knowingly and intelligently." 910 F.2d at 54-55 (citations omitted). The Ming He court's adoption of the "knowingly and intelligently" standard for waiver of counsel recognizes the critical role counsel may play at certain proffer sessions[5] and also provides a reference point for determining whether

---

[5] In Ming He, the Second Circuit took the unusual step to invoke its supervisory authority to protect the right to counsel during proffer sessions because it recognized that counsel's involvement during a client's cooperation could be of pivotal importance:

> While it is true that the government's questions are aimed at facilitating its own trial preparation rather than "trapping" a cooperating witness, the potential obviously exists for the statements to be used later against the defendant. Thus, counsel has a role to play, even in interviews covering essentially factual matters.
>
> Because the government's understanding of the defense attorney's role is cramped, we decline to adopt it. Counsel can assist her client at a debriefing session in several important ways. First, a lawyer can explain the government's questions while also keeping her client calm. Some defendants are not sophisticated or intelligent enough to grasp a question's purport and may blurt out unthinking answers because the interview process intimidates them. A cooperating *790 witness walks a swaying tightrope. On the one hand, if he hopes to help himself, he must provide truthful information that will help the government. On the other hand, the witness must exercise some care because he is providing information to the government about his former criminal conspirators, people who may be predisposed to commit violence against him or his family because he is trading information to obtain leniency for himself.
>
> Second, a lawyer can keep her client focused on the fact that while he is seeking the assistance and protection of the government, that entity does not share

particular language purporting to waive counsel prospectively at an interview such as that conducted May 24th should be deemed adequate.

In Ming He there was no counsel waiver provision in the cooperation agreement, and the court therefore had to determine whether the defendant had implicitly waived his counsel right by continuing to attend proffer sessions without counsel. The court clarified what was required in this context to find a waiver: "Defendant and his counsel should be given reasonable notice of the time and place of the scheduled debriefing so that counsel might be present. A cooperating witness's failure to be accompanied by counsel at debriefing may later be construed as a waiver, providing defendant and counsel have had notice so that the consequences of counsel's failure to attend could be explained to defendant." 910 F.2d at 794. Where notice is given of a *particular* upcoming meeting a defendant and his/her client are able to address waiver in context; they can discuss the purpose of the particular meeting, its likely course and its consequences. Where, after such notice, a defendant proffers without counsel a waiver of counsel may be deemed to have been made "knowingly and intelligently."

An explicit counsel waiver provision incorporated into a cooperation agreement is quite different. Although clarity may be enhanced by the use of a writing, such waivers

---

> the defendant's interests even after the execution of a cooperation agreement. Since sentencing is adjourned until defendant's side of the bargain has been performed, the defendant's rights have not been fully adjudicated and the government remains the cooperating witness's adversary. Third, in this setting, a defense attorney might help resolve potential disagreements between the government and the defendant and assist the defendant in clarifying his answers to ensure they are complete and accurate.

94 F.3d at 789-790.

necessarily are not interview-specific; that is, they purport to waive counsel at any number of future meetings without notice to counsel. Thus counsel and client have no opportunity to discuss the purpose, likely course and possible consequences of each such meeting before the meeting occurs.

The court in Ming He "express[ed] no view on the precise extent of what can be waived or the form that such a waiver might take." 94 F.3d at 794. We propose the following rule: defendants should not be deemed to have waived the presence of counsel at any meeting conducted pursuant to a general counsel waiver provision of a cooperation agreement unless, *at least*, the provision includes a requirement, honored by the government, that counsel be notified of the meeting and its general purpose. Where such language is used, and such notice is given, a defendant may be found to have waived counsel at a particular interview when he/she appears without counsel because the attorney and client would have been provided sufficient information regarding the scheduling and purpose of the meeting to knowingly and intelligently determine whether counsel should be present or counsel's presence waived.

That is not what occurred here. The cooperation agreement did not oblige the government to alert defense counsel that an interview was scheduled let alone inform counsel of its purpose. Rather, the counsel waiver provision purported to extract from Pastrana, as a condition of cooperation, an agreement that the government "may meet with and debrief him without the presence of counsel, unless the defendant specifically requests counsel's presence at such debriefings and meetings." Absent such request by the defendant the government was under no obligation to notify counsel of meetings, and the agreement ominously warned, "[A]ny cancellations or reschedulings of debriefings or

meetings requested by the defendant that hinder the Office's ability to prepare adequately for trials, hearings or other proceedings may adversely affect the defendant's ability to provide substantial assistance."

Thus, the agreement did not require that counsel be informed of scheduled meetings and their purpose so that she could advise Pastrana regarding whether to waive counsel's assistance; instead the agreement wrongly put responsibility on the defendant to decide whether he needed counsel at a particular meeting, a stipulation that effectively inverted (if not outright subverted) the attorney-client relationship. And, as Ms. Richman affirms, she in fact was informed neither that the May 24, 2004 meeting had been scheduled nor that its purpose was to determine whether Pastrana committed perjury and/or withheld information. See Affirmation of Stacey Richman, ¶13. Had she been so informed, she most certainly would have attended the meeting, because she would have understood that its purpose was not to foster Pastrana's continued cooperation but rather to ascertain whether he had committed perjury at the Soto trial and whether the benefits of cooperation should be denied him. As such she would have understood the interview would likely be adversarial, the antithesis of "cooperation", and that counsel's presence therefore was imperative. As the court observed at the August 7, 2006 conference, "I think that at that point the lawyer might have been very helpful to him because he still had some cards to bargain with. And I think that at that point, he should have had a lawyer present." (Tr. 18-19).

We can see no good reason for not requiring cooperation agreements that purport to exact counsel waivers at future meetings to include an agreement by the government to at least notify counsel of a scheduled meeting and its purpose. Such a requirement would

not at all impinge upon the government's efforts to secure a defendant's timely cooperation and would, at the same time, provide reasonable assurance that the right to counsel is honored and that waivers of the right are made "knowingly and intelligently." Because nothing in the record suggests that Pastrana knowingly and intelligently waived his right to counsel at the May 24, 2004 interview, the court should find that the interview was in derogation of this right.

C. The appropriate remedy for the government's violation of Pastrana's right to counsel is to forbid the use of Pastrana's uncounseled statements and require the government to file a § 5K1.1 motion on his behalf. Should the court determine that the government violated Pastrana's right to counsel it should preclude the government from using Pastrana's statements as a reason to deny him a § 5K1.1 letter.

In Ming He, the court held that because the wrongly-procured statements may have been considered by the judge in fashioning an appropriate sentence a remand for resentencing was required:

> Further, since the district court explicitly relied on defendant's lack of candor, its sentencing error was not harmless. Plainly, this factor influenced the sentencing court's selection of the sentence. *See* Williams v. United States, 503 U.S. 193, 203 (1992) (holding remand required where consideration of impermissible factors affected length of sentence). Reading the entire record leads us additionally to reject the government's contention that resentencing is unnecessary because the negative comments in the government's § 5K1.1 letter might have been based entirely on defendant's conduct before signing the cooperation agreement and might therefore have constituted a source independent of the alleged illegality. Hence, since defendant was sentenced in violation of law, his sentence must be vacated. *See* 18 U.S.C. § 3742(f)(1).

94 F.3d at 795. Here, of course, Pastrana has yet to be sentenced, and the appropriate remedy therefore is to forbid the government's use of his uncounseled statements to determine whether to honor the cooperation agreement. Without these statements there is

no valid reason for the government to deny Pastrana the benefit of his bargain, for although the government has identified other problems with Pastrana's cooperation it has said "we are not considering them as a basis for breaching Pastrana's cooperation agreement." Exhibit 1 at 3 n.1. See Ming He, 94 F.3d at 795 ("Of course, on remand, the government cannot withdraw its § 5K1.1 motion, as that action under the circumstances would be a violation of defendant's due process rights protected by the Fifth Amendment. Cf. Blackledge v. Perry, 417 U.S. 21, 28-29 (1974) (holding that "it was not constitutionally permissible for the State to respond to [defendant's] invocation of his statutory right to appeal by bringing a more serious charge against him prior to the trial *de novo* ")."

Point Two

THE GOVERNMENT MAY NOT WITHHOLD THE BENEFITS OF COOPERATION FROM PASTRANA WHERE, AFTER THE GOVERNMENT LEARNED OF THE BREACH, IT CONTINUED TO USE HIS COOPERATION.

Even if the government would have been within its rights to deny Mr. Pastrana the benefits of his cooperation upon obtaining his admission that he withheld information regarding the "Jeff" and "bodega" murders, it lost that right when it chose to recall Pastrana without first telling him it would not make a § 5K1.1 motion on his behalf.

In fact the government apparently recalled Mr. Pastrana to obtain a strategic advantage. After meeting with Pastrana on May 24, 2004, the government informed the defense attorneys in United States v. Soto of developments and took the position that Pastrana in fact had not lied at trial but merely had withheld information from the government. It told the defense it was not intending to recall Pastrana and would not provide the defense the related 3500 material. After this court required the government

to disclose the 3500 material and suggested it might recall Pastrana as a court witness the government made a strategic decision to recall Pastrana itself. At no time did the government tell the court or Pastrana that it would not file a 5K1 motion on Pastrana's behalf

In the ensuing examination the government elicited from Pastrana that he had contacted the government following his previous appearance to correct the misimpressions left by the defense regarding his alleged participation in other murders (Tr. 2690); to flesh out the facts regarding the "Jeff" and "bodega" murders (Tr. 2691 et seq.); to implicate defendant Ramos in the bodega murder (Tr. 2702-07); to explain why he had acted oddly when asked about this event on cross-examination (Tr. 2707-08); and to explain that he previously withheld information regarding this murder to protect Ramos and because he was concerned Ramos might retaliate against him (Tr. 2708).

Additionally the government elicited from Pastrana his understanding that by withholding information he was "in potential breach" of his cooperation agreement and that it was "a possibility that you don't write a 5K1 for me" (Tr. 2709). He agreed that no one had made him "any promises about whether or not you're going to be -- your cooperation is going to be torn up" (Tr. 2709-10). He also testified, however, on cross-examination, that he was "still hoping to get your 5K letter" (Tr. 2718), a clear indication that the government never suggested, previous to recalling him, that it would deny him the benefits of cooperation.

There can be no question, based on these facts, that the government, previous to putting Pastrana back on the stand led him to believe that his cooperation agreement might still be honored; the government certainly did not tell him the agreement would not

be honored and, as Pastrana told the court, surely he would not have further testified and put himself at risk if knew the result inevitably would be a mandatory life sentence. Under these circumstances Pastrana had a reasonable expectation that should he, going forward, fully comply with the agreement the government would file the § 5K1.1 motion on his behalf.

The government cannot reasonably argue that it simply was unable, previous to recalling Pastrana, to determine whether the agreement should be abrogated, for the government had all facts required to make such a determination. What the government did was hold out to Pastrana the possibility that his agreement would yet be honored, in order to secure his continued cooperation, and then, having secured that benefit, cut the cord.

In United States v. Roe, 445 F.3d 202 (2d Cir. 2006), the defendant proffered several times to the government and then pleaded guilty to drug-related offenses pursuant to a cooperation agreement., which included the government's promise, should the defendant fully comply with his obligations, to file a motion pursuant to 18 U.S.C. § 3553(e) and U.S.S.G. § 5K1.1. The government, at the time of sentencing, declined to file the § 3553(e) motion, asserting that the defendant had lied during certain of his pre-plea proffer sessions and that he continued to withhold information. The defendant moved in the alternative for specific performance or to withdraw his guilty plea, arguing that the government was acting in bad faith. He argued "that, assuming *arguendo* that he had not been truthful during some of the proffer sessions, the government had knowledge of his untruthfulness before the cooperation agreement was executed, and therefore could not properly 'use [pre-agreement statements or actions] as bas[es] to breach [the

defendant].'" 445 F.3d at 206. The government responded that, "although it already had 'a number of suspicions, a number of concerns because of the method by which [the defendant] responded to questions and the information he provided, many of which were inconsistent and had to be investigated,' its doubts about the defendant's cooperation were not 'confirm[ed]' until later, when the defendant's relative was arrested and further evidence related to the defendant's behavior was disclosed." 445 F.3d at 206. The district court denied the motion without a hearing and imposed a sentence of 382 months.

The Second Circuit remanded for an evidentiary hearing. First, it observed that the analysis of whether the government has acted properly when it refuses to make a § 3553(e) motion on behalf a defendant who has cooperated depends in the first instance on whether the parties had signed a cooperation agreement. If they did not, then the court will find that the government acted improperly only if it withholds a motion for a constitutionally impermissible reason. Id. at 207. Where, however, the parties have entered into a cooperation agreement, review of "the government's decision not to file [the] motion is more searching," id. quoting United States v. Leonard, 50 F.3d 1152, 1157 (2d Cir. 1995); the government's right to withhold the benefits of cooperation must be exercised fairly and in good faith.

Additionally, the government acts impermissibly when it withholds the benefits of cooperation based on facts known to the government before the agreement is ratified:

> We have made clear, however, that the government may not base its dissatisfaction with a defendant's performance of an agreement on facts known to the government at the time the agreement is executed. "Not only would it be unfair for the government to rely upon ··· known, pre-agreement circumstances as reasons for not moving [under section 3553(e)], it would have been fraudulent to have induced a defendant's plea with a promise that the government already knew it was not going to keep." United States v. Knights, 968 F.2d 1483, 1488 (2d Cir.1992); *see*

> *also* Khan, 920 F.2d at 1105 ("[A] presumption of fairness underlies agreement between the defendant and the prosecutor, so that when a prosecutor makes a promise and obtains in return cooperation from the defendant, the promise must be kept.").

Id. at 207-208. Turning to the facts of the case before it, the court observed that the government did not proffer the defendant after it signed the cooperation agreement, nor did it call the defendant to testify at any trial; accordingly, the government's dissatisfaction "must have been based upon events that occurred before the cooperation agreement was executed." Id. at 208 (footnote omitted). The government proffered four areas of concern that led it to its decision not to file a § 3553(e) motion but, as the court pointed out, it was not apparent that the government had learned of any of these difficulties subsequent to the execution of the cooperation agreement. Id. at 209. Thus, concluded the court, the defendant had established a sufficient showing of bad faith to warrant a hearing, and the case was remanded for that purpose.

Here, of course, the facts triggering the government's decision to withhold the benefits of cooperation became known to the government long after the cooperation agreement was signed, but they were fully disclosed before the government strategically decided to recall Pastrana at the trial. The government might argue it had not intended to recall Pastrana and did so only because the court said it would otherwise recall him as a court's witness. Yet it nonetheless made the strategic decision to recall him so that it might initiate the renewed testimony, and the transcript reflects that the government used the opportunity to its advantage.

To be sure, the government had not affirmatively promised to file the § 3553(e) motion when it recalled Pastrana, but the lack of such a promise is entirely unilluminating

since the government *never* unconditionally promises to write such a motion until the defendant's cooperation has been concluded.

The critical question here, as it was in Roe, is whether Pastrana was led to believe that he could obtain the benefits of cooperation by complying with the terms of the agreement *going forward.* If he was led to so believe and in fact complied with his obligations going forward, then the government's withholding of the benefits of cooperation is both unfair and in bad faith. We suggest such is the case here. Indeed, there is no other reasonable interpretation for the events that ensued. At the least it is clear that the government did not tell Pastrana previous to re-calling him that it *would not* file the § 3553 motion. On the contrary it led him to believe it in fact might file the motion. If this possibility was held out to Pastrana, it could only have been based on his future cooperation.

In an important sense, Pastrana's claim of entitlement is stronger than the defendant's in Roe because in Roe the government, through the promises it made in the cooperation agreement, did not induce any affirmative cooperation, since all his cooperation had occurred previous to the execution of the agreement. Here by contrast, Pastrana testified as a government witness *after* being led to believe he could still receive the benefits of cooperation. He didn't have to testify, since he would have had a good faith basis to assert his Fifth Amendment Privilege at this point based on the possibility – though disavowed by the government – that he could be prosecuted for perjury. Had he done so the government's case would have been substantially undermined.[6] The

---

[6] Had Pastrana properly invoked the Privilege these possibilities existed: Pastrana may not have been recalled at all and his initial, impeached testimony would have been left unexplained; or the court may have advised the jury that Pastrana was now asserting

government should be held to its bargain here no less than when it induces a guilty plea based on promises made in a plea agreement.

When the parties appeared before the court on August 7, 2006, the government attempted to draw support for its position that it need not honor the cooperation agreement from Pastrana's testimony on June 1, 2004, during which Pastrana acknowledged he was "in potential breach of the cooperation agreement"; that "It's a possibility that you don't write the 5K1 motion for me"; and that no one had "made... any promises about whether or not you're going to be – you're cooperation agreement is going to be torn up" (Exhibit 7 at 21-22 quoting trial transcript at 2704). Rather than support the government's position, however, the quoted testimony demonstrates that the government had not told Pastrana that his breach was so serious and irremediable that he would no longer qualify for a § 5K1.1 letter, and thus suggested to him that if he cooperated fully going forward he in fact would yet qualify for relief.

Simply put, the government does not act fairly and in good faith when it induces a defendant to honor his commitment under an existing cooperation agreement which has not yet been abrogated and then refuses to honor its own obligations under the very same document. See United States v. Vaval, 404 F.3d 144 (2d Cir. 2005) (discussing remedies in face of breach of plea agreement). We understand the government's need to impress upon cooperators the seriousness of their commitments and the consequences of breach, but the government cannot have it both ways; it cannot demand that defendants remain

---

his Fifth Amendment rights, to the government's strategic detriment; or the court may have stricken Pastrana's initial testimony since he was unavailable for continued cross-examination. Had the court disagreed with Pastrana's invocation of the Privilege it could have held Pastrana in contempt, but Pastrana at that point would have been told his agreement had been abrogated and he therefore – knowing he would receive a life sentence -- would have had nothing to lose.

faithful to their commitments if the government, having induced such fidelity, disavows its own commitments.[7]

What appears to have occurred in the instant case is that the government simply chose to delay any decision upon whether to abrogate Pastrana's agreement because it understood – as Pastrana himself told the court – that Pastrana would not likely have testified willingly or helpfully when recalled by the government had the government first told him he could no longer secure the benefits of cooperation.

Such a cynical strategy, however, is manifestly in bad faith and provides ample reason for this court to order the government to file a § 5K1.1 motion on Pastrana's behalf.

Point Three

SHOULD THE COURT NOT REQUIRE THE GOVERNMENT TO FILE A § 5K1.1 MOTION ON PASTRANA'S BEHALF IT SHOULD PERMIT PASTRANA TO WITHDRAW HIS GUILTY PLEA

We respectfully suggest that the applicable facts and law amply support the primary relief we request – an order compelling the government to honor its commitment under the cooperation agreement and file a § 5K1.1 letter on Pastrana's behalf. Should the court not do so, however, we ask that Mr. Pastrana be permitted to withdraw his guilty plea under Fed.R.Crim.P. 11(d)(2)(B). The court has previously suggested that such a remedy might be appropriate. See Transcript of August 7, 2006 (Exhibit 7) at 8 ("There's nothing I can do here unless he wants to withdraw his plea and I will consider that"); id. at 16 ("…I can let you have the plea back. And you could go to trial").

---

[7] Of course, as the court observed at the August 7, 2006 status conference, the government has often forgiven breaches by defendants where it suits their purpose. Exhibit 7, pp.3-4.

Rule 11(d)(2)(B) provides that a defendant may withdraw a guilty plea after the court accepts the plea, but before it imposes sentence if "the defendant can show a fair and just reason for requesting the withdrawal."

Permitting Pastrana to withdraw his plea unquestionably would be "fair and just." He pleaded guilty to a violation of 18 U.S.C. § 1959 notwithstanding its mandatory sanction of life imprisonment, because he hoped to secure the benefits of a cooperation agreement. Even accepting, as we do, that Pastrana violated his obligations under the agreement there can be no question – and the government readily acknowledges – that Pastrana provided the government substantial information that was instrumental in obtaining the arrest and conviction of several dangerous predators who might otherwise have escaped punishment and who very well could have (and still might) harm him or his family. Had he not cooperated at all Pastrana would probably never have been charged under 18 U.S.C. § 1959, since he had previously pleaded guilty to a serious drug felony requiring imposition of a mandatory minimum sentence of ten years, and the admissions he made during his early proffers provided critical support the section 1959 charge. And even had the government charged a non-cooperating Pastrana under section 1959 (again a highly doubtful proposition), the government unquestionably would have offered him a plea bargain that would have permitted imposition of a sentence of less than life imprisonment. Under these circumstances Pastrana should be permitted to withdraw his guilty plea.

Conclusion

For all the foregoing reasons the court should compel the government to file a § 5K1.1 motion on Pastrana's behalf. In the alternative the court should permit Pastrana to withdraw his guilty plea.

Dated: New York, New York
October 31, 2006

Respectfully submitted,

LAW OFFICES OF
RICHARD LEVITT
148 East 78th Street
New York, New York 10021
(212) 737-0400
Co-Counsel for Jose Pastrana

By: _____
Richard Levitt (ID # RL9177)