**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF TEXAS**
**DALLAS DIVISION**

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|---|---|---|
| **UNITED STATES OF AMERICA,** | ) | **CRIMINAL ACTION NO.** |
| | ) | |
| **Plaintiff,** | ) | **3:03-CR-145-H** |
| | ) | |
| **v.** | ) | |
| | ) | |
| **XXX XXX,** | ) | |
| | ) | |
| **Defendant.** | ) | |
| | ) | |

**ADDENDUM TO MOTION TO WITHDRAW PLEA**

Defendant, XXX XXX, previously moved to withdraw his guilty plea in the above referenced action on two grounds. First, Mr. XXX argued that, under Fed. R. Crim. P. 11(d) and the decision by the United States Court of Appeals for the Fifth Circuit in *United States v. Carr*, 740 F.2d 339 (5th Cir. 1984), *cert. denied*, 471 U.S. 1004 (1985), he presented "fair and just reason" for allowing the withdrawal. Second, he argued that the plea agreement in this case was illusory and, thus, void for lack of consideration. Since the filing of that motion, Mr. XXX has obtained the transcript of his rearraignment and, it appears that his rearraignment violated Fed. R. Crim. P. 11 and, therefore, he moves to withdraw his plea on this independent basis as well.

**I. LAW**

The following cases are instructive:

- In *United States v. Cook*, 526 F.2d 708 (5th Cir. 1976), the United States Court of Appeals for the Fifth Circuit held that Fed. R. Crim. P. 11 requires the district judge to *personally* admonish the defendant. "[W]e read the language of Rule 11 requiring the court to personally address the defendant to mean exactly what it says." *Id*. at 710. Indeed, the Fifth Circuit rejected the "government's argument that the trial judge does not have to make the

required admonitions as long as these inquiries are made by someone in the judge's presence. The language of Rule 11 commands the court to personally address the defendant." *Id*. at 709. - *See also, United States v. Hart*, 566 F.2d 977 (5th Cir. 1978) (same); Fed. R. Crim. P. 11(b)(1) ("T]he court must address the defendant personally in open Court.")

• In *United States v. Monroe*, 463 F.2d 1032, 1035 (5th Cir. 1972), the Fifth Circuit observed, "a single response by the defendant that he 'understands' the charge 'gives no assurance or basis for believing he does.'"

• In *United States v. Corbett*, 742 F.2d 173 (5th Cir. 1984) the following plea colloquy had taken place:

> THE COURT: All right, you heard what the Government said, that you want to change your plea and plead to an information; is that correct?
>
> CORBETT: Yes, sir.
>
> * * * * * *
>
> THE COURT: All right, Mr. Corbett, how do you plead to Count 1 of the information?
>
> CORBETT: Guilty, sir.
>
> THE COURT: How do you plead to Count 2?
>
> CORBETT: Guilty, sir.
>
> * * * * *
>
> THE COURT: Do you fully understand the charges against you?
>
> CORBETT: Yes, sir.
>
> * * * * *
>
> THE COURT: Have you had sufficient time to discuss with your attorney any possible defense you may have to the charge?
>
> CORBETT: Yes, sir.
>
> * * * * *

> THE COURT (to Counsel for Corbett): Counsel, are you satisfied the Defendant is entering the guilty plea voluntarily with an understanding of the nature of the charges, as well as the consequences of his plea?
>
> MR. McFARLAND (Counsel for Corbett): Yes, your honor.

*Id*. at 179. The Fifth Circuit held that Fed. R. 11 was not complied with. *Id*. at 180 ("Our decisions also establish that, at a bare minimum, the charging instrument must be read to the accused or he must otherwise be furnished the same information that would be imparted to him if he heard the charging instrument read aloud. A naked inquiry into whether the accused understands the charges against him, unaccompanied by a reading or explanation of those charges, will not suffice.").

• In *United States v. Tucker*, 425 F.2d 624, 629 (5th Cir. 1970), the Court wrote: "Statements and admissions by a defendant's counsel do not satisfy Rule 11's requirement that the court personally address the defendant to ascertain that defendant understands the nature of the charge. Nor do generalized admissions or statements by a defendant's counsel meet the requirement that the court be satisfied that there is a factual basis for the plea from the defendant's own admission that he engaged in conduct which constitutes the charged offense. Such generalized admissions or statements are totally inconsistent with the purposes of Rule 11."

• In a seminal case on Fed. R. Crim. P. 11, *United States v. Dayton*, 604 F.2d 931, 938 (5th Cir. 1979), the Fifth held that while the district judge need not be the "sole orator or lector" at the Rule 11 colloquy, he should "dominate" it.

## II. FACTS

The colloquy in the instant case is clearly insufficient under Fifth Circuit law.

First, the Court, contrary to *Cook* and Fed. R. Crim. P. 11(b)(1), did *not* personally admonish Mr. XXX as to the rights he was giving up by pleading guilty. In fact, neither did the

prosecutor advise Mr. XXX as to the rights he was giving up by pleading guilty other than to say that the defendant agreed to waive rights set out in the plea agreement. *See* Attachment A ("Plea Tr.") at 5-6. In short, the plea colloquy doesn't *even* contain the "single response" that Mr. XXX understood the charge that the Fifth Circuit found insufficient in *Monroe*.

Second, while the Court inquired of Mr. XXX's counsel as to whether they discussed his waiver of appellate rights, it *never* admonished Mr. XXX regarding this waiver nor did it ascertain that Mr. XXX understood the waiver. *See* Fed. R. Crim. P. 11(b)(1)(N).

Third, contrary to *Corbett*, the indictment was not read in this case nor was the charge explained. Indeed, all the record in this case contains is the type of "naked inquiry into whether the accused understands the charges against him..." that the Fifth Circuit has previously found to be plainly insufficient. *See* Attachment A at 3.

Fourth, contrary to Fed. R. Crim P. 11(b)(2), the Court took absolutely no steps to ensure the plea was voluntary much less "address the defendant personally in open court" in order to make this determination.

Finally, a review of the transcript certainly makes clear that the Court did *not* "dominate" the plea colloquy in this case.

## III. CONCLUSION

In addition to the grounds previously raised, Mr. XXX should be allowed to withdraw his plea in that the plea colloquy wholly failed to satisfy Fed. R. Crim. P. 11 and the interpretation of that rule by the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, F. Clinton Broden, certify that on June 8 2005, I caused the foregoing document to be served by hand delivery on:

William C. McMurrey
United States Attorney's Office
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Dallas, Texas 75242

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F. Clinton Broden