UNITED STATES DISTRICT COURT
DISTRICT OF DELAWARE
AT WILMINGTON

UNITED STATES OF AMERICA,	:	**Crim. No. 1:13-cr-83-GAM-3**
	:	**Civil No. 1:20-cv-800-GAM**
Plaintiff-Respondent,	:	
	:	**HON. GERALD MCHUGH**
vs.	:	**MAG.**
	:	
AMY GONZALEZ,	:	**MOVANT'S REPLY**
	:	
Defendant-Movant.	:	

* * * * * * * * * * *

COMES NOW DEFENDANT-MOVANT Amy Gonzalez and submits the following reply to the government's response to her Section 2255 motion[1].

This reply includes and incorporates by reference the factual allegations, verified pursuant to 28 U.S.C. § 1746 set forth in Ms Gonzalez's Section 2255 motion.

ISSUES PRESENTED

Issue: **Page:**

[1] References to this response will hereinafter be "Govt. Resp. [page]". References to Ms Gonzalez's Section 2255 motion will be denominated "Section 2255 Motion [page or paragraph]". Unless otherwise indicated, any references to paragraphs in the Section 2255 motion will refer to the numbered paragraphs of the "Statement of Claim" of the motion.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

The facts relevant to this reply are set forth in the Statement of Claim of Ms Gonzalez's Section 2255 motion. In the Statement of Claim, Ms Gonzalez has pleaded inter alia:

> 3.) On or about 8-6-13 Amy Gonzalez was charged with violation of 18 U.S.C. § 371 (Conspiracy to commit interstate and cyber stalking) (Count 1); 18 U.S.C. § 2261A(2); 18 U.S.C. § 2261A(2)(B); 18 U.S.C. § 226I(b); 18 U.S.C. § 2 (Aiding & Abetting cyber stalking resulting in death) (Count 4). (Presentence Report) (J&C) (USDC Docket)[1]
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> 4.) These charges arose from allegations that she monitored and participated in communications to and about Christine Belford, the ex-wife of her brother and codefendant David Matusiewicz who was subsequently killed by their father.
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> 5.) She was arraigned on or about 9-17-13 at which time she pleaded not guilty to the charged violations. (USDC Docket)
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> 6.) No motion to suppress was filed or litigated.
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> 7.) On or about 6-8-15 Ms Gonzalez proceeded to trial. (USDC Docket)
>
> 8.) At trial, the evidence was riddled with lies, half-truths, inconsistencies, innuendoes, inferences from inferences and questionable circumstantial evidence.
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> 9.) The evidence that Ms Gonzalez "harrassed" Ms Belford and that Ms Gonzalez' father killed Ms Belford was, however, overwhelming. In order for Ms Gonzalez to be sentenced to life incarceration, that is essentially all the government had to prove.
>
> 10.) In the Court's jury instruction entitled "Special Interrogatory Regarding the Death of Christine Belford - Counts Three and Four" (CR 332, pages 46-47) the Court instructed that, in answering the interrogatory, the jury could find Ms Gonzalez culpable for the death of Ms Belford under either the theory of Burrage v. United States, 571 U.S. 204; 134 S. Ct. 881; 187 L. Ed. 2d 715; 2014 U.S. LEXIS 797 (2014) or under the theory of Pinkerton v. United States, 328 U.S. 640, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946). This instruction caused substantial confusion to the jury as reflected in their note to the Court (Transcript of Trial 7-9-15 page 6040) so the Court provided additional instruction by handwritten annotation on said instruction. (Transcript of Trial 7-10-15).

[1] This refers to the Appendix of Exhibits attached to the memorandum in support of this motion which is filed simultaneously with this motion.

11.) No objection was made to the submission of the Pinkerton instruction. (Transcript of Trial page 6041-6042)[2].

12.) On 7-10-15, Ms Gonzalez was found guilty by the jury as to violation of 18 U.S.C. § 371 (Conspiracy to commit interstate and cyber stalking) (Count 1); 18 U.S.C. § 2261A(2); 18 U.S.C. § 2261A(2)(B); 18 U.S.C. § 226l(b); 18 U.S.C. § 2 (Aiding & Abetting cyber stalking resulting in death) (Count 4). (CR 334) There is no way to determine whether the jury used the Burrage theory or the Pinkerton theory to determine Ms Gonzalez' culpability for the death of Ms Belford. Id.

13.) When the Presentence Report was prepared, the Probation Officer recommended finding a Total Offense Level 43 and a Criminal History "I" with a guideline sentencing range of "life" and a statutory maximum of "life". The enhancement to the statutory maximum from 5 years to life was predicated on the jury verdict and the "Special Interrogatory Regarding the Death of Christine Belford - Counts Three and Four". (Presentence Report ¶¶132-133)

14.) On 2-18-16, Ms Gonzalez appeared for sentencing. At sentencing, the court relied on the jury verdict to increase Ms Gonzalez' statutory maximum sentence from 5 years to life incarceration. (Transcript of sentencing page 22, 110)

15.) On 2-18-16, Ms Gonzalez was sentenced to life incarceration for violations of 18 U.S.C. § 371 (Conspiracy to commit interstate and cyber stalking) (Count 1); 18 U.S.C. § 2261A(2); 18 U.S.C. § 2261A(2)(B); 18 U.S.C. § 226l(b); 18 U.S.C. § 2 (Aiding & Abetting cyber stalking resulting in death) (Count 4). This sentence represented enhancement of her statutory maximum sentence from 5 years to life incarceration based on the jury verdict from which it is impossible to say whether she was found culpable for the death of Ms Belford under the theory of Pinkerton v. United States, 328 U.S. 640, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946) or the theory of Burrage v. United States, 571 U.S. 204; 134 S. Ct. 881; 187 L. Ed. 2d 715; 2014 U.S. LEXIS 797 (2014). (Transcript of Trial 7-9-15, pages 6038-6045) (Transcript of Trial 7-10-15).

16.) It is impossible to say that the sentence received by Ms Gonzalez did not include an unlawful increase in her maximum sentence based upon the jury verdict. This is because, while the theory of Pinkerton can be used for guilt-stage liability for coconspirators' substantive offenses, for sentencing liability for coconspirators' conduct, Pinkerton has been narrowed[3] and it is impossible to say from the verdict that the jury did NOT rely on Pinkerton.

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[2] There was no "objection" to the Pinkerton "instruction" but the FPD filed a motion "preserving" Pinkerton somehow for appellate review. NOTE in the Federal Public Defender's USCA brief, his argument did NOT go to the validity of the Pinkerton instruction; just the Burrage. (Transcript of Trial page 6042)

[3] United States v. Hamm, 952 F.3d 728, 746; 2020 U.S. App. LEXIS 7061 **20-39 (6th Cir. 2020) (Pinkerton did not support "death results" enhancement for sentencing) (citing

17.) Counsel filed a direct appeal. In the appeal, counsel did NOT argue that the statutory enhancement of Ms Gonzalez' sentence from 5 years to life was NOT based on a lawful finding by the jury because it is impossible to say that it was NOT predicated on Pinkerton liability.

18.) On 9-7-18, the Court of Appeals denied Ms Gonzalez' direct appeal. United States v. Gonzalez, 905 F.3d 165; 2018 U.S. App. LEXIS 25421 (3rd Cir. 9-7-18).

19.) A petition for Writ of Certiorari was timely filed with the Supreme Court. In the petition for Writ of Certiorari, counsel did not argue did NOT argue that the statutory enhancement of Ms Gonzalez' sentence from 5 years to life was NOT based on a lawful finding by the jury because it is impossible to say that it was NOT predicated on Pinkerton liability. On 6-17-19, the Supreme Court denied that petition. Gonzalez v. United States, 2019 U.S. LEXIS 4086; 139 S. Ct. 2727; 204 L. Ed. 2d 1120 (6-17-19).

20.) Ms Gonzalez provided counsel with complete and accurate information and did not place any restrictions on counsel.

21.) Ms Gonzalez relied completely and in all material respects on the advice of counsel.

CLAIM NUMBER ONE

22.) Ms Gonzalez restates, repleads, and realleges the facts, pleadings, and allegations set forth in ¶¶1-21 herein.

23.) Ms Gonzalez' sentence is violative of her Sixth Amendment constitutional right to effective assistance of counsel in the trial, sentencing, and direct appeal process as hereinafter more fully appears.

24.) Counsel could have but did not object at trial that the instruction to the jury allowing it to find that "death resulted" based on Pinkerton liability was unlawful.

25.) Counsel could have but did not object at sentencing that the statutory enhancement of Ms Gonzalez' sentence from 5 years to life was NOT based on a lawful finding by the jury because it is impossible to say that it was NOT predicated on Pinkerton liability.

26.) Counsel could have but did not argue on direct appeal that the statutory enhancement of Ms Gonzalez' sentence from 5 years to life was NOT based on a lawful finding by the jury because it is impossible to say that it was NOT predicated on Pinkerton liability.

27.) Counsel's omissions set forth in ¶24-26 were based on an incomplete investigation of the law relevant to Ms Gonzalez' trial, sentencing, and direct appeal process.

United States v. Swiney, 203 F.3d 397 (6th Cir. 2000) and Pinkerton v. United States, 328 U.S. 640, 642, 645-647; 66 S.Ct. 1180; 90 L.Ed. 1489 (1946) and United States v. Watson, 620 F. App'x 493, 509 (6th Cir. 2015) and United States v. Walker, 721 F.3d 828, 833-36 (7th Cir. 2013) (adopting Swiney's holding and reasoning), vacated on other grounds, 572 U.S. 1111, 134 S. Ct. 2287, 189 L. Ed. 2d 169 (2014)).

28.) Counsel could have but did not investigate United States v. Swiney, 203 F.3d 397 (6th Cir. 2000) (Pinkerton liability does not support statutory sentencing enhancement) and United States v. Watson, 620 F. App'x 493, 509 (6th Cir. 2015) (same) and United States v. Walker, 721 F.3d 828, 833-36 (7th Cir. 2013) (adopting Swiney's holding and reasoning), vacated on other grounds, 572 U.S. 1111, 134 S. Ct. 2287, 189 L. Ed. 2d 169 (2014) and and Pinkerton v. United States, 328 U.S. 640, 642, 645-647; 66 S.Ct. 1180; 90 L.Ed. 1489 (1946) (liability is limited to culpability for offense).

29.) Counsel's omissions set forth in ¶¶24-30 were not the result of reasoned decisions based on strategic or tactical choices among all plausible options available to counsel for the defense of Ms Gonzalez during the trial, sentencing, and direct appeal process.

30.) Counsel's omissions set forth in ¶¶24-30 were the result of counsel's abdication of the duty and responsibility to advocate Ms Gonzalez' case and cause during the trial, sentencing, and direct appeal process.

31.) Ms Gonzalez was prejudiced from the unprofessional omissions of counsel, set forth in ¶¶24-30 because, absent said omissions, there is a reasonable probability that the outcome of her trial, sentencing, and direct appeal process would have been different. More specifically, but for counsel's unprofessional omissions there is a reasonable probability that she would have been sentenced to the unenhanced statutory maximum of 5 years incarceration pursuant to 18 U.S.C. § 2261(b)(5). This is because it is impossible to say that the sentence received by Ms Gonzalez did not include an unlawful increase in her maximum sentence based upon the jury verdict. This is because, while the theory of Pinkerton can be used for guilt-stage liability for coconspirators' substantive offenses, for sentencing liability for coconspirators' conduct, Pinkerton has been narrowed[4] and it is impossible to say from the verdict that the jury did NOT rely on Pinkerton.

32.) Ms Gonzalez was prejudiced from the unprofessional omissions of counsel, set forth in ¶¶24-30 because said omissions deprived her of her procedural and substantive right to statutory enhancement of her sentence based solely on a lawful jury verdict; a procedural and substantive right to which the law entitled her.

33.) Ms Gonzalez was prejudiced from the unprofessional omissions of counsel, set forth in ¶¶24-30 because said omissions

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[4] United States v. Hamm, 952 F.3d 728, 746; 2020 U.S. App. LEXIS 7061 **20-39 (6th Cir. 2020) (Pinkerton did not support "death results" enhancement for sentencing) (citing United States v. Swiney, 203 F.3d 397 (6th Cir. 2000) and Pinkerton v. United States, 328 U.S. 640, 642, 645-647; 66 S.Ct. 1180; 90 L.Ed. 1489 (1946) and United States v. Watson, 620 F. App'x 493, 509 (6th Cir. 2015) and United States v. Walker, 721 F.3d 828, 833-36 (7th Cir. 2013) (adopting Swiney's holding and reasoning), vacated on other grounds, 572 U.S. 1111, 134 S. Ct. 2287, 189 L. Ed. 2d 169 (2014)).

undermine confidence in the reliability of her trial, sentencing, and direct appeal process.

CLAIM NUMBER TWO

34.) Ms Gonzalez restates, repleads, and realleges the facts, pleadings, and allegations set forth in ¶¶1-21 herein.

35.) Ms Gonzalez' plea of not guilty, conviction, and sentence are violative of her Sixth Amendment constitutional right to effective assistance of counsel in the plea process as hereinafter more fully appears.

36.) Prior to trial and during the plea process, counsel could have but did not advise Ms Gonzalez, in a way that she could understand, the minimum facts that the government would have to prove in order for her to be eligible for, and likely receive, a sentence of life incarceration.

37.) Prior to trial and during the plea process, counsel could have but did not advise Ms Gonzalez of an available plea offer whereby she could receive a maximum of 5 years incarceration if she did not proceed to trial.

37A.) There was, in fact, an offer made for a 5 year sentence for Ms Gonzalez if she did not proceed to trial.

37B.) There is a reasonable probability that Ms Gonzalez and counsel could have negotiated the agreement to allow her to plea nolo contendere for the 5 year sentence.

38.) Prior to trial and during the plea process, counsel could have but did not advise Ms Gonzalez that there was virtually no chance she could prevail at trial due to the overwhelming weight of the government's evidence that Ms Gonzalez "harrassed" Ms Belford and that Ms Gonzalez' father killed Ms Belford.

39.) Prior to trial and during the plea process, counsel affirmatively misadvised Ms Gonzalez that she had a viable First Amendment challenge to her charge of violation of 18 U.S.C. § 2261A(2); 18 U.S.C. § 2261A(2)(B); 18 U.S.C. § 226l(b); 18 U.S.C. § 2 (Aiding & Abetting cyber stalking resulting in death).

40.) Counsel's failures set forth in ¶¶36-39 ere not the result of reasoned decisions based on strategic or tactical choices among all plausible options available to counsel for the defense of Ms Gonzalez during the plea process.

41.) Counsel's omissions set forth in ¶¶36-39 were the result of counsel's abdication of the duty and responsibility to advocate Ms Gonzalez' case and cause during the plea process.

42.) The advice received from counsel regarding whether to plead guilty, nolo contendere, or not guilty was so incorrect and so insufficient that it undermined Ms Gonzalez' ability to make a voluntary and intelligent choice among the alternative courses of action open to her.

43.) Based on the facts set forth in ¶¶36-42, Counsel's performance in the plea process fell below the objective standard of reasonableness required by the Sixth Amendment.

44.) Based on the facts set forth in ¶¶36-43, Ms Gonzalez' plea of not guilty was not a voluntary and intelligent choice among the alternative courses of action open to her.

45.) Ms Gonzalez was prejudiced by counsel's constitutionally ineffective and deficient performance set forth herein, because, absent said performance, Ms Gonzalez would have pleaded nolo contendere instead of proceeding to trial.

46.) Ms Gonzalez was prejudiced by counsel's constitutionally ineffective and deficient performance set forth herein, because a substantial difference exists between the sentence she could have obtained by a plea of guilty or nolo contendere and the actual sentence she received after trial. More specifically, had Ms Gonzalez pleaded guilty or nolo contendere instead of proceeding to trial, there is a reasonable probability she would have received a sentence of 5 years incarceration instead of the sentence of life incarceration she received after trial.

47.) The facts set forth in ¶46 plead and demonstrate "objective evidence" and "special circumstances" to support Ms Gonzalez' allegations set forth in ¶45.

48.) Ms Gonzalez was prejudiced from the unprofessional acts and omissions of counsel, set forth herein, because said omissions undermine confidence in the reliability of the plea process in her case.

CLAIM NUMBER THREE

49.) Ms Gonzalez restates, repleads, and realleges the facts, pleadings, and allegations set forth in ¶¶1-48 herein.

50.) Counsel unprofessionally failed to advise Ms Gonzalez as to all facts and law relevant to her decision to plead not guilty and proceed to trial. Had Ms Gonzalez been fully advised, there is a reasonable probability that she would have pleaded nolo contendere. But for counsel's unprofessional error, there is a reasonable probability that the outcome of the proceeding would have been different.

51.) Counsel unprofessionally failed to timely, properly, and effectively move for suppression of evidence material to the conviction and/or sentence of Ms Gonzalez. But for counsel's unprofessional error, there is a reasonable probability that the outcome of the proceeding would have been different.

52.) Counsel unprofessionally failed to investigate or present available, material, exculpatory evidence and testimony at trial and failed to timely object to the unlawful admission of evidence by the prosecution. But for counsel's unprofessional error, there is a reasonable probability that the outcome of the proceeding would have been different.

53.) Counsel unprofessionally failed to timely request appropriate jury instructions and to timely object to insufficient instructions. In final argument, counsel unprofessionally also failed to timely object to improper argument by the prosecution and/or to timely ask for curative instructions for the improper argument. But for counsel's unprofessional error, there is

a reasonable probability that the outcome of the proceeding would have been different.

54.) Counsel unprofessionally failed to investigate or present available evidence and legal authority material to the sentencing of Ms Gonzalez. Counsel also unprofessionally failed to object to, unlawful, false and unreliable evidence used to determine Ms Gonzalez' guideline sentencing range and ultimate sentence. But for counsel's unprofessional error, there is a reasonable probability that the outcome of the proceeding would have been different.

55.) Ms Gonzalez was prejudiced by the objectively unreasonable performance of counsel during the trial, sentencing and direct appeal process, when counsel failed to timely argue that Ms Gonzalez was denied her Sixth Amendment constitutional rights by an unlawful increase in her maximum sentence based upon the jury verdict. This is because, while the theory of Pinkerton can be used for guilt-stage liability for coconspirators' substantive offenses, for sentencing liability for coconspirators' conduct, Pinkerton has been narrowed and it is impossible to say from the verdict that the jury did NOT rely on Pinkerton.

56.) Counsel unprofessionally failed to investigate or present the strongest issues available to Ms Gonzalez for her direct appeal. But for counsel's unprofessional error, there is a reasonable probability that the outcome of the proceeding would have been different.

57.) Trial counsel failed to reasonably investigate or advance at trial obvious and most viable defense of "intervening events" of killer's brain tumor and subsequent murder/suicide at courthouse, thereby depriving petitioner of the effective assistance of counsel.

58.) Counsel failed to reasonably investigate Thomas Matusiewicz's brain tumor, its likely cause for extreme behavior, and to present forensic experts on issue for jury. Left issue of "causation" unchallenged by defense. Counsel's stipulation in re: brain tumor constitutes ineffective assistance of counsel when based on incomplete investigation/information.

59.) Counsel failed to present defense of "intervening events" of brain tumor and murder/suicide to establish a break in chain-of-events leading to death of victims (defense to "causation" element).

60.) Counsel failed to produce Dr. Carry Gordon's testimony & report for jury consideration constitutes ineffective assistance of counsel.

61.) Trial counsel failed to produce for jury's consideration available evidence to support "truth of claim" defense to stalking charges depriving petitioner of the effective assistance of counsel.

62.) Counsel failed to produce for jury 2006 video evidence from private investigator, Michael O'Rourke, of abuse of Leigh Matusiewicz by Christine Belford.

63.) Failed to call/interview Detective Phillips, videographer/investigator, who witnessed and recorded abuses of Matusiewicz children in 2006.

64.) Counsel failed to reasonably investigate or produce for jury's consideration evidence of admissions by Christine Belford of her abuse of her daughter left issue of defamation unchallenged. (Trial transcript 2143-49)

65.) Counsel failed to question Laura and/or Dr. Hann-DeSchane about pubic shaving, or to produce expert opinion to explain possible meaning of pubic shaving of a 9 year-old to jury.

66.) Trial and appellate counsel were ineffective for failing to object to or appeal trial court's ex parte communication with jury resulting in confusion about "causation" instruction ("but-for" question from jury).

67.) Ms Gonzalez' conviction and/or sentence is violative of her Sixth Amendment constitutional right to effective assistance of counsel in the pretrial, plea, trial, sentencing and direct appeal process due to the individual errors, the multiplicity of errors, and the cumulative effect of the errors by counsel as set forth herein.

(Section 2255 Motion, PDF pages 11-22 ¶¶3-67) (Statement of Claim)

Ms Gonzalez has also submitted the following proffer as part of her Statement of Claim to support the foregoing allegations:

72.) Pursuant to Rule 6 of the Rules Governing Section 2255 Proceedings, Ms Gonzalez asks leave of this Court to invoke the processes of discovery. More specifically, she asks this Honorable Court to **ORDER** that Jeremy Ibrahim allow himself to be deposed. The evidence developed through the foregoing deposition will materially support the allegations of Ms Gonzalez, as to the "performance" of counsel, detailed and set forth herein. More specifically, Ms Gonzalez requests this Court to allow counsel to question Jeremy Ibrahim as to the reasons for his failures complained of herein. Ms Gonzalez also requests this Court to allow counsel to depose and AUSA's Jamie M. McCall and Edward J. McAndrew and Shawn Weede as to the details of the plea offer made for Ms Gonzalez and as to the terms they would have accepted.

73.) Ms Gonzalez proffers to this Honorable Court that the foregoing depositions and/or evidentiary hearing will substantiate her allegations set forth in ¶¶27-30, 36-44, 50, 53-56.

(Statement of Claim ¶¶72-73)

Ms Gonzalez has moved for appointment of counsel and an evidentiary hearing to prove her case. She has also submitted a supplemental declaration in support of her Section 2255 motion.

The government has responded to Ms Gonzalez's section 2255 motion by arguing that "out-of circuit" authority is insufficient to support Claim Number One and that Claim Number Two fails because they would not have accepted a nolo contendere plea.

Ms Gonzalez demonstrates within that (1.) she has, in fact and law, pleaded and supported a prima facie claim of ineffective assistance of counsel in the plea process; (2.) she has, in fact and law, pleaded and supported a prima facie claim of ineffective assistance of counsel due to counsel's failure to specifically object to or appeal the use of the Pinkerton theory for enhancement of her sentence from 5 years to life incarceration.

ARGUMENT

1.) MS GONZALEZ HAS, IN FACT AND LAW, PLEADED AND SUPPORTED A PRIMA FACIE CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL IN THE PLEA PROCESS.

As set forth above, Ms Gonzalez has pleaded in Claim Number Two of her Section 2255 motion that she suffered ineffective assistance of counsel in the plea process when counsel never advised her of the potential option of pleading nolo contendere. Counsel concedes he did not advise about a "nolo contendere" plea. Ms Gonzalez has stated under penalty of perjury that she was prejudiced by counsel's constitutionally ineffective and deficient performance because, absent said performance, Ms Gonzalez would have pleaded "nolo contendere" instead of proceeding to trial (A) if she had been advised that such a plea existed, and (B) if she had been advised in a way that she could understand that (i) she was not charged with "murder", and (ii) all that was necessary to convict her was proof that she had harassed

her ex wife and that as a result she died. She has supplemented these allegations with a declaration, signed under penalty of perjury and submitted with this reply, that she would have accepted a plea agreement offering a favorable plea of nolo contendere whereby she would not have had to "implicate others".[5] These allegations establish a prima facie claim of ineffective assistance of counsel in the plea process sufficient to require an evidentiary hearing. United States v. Booth, 432 F.3d 542, 546 (3d Cir. 2005); Lafler v. Cooper, ___ U.S. ___; 132 S. Ct. 1376; 182 L. Ed. 2d 398; 2012 U.S. LEXIS 2322 (3-21-12). Cf. United States v. Lawson, 2000 U.S. App. LEXIS 3407 * (2d Cir. 2000) ("objectively reasonable for [defendant's] attorneys to recommend a plea of nolo contendere").

The government has responded to the claim by arguing that no specific plea offer was ever formally offered and that a plea agreement offering a nolo contendere plea "never would have been" offered or accepted by the government[6]. This is in spite of the fact that the government anticipated a "six week trial" in their 388 page Trial Brief[7] in May of 2015 and in spite of the fact that "all of the district judges in the District of

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[5] No "factual basis" is required for a plea of nolo contendere. None-the-less, the courts have accepted such pleas and allowed the government to proffer or provide an offer of proof as to what they would prove. In response, the defense declines to object. See: United States v. Farrar, 876 F.3d 702, 706 * | 2017 U.S. App. LEXIS 24151 ** (5th Cir. 2017); United States v. Aitoro, 403 F. App'x 748, 750 (3d Cir. 2010). The defendant does not admit guilt nor 'implicate' anyone.

[6] It is well settled law that an attorney's arguments are not evidence. Lindhorst v. United States, 585 F.2d 361, 365 (8th Cir. 1978); United States v. Willis, 639 F.2d 1335; 1981 U.S. App. LEXIS 19080 (5th Cir. Unit A 1981); Duha v. Agrium, 448 F.3d 867; 2006 U.S. App. LEXIS 12598 (6th Cir. 2006) ("Arguments in parties' briefs are not evidence.") (citing Braden v. Univ. of Pittsburgh, 477 F.2d 1, 6 (3rd Cir. 1973)

[7] See Case #1:13-cr-83, Docket Entry 227 Filed 05/06/15 Page 5 of 388. (Hereinafter "CR 227, page 5")

Delaware were recused" from the case[8] and that the trial ulimately generated "over 80 witnesses and 700 exhibits"[9] as well as a direct appeal which occupied the Court of Appeals for well over 3 years.[10]

The government attorney's arguments are not well taken and should be rejected by this Court as hereinafter more fully appears.

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[8] United States v. Gonzalez, 905 F.3d 165, 195; 2018 U.S. App. LEXIS 25421 (3rd Cir. 9-7-18)

[9] Government Response, page 2.

[10] See USCA 3 docket, case #16-1559.

1A.) Circuit Precedent Holds That Counsel Can Be Ineffective And A Defendant Prejudiced In The Plea Process Under Strickland Even If No "Plea Agreement" Was Formally Offered To Resolve The Case.

On pages 24-25 of the government brief, their attorney has argued that Ms Gonzalez's Claim Number Two of her Section 2255 motion should be denied because no "formal" plea offer was formally made to Ms Gonzalez.

Ms Gonzalez agrees that no formal plea offer was apparently made. Where she and the government attorney part ways is when the attorney argues that she can't prevail in her Claim Number Two due to the fact that no "formal" plea offer was ever formally made.

This is because circuit precedent holds that counsel can be ineffective and a defendant prejudiced in the plea process under Strickland even if no "plea agreement" was formally offered to resolve the case. United States v. Booth, 432 F.3d 542, 548-49 (3d Cir. 2005) (ordering evidentiary hearing where defense counsel failed to advise defendant of the possibility to plead guilty and potentially reduce her sentence without a plea agreement).

Based on the foregoing, this Court should find that the government attorney's argument is not well taken and should be rejected by this Court.

1B.) While Nolo Contendere Pleas Are Not The Usual Resolution Of Criminal Charges, Third Circuit Courts Regularly Employ And Approve Them.

On pages 28-29 of the government brief, their attorney has argued that Ms Gonzalez's Claim Number Two of her Section 2255 motion should be denied because, government counsel asserts,

> "An offer to plead guilty nolo contendere was not made in this case, and never would have been, since the United States Department of Justice directs federal prosecutors to oppose nolo contendere pleas except in the most unusual circumstances"

(Government Response page 29)

Ms Gonzalez responds to this argument as hereinafter more fully appears.

While Ms Gonzalez can find no recent pleas in Lexis to nolo contendere in the District of Delaware, they have in fact, been accepted in Delaware as have nolo contendere pleas throughout the Third Circuit,[11] and, of course, while the Court is obligated to "consider the parties' views and the public interest"[12] in deciding whether to grant a nolo contendere plea, the "parties' views" are not dispositive.[13]

Based on the foregoing, this Court should find that while nolo contendere pleas are not the usual resolution of criminal charges, Third Circuit courts regularly employ and approve them.

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[11] United States v. Wolfson, 52 F.R.D. 170 (D. Del. 1971) (nolo contendere plea accepted); In re Wagner, 421 F.3d 275 (3d Cir. 2005) (same); United States v. Aitoro, 403 F. App'x 748 (3d Cir. 2010) (same); United States v. McCormick, 233 F. App'x 204 (3d Cir. 2007) (same); United States v. Fournier, 647 F. App'x 123 (3d Cir. 2016) (same); United States v. Harris, 751 F.3d 123 (3d Cir. 2014) (same); United States v. Ismaili, 828 F.2d 153 (3d Cir. 1987) (same); United States v. Jackson, Nos. 04-87, 06-3935, 2006 U.S. Dist. LEXIS 83163 (E.D. Pa. Nov. 15, 2006) (same); United States v. Bucci, 730 F. App'x 112 (3d Cir. 2018) (same).

[12] Fed.R.Crim.P. 11(a)(3).

[13] United States v. Harris, No. 11-196, 2012 U.S. Dist. LEXIS 129880 **11 (W.D. Pa. Sep. 11, 2012) (nolo contendere plea accepted over government objection due to defendant's "intoxication" during offense)

1C.) The Unusual Circumstances In Ms Gonzalez's Case Together With The Availability Of A Factual Basis Through "Proffer" Support A Reasonable Probability The Government And Defendant Would Have Agreed And One Of The Judges Would Have Accepted A Plea Of Nolo Contendere.

As set forth above, on pages 28-29 of the government brief, their attorney has argued that Ms Gonzalez's Claim Number Two of her Section 2255 motion should be denied because, government counsel asserts, an offer of a nolo contendere plea "never would have been" made in this case. (Government Response page 29)

To the extent that the courts and parties tend to avoid nolo contendere pleas except for unusual circumstances, "[t]she expense of trial is the most common basis argued for acceptance of a nolo contendere plea". United States v. AEM, Inc., 718 F. Supp. 2d 1334, 1337-38 (M.D. Fla. 2010) (granting nolo contendere plea over government objection).

In Ms Gonzalez's case as set forth above, in Claim Number Two of her Section 2255 motion she has pleaded that she suffered ineffective assistance of counsel in the plea process when counsel never advised her of the potential option of pleading nolo contendere. Counsel concedes he did not advise about a "nolo contendere" plea. Ms Gonzalez has stated under penalty of perjury that she was prejudiced by counsel's constitutionally ineffective and deficient performance because, absent said performance, Ms Gonzalez would have pleaded "nolo contendere" instead of proceeding to trial (A) if she had been advised that such a plea existed, and (B) if she had been advised in a way that she could understand that (i) she was not charged with "murder", and (ii) all that was necessary to convict her was proof that she had harassed her ex wife and that as a result she died. She has supplemented these allegations with

a declaration, signed under penalty of perjury and submitted with this reply, that she would have accepted a plea agreement offering a favorable plea of nolo contendere whereby she would not have had to "implicate others".[14] These allegations establish a prima facie claim of ineffective assistance of counsel in the plea process sufficient to require an evidentiary hearing. United States v. Booth, 432 F.3d 542, 546 (3d Cir. 2005); Lafler v. Cooper, ___ U.S. ___; 132 S. Ct. 1376; 182 L. Ed. 2d 398; 2012 U.S. LEXIS 2322 (3-21-12). Cf. United States v. Lawson, 2000 U.S. App. LEXIS 3407 * (2d Cir. 2000) ("objectively reasonable for [defendant's] attorneys to recommend a plea of nolo contendere").

To the extent that the government has responded to the claim by arguing that a plea agreement offering a nolo contendere plea "never would have been" offered or accepted by the government[15], the government attorney's own evidence defeats its argument. This is because the government anticipated a "six week trial" in their 388 page Trial Brief[16] in May of 2015 and "all of the district judges in the District of Delaware were recused" from the case[17] and the trial ulimately generated "over 80 witnesses and

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[14] As set forth above, no "factual basis" is required for a plea of nolo contendere. None-the-less, the courts have accepted such pleas and allowed the government to proffer or provide an offer of proof as to what they would prove. In response, the defense declines to object. See: United States v. Farrar, 876 F.3d 702, 706 * | 2017 U.S. App. LEXIS 24151 ** (5th Cir. 2017); United States v. Aitoro, 403 F. App'x 748, 750 (3d Cir. 2010). The defendant does not admit guilt nor 'implicate' anyone.

[15] As set forth above, it is well settled law that an attorney's arguments are not evidence. Lindhorst v. United States, 585 F.2d 361, 365 (8th Cir. 1978); United States v. Willis, 639 F.2d 1335; 1981 U.S. App. LEXIS 19080 (5th Cir. Unit A 1981); Duha v. Agrium, 448 F.3d 867; 2006 U.S. App. LEXIS 12598 (6th Cir. 2006) ("Arguments in parties' briefs are not evidence.") (citing Braden v. Univ. of Pittsburgh, 477 F.2d 1, 6 (3rd Cir. 1973)

[16] CR 227, page 5.

[17] United States v. Gonzalez, 905 F.3d 165, 195; 2018 U.S. App. LEXIS 25421 (3rd Cir. 9-7-18)

700 exhibits"[18] as well as a direct appeal which occupied the Court of Appeals for well over 3 years.[19] In light of these facts, for the government attorney to argue that a quick nolo contendere plea with a proffered factual basis would not have been strongly considered by the prosecution and both Judges early on is ludicrous.

Based on the foregoing, this Court should find that the unusual circumstances in Ms Gonzalez's case together with the availability of a factual basis through "proffer" support a reasonable probability the government and defendant would have agreed and one of the Judges would have accepted a plea of nolo contendere.

Based on all of the foregoing, this Court should find that Ms Gonzalez has, in fact and law, pleaded and supported a prima facie claim of ineffective assistance of counsel in the plea process.

2.) MS GONZALEZ HAS, IN FACT AND LAW, PLEADED AND SUPPORTED A PRIMA FACIE CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL DUE TO COUNSEL'S FAILURE TO SPECIFICALLY OBJECT TO OR APPEAL THE USE OF THE PINKERTON THEORY FOR ENHANCEMENT OF HER SENTENCE FROM 5 YEARS TO LIFE INCARCERATION.

As set forth above, Ms Gonzalez has pleaded in Claim Number One of her Section 2255 motion that she suffered ineffective assistance of counsel in the trial, sentencing, and direct appeal process when counsel failed to specifically object to or appeal the use of the Pinkerton theory for enhancement of her sentence from 5 years to life incarceration. Ms Gonzalez pleaded that Sixth and Seventh Circuit authorities "**and Pinkerton v. United States**, 328 U.S. 640, 642, 645-647; 66 S.Ct. 1180; 90 L.Ed. 1489 (1946) (liability is limited to culpability for offense)" should have alerted counsel to make

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[18] Government Response, page 2.
[19] See USCA 3 docket, case #16-1559.

a specific objection. (Section 2255 motion, PDF pages 14-15, paragraph 28) (emphasis added)

The government attorney has responded that trial counsel followed "the binding law of [the Third] circuit" in failing to specifically object to the Pinkerton instruction and that "out-of-circuit" authority does not support a claim of ineffective assistance of counsel. (Government Response, pages 18-23).

The government attorney's arguments are not well taken and should be rejected by this Court as hereinafter more fully appears.

2A.) Neither The Court Of Appeals Decision In Gonzalez Nor Circuit Law Forecloses A Finding Of Ineffective Assistance Of Counsel In Sentencing And Direct Appeal In This Case.

As set forth above, in the government brief, their attorney has argued that Ms Gonzalez's Claim Number One of her Section 2255 motion should be denied because, government counsel asserts, "binding law" supported the Pinkerton instruction.

To the extent that the Pinkerton instruction allowed "conviction" under the substantive counts based on the conspiracy conviction, Ms Gonzalez agrees that that is and has been binding law since Pinkerton was decided in 1946.

While the Court of Appeals in United States v. Gonzalez, 905 F.3d 165; 2018 U.S. App. LEXIS 25421 (3rd Cir. 9-7-18) affirmed the Pinkerton instruction given, the affirmation was under the "plain error" standard and only affirmed the instruction "to prove the guilt" of Ms Gonzalez. Id. 905 F.3d at 190. It did not address whether it was appropriate to use the Pinkerton conviction to enhance the statutory maximum sentence of the substantive counts. Id.

The government attorney correctly notes that the Circuit theory for application of Pinkerton to sentencing for substantive counts is derived from United States v. Williams, 974 F.3d 320, 364-68, 366 n.35 (3d Cir. 2020) (applying Pinkerton theory of liability to determine the threshold drug quantities for purposes of establishing mandatory minimum sentences under 841(b)). Where the government attorney comes up short is by overlooking Footnote #35 of Williams where the Third Circuit specifically limited this holding as follows: "Our holding here applies [Pinkerton liability] to the § 846 drug-trafficking context." Id. 974 F.3d at 366 n.35.

Based on the foregoing, this Court should find that neither the Court of Appeals decision in Gonzalez nor circuit law forecloses a finding of ineffective assistance of counsel in sentencing and direct appeal in this case.

2B.) Seventy Year Old Supreme Court Precedent And Third Circuit Decisions Provided Sufficient Warning To Counsel To Specifically Object And Appeal The Pinkerton Instructions As Used To Enhance The Statutory Maximum Sentence Of Defendant.

On pages 20-23 of the government brief, their attorney has argued that Ms Gonzalez's Claim Number One of her Section 2255 motion should be denied because, government counsel asserts, counsel couldn't be ineffective for failure to argue the reasoning of the "out-of-circuit" Sixth and Seventh Circuit decisions cited in paragraph 28 of the Statement of Claim of Ms Gonzalez's Section 2255 motion.[20]

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[20] 28.) Counsel could have but did not investigate United States v. Swiney, 203 F.3d 397 (6th Cir. 2000) (Pinkerton liability does not support statutory sentencing enhancement) and United States v. Watson, 620 F. App'x 493, 509 (6th Cir. 2015) (same) and United States v. Walker, 721 F.3d 828, 833-36 (7th Cir. 2013) (adopting Swiney's holding and reasoning), vacated on other grounds, 572 U.S. 1111, 134 S. Ct. 2287, 189 L. Ed. 2d 169 (2014) and and Pinkerton v. United States, 328 U.S. 640, 642,

The government attorney has overlooked the fact that Ms Gonzalez pleaded that the plain language of Pinkerton also should have alerted counsel to the unlawful sentence enhanc utilizing Pinkerton.[21] The plain language of the Pinkerton holding is, "we fail to see why ... acts in furtherance of the conspiracy are ... not attributable to the others **for the purpose of holding them responsible for the substantive offense**." Id. (emphasis added) The plain language of Third Circuit precedent in Williams is limited to enhancements to the statutory maximum sentence under the unique circumstances of 21 U.S.C. § 846 sentencing under 21 U.S.C. § 841(b)[22], and simply state that Pinkerton is a theory of finding "guilt" of a substantive offence instead of a sentencing theory.[23]

Based on the foregoing, there was no need for counsel to rely on "Out-Of-Circuit Precedent"; the 70 year old Supreme Court precedent uncontradicted and supported by Third Circuit precedent was sufficient to put counsel on notice to make specific objection at sentencing and on direct appeal to the enhancement of defendant's statutory maximum sentence based on the Count One conviction under the Pinkerton theory.

Based on all of the foregoing, this Court should find that Seventy year old Supreme Court precedent and Third Circuit decisions provided sufficient warning to

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645-647; 66 S.Ct. 1180; 90 L.Ed. 1489 (1946) (liability is limited to culpability for offense).

[21] Id.

[22] Other than for 21 U.S.C. § 846 offenses with sentences under 21 U.S.C. § 841(b), Third Circuit precedent has never allowed enhancement of a statutory maximum sentence through a conviction obtained under Pinkerton.

[23] See United States v. Ramos, 147 F.3d 281, 286 (3d Cir. 1998) ("a defendant **may be found guilty**" of 18 U.S.C. § 924(c)(1) through Pinkerton liability) (emphasis added); United States v. Lopez, 271 F.3d 472 (3d Cir. 2001) (Pinkerton "permits the government **to prove the guilt** of one defendant through the acts of another") (emphasis added).

counsel to specifically object and appeal the Pinkerton instructions as used to enhance the statutory maximum sentence of defendant.

2C.) Ms Gonzalez Was, In Fact And Law, Prejudiced By Counsel's Unprofessional Failures To Specifically Object And Appeal The Pinkerton Instructions As Used To Enhance The Statutory Maximum Sentence Of Her Case.

On pages 22-23 of the government brief, their attorney has argued that Ms Gonzalez's Claim Number One of her Section 2255 motion should be denied because, government counsel asserts, the error was harmless.

Ms Gonzalez is arguing that the following instruction was unlawful:

> Alternatively members of the jury, if you find that as to that defendant, even if they personally did not engage in such conduct, if they were in a conspiracy with another one of the defendants, and it was one of the objectives of that conspiracy that conduct would occur that would otherwise meet these requirements for resulting in death, then you may also answer the interrogatory yes.

(Transcript of Trial, page 6044)

Ms Gonzalez respectfully submits that counsel (A) could have and should have but did not make a specific objection to this instruction during trial, and (B) failed to object to the sentencing enhancement at sentencing based on this instruction, and (C) failed to specifically argue on direct appeal that it resulted in unconstitutional sentencing under the Sixth Amendment.

This is because submission of the special interrogatories for the substantive counts under the Pinkerton instruction given allowed enhancement of defendant's statutory maximum sentence under a conspiracy wide, instead of individualized, determination in violation of the Sixth Amendment and the prior Third Circuit holding in United States v. Miller, 645 Fed. App'x 211, 218 (3d Cir. April 1, 2016) (finding Sixth

Amendment error because "the jury did not determine [a drug quantity] directly attributable" to the individual defendant)[24]

Based on the foregoing, this Court should find that Ms Gonzalez was, in fact and law, prejudiced by counsel's unprofessional failures to specifically object and appeal the Pinkerton instructions as used to enhance the statutory maximum sentence of her case.

Based on all of the foregoing, this Court should find that Ms Gonzalez has, in fact and law, pleaded and supported a prima facie claim of ineffective assistance of counsel due to counsel's failure to specifically object to or appeal the use of the Pinkerton theory for enhancement of her sentence from 5 years to life incarceration.

3.) BASED ON THE FACTS, LAW, AND EVIDENCE SUBMITTED BY MS GONZALEZ, THE COURT SHOULD GRANT AN EVIDENTIARY HEARING TO ALLOW HER TO PROVE HER CASE

Title 28, United States Code, Section 2255 provides that a prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released or for reduction of sentence may move the court which imposed the sentence to vacate, set aside or correct the sentence. This section also provides as follows:

> "Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto."

28 U.S.C. § 2255 [25]

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[24] While Miller was decided in light of Alleyne v. United States, 133 S. Ct. 2151; 186 L. Ed. 2d 314; 2013 U.S. LEXIS 4543 (6-17-13) governing imposition of statutory mandatory minimum sentences, Apprendi v. New Jersey, 530 U.S. ___, 147 L. Ed. 2d 435, 120 S. Ct. 2348; 2000 U.S. LEXIS 4304 (6-26-00) governs imposition of statutory maximum sentences. They were both decided under the Sixth Amendment. They are two peas from the same pod.

Although a district court has discretion whether to order a hearing when a defendant brings a motion to vacate sentence pursuant to 28 U.S.C.S. § 2255, caselaw has imposed limitations on the exercise of that discretion. In considering a motion to vacate a defendant's sentence, the court must accept the truth of the movant's factual allegations unless they are clearly frivolous on the basis of the existing record. R. Governing § 2255 Proc. U.S. Dist. Cts.4(b). The district court is required to hold an evidentiary hearing unless the motion and files and records of the case show conclusively that the movant is not entitled to relief. Courts have characterized this standard as creating a reasonably low threshold for habeas petitioners to meet. Thus, the district court abuses its discretion if it fails to hold an evidentiary hearing when the files and records of the case are inconclusive as to whether the movant is entitled to relief. United States v. Booth, 432 F.3d 542, 545-546 (3d Cir. 2005)

Where a case presents extra record material factual issues which turn upon a credibility determination of the witnesses, such as where opposing affidavits are

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[25] See also United States v. Galloway, 56 F.3d 1239, 1240 [n.1] (10th Cir. 1995) (en banc) (A hearing is required "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief.") and Ciak v. United States, 59 F.3d 296, 306-07 (2nd Cir. 1995) (District Court should have granted evidentiary hearing because movant "alleged facts, which, if found to be true, would have entitled her to habeas relief) and Shaw v. United States, 24 F.3d 1040, 1043 (8th Cir. 1994) (District Court erred by denying evidentiary hearing on allegations of ineffective assistance of counsel that were neither inadequate on their face nor conclusively refuted by the record) and United States v. Blaylock, 20 F.3d 1458, 1465 (9th Cir. 1994) (evidentiary hearing required unless § 2255 motion, files, and trial record "conclusively show" petitioner entitled to no relief) and Virgin Islands v. Weatherwax, 20 F.3d 572, 573 (3rd Cir. 1994) (petitioner entitled to evidentiary hearing on ineffective assistance of counsel claim where facts viewed in light most favorable to petitioner would entitle her to relief) and United States v. Magini, 973 F.2d 261, 264-65 (4th Cir. 1992) (petitioner entitled to evidentiary hearing when motion presented colorable claim and material facts beyond the record are in dispute) and Stoia v. United States, 22 F.3d 766, 768 (7th Cir.

submitted, the District Court cannot make the credibility determination by simply choosing between the affidavits without an evidentiary hearing. United States v. Stuffle, 1997 U.S. App. LEXIS 21010 (4th Cir. 1997) (citing Williams v. Griffin, 952 F.2d 820, 823 (4th Cir. 1991); United States v. Grist, 1998 U.S. App. LEXIS 20199 (10th Cir. 1998) (citing Machibroda v. United States, 368 U.S. 487, 494-95 (1962) and citing Moore v. United States, 950 F.2d 656, 660-61 (10th Cir. 1991)); United States v. Jolly, 2007 U.S. App. LEXIS 25334 (5th Cir. 2007) (collecting cases as to "warning[s] that this court has had to make repeatedly in the recent past"); Guy v. Cockrell, 343 F.3d 348; 2003 U.S. App. LEXIS 16632 (5th Cir. 2003) (conflicts between several affidavits of same witness and lack of clear record as to performance of counsel required evidentiary hearing). [26]

In the instant case, the government has responded to Ms Gonzalez's Section 2255 motion by arguing, inter alia, that they would not have accepted a nolo contendere plea. In support, they have submitted the affidavit of Shannon T. Hanson who was the Chief of the Criminal Division during the trial of Ms Gonzalez. Ms Hanson states in the affidavit that she "would not have approved" of a nolo contendere plea for Ms Gonzalez. While this naked statement is competent evidence at this point, it is NOT dispositive. Ms Gonzalez is entitled to test this statement by cross examination.

1994)(same) and J. Liebman and R. Hertz, Federal Habeas Corpus Practice and Procedure, § 41.5b [n. 9], § 41.6d [n. 10-13] (3rd Ed. 1998) (same)

[26] See also Smith v. McCormick, 914 F.2d 1153, 1170 (9th Cir. 1990) (same); United States v. Giardino, 797 F.2d 30, 32 (1st Cir. 1986) (same); Lindhorst v. United States, 585 F.2d 361, 365 (8th Cir. 1978) (same). This is just as true where an affidavit is submitted by prior counsel opposing the defendant's sworn factual allegations in an ineffective assistance of counsel claim. Id. Simply stated, "[t]she district court cannot prefer the lawyer's affidavit to Appellant's verified pleadings without a hearing." United States v. Stuffle, 1997 U.S. App. LEXIS 21010 (4th Cir. 1997) "When the issue is one of credibility, resolution on the basis of affidavits can rarely be conclusive." Id. (quoting

As the Second Circuit has declared:."An opposing affidavit by the Government is not part of "the files and records of the case' which can be taken to "conclusively show that the prisoner is entitled to no relief,' within 28 U.S.C. § 2255. The principle was established by the Supreme Court as long ago as Walker v. Johnston, 312 U.S. 275, 61 S. Ct. 574, 85 L. Ed. 830 (1941), and Waley v. Johnston, 316 U.S. 101, 62 S. Ct. 964, 86 L. Ed. 1302 (1942)." See Taylor v. United States, 487 F.2d 307, 308 (2nd Cir. 1973); Accord Pennsylvania ex rel Herman v. Claudy, 350 U.S. 116, 123, 76 S. Ct. 223, 100 L. Ed. 126 (1956); Machibroda v. United States, 368 U.S. 487, 494, 82 S. Ct. 510, 7 L. Ed. 2d 473 (1962). As the Supreme Court observed in a similar case: "It is true that they (appellant's allegations) are denied in the (government) affidavits filed with the return to the rule, but the denials only serve to make the issues which must be resolved by evidence taken in the usual way. They can have no other office. The witnesses who made them must be subjected to examination Ore tenus or by deposition as are all other witnesses." Walker v. Johnston, 312 U.S. 275, 286-87, 61 S. Ct. 574, 579, 85 L. Ed. 830 (1941). See Lindhorst v. United States, 585 F.2d 361, 365 (8th Cir. 1978).

Ms Gonzalez respectfully submits that, in light of the government attorney's own evidence of the extraordinary nature of the trial and appeal process in this case[27], there is a reasonable probability that the pleas would have been accepted and approved by

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Raines v. United States, 423 F.2d 526, 529-530 (4th Cir. 1970) (citing Machibroda v. United States, 368 U.S. 487 (1962)

[27] The government anticipated a "six week trial" in their 388 page Trial Brief in May of 2015 plus "all of the district judges in the District of Delaware were recused" from the case, the trial ulimately generated "over 80 witnesses and 700 exhibits" and the direct appeal occupied the Court of Appeals for well over 3 years. Moreover, a factual basis could have been established pretty much to the prosecutor's heart's content thru proffer. It's hard to imagine stronger reasons to settle the case by plea.

either Judge McHugh or Judgte Sleet, each of whom presided over critical stages of the plea process.

Based the facts, law, and evidence submitted by Ms Gonzalez, the Court should grant an evidentiary hearing to allow her to prove her case.

CONCLUSION

Based on all of the foregoing, Ms Gonzalez respectfully asks this Honorable Court to:

A.) **FIND** that the government opposition to her Section 2255 motion is not well taken; and,

B.) **ORDER** an evidentiary hearing as set forth and requested in her Section 2255 motion so that she can prove her case.

Date:_____

Respectfully submitted,

_____

Amy Gonzalez
Movant
49619-379
P.O. Box 27137
Fort Worth, TX 76127

UNITED STATES DISTRICT COURT
DISTRICT OF DELAWARE
AT WILMINGTON

UNITED STATES OF AMERICA,	:	**Crim. No. 1:13-cr-83-GAM-3**
	:	**Civil No. 1:20-cv-800-GAM**
Plaintiff-Respondent,	:	**HON. GERALD MCHUGH**
	:	**MAG.**
vs.	:	
	:	
AMY GONZALEZ,	:	**MOVANT'S RENEWED**
	:	**MOTION FOR DISCOVERY**
Defendant-Movant.	:	

* * * * * * * * * *

COMES NOW DEFENDANT-MOVANT Amy Gonzalez and renews her motion for discovery which was included in her Section 2255 motion. The grounds for this motion hereinafter more fully appear:

1.) Disputed issues of material fact exist in this case including but not limited to whether the government could have been persuaded to offer a nolo contendere plea.

2.) Both the plain language of 28 U.S.C. § 2255 and case law construing this section mandate that the material factual disputes be resolved as part of the Court's determination of the Section 2255 motion.

3.) The requested discovery may well resolve the material factual disputes without the need for an evidentiary hearing, thereby conserving judicial resources.

CONCLUSION

4.) For all of the foregoing reasons, Ms Gonzalez respectfully requests this Honorable Court to grant the discovery requested in her Section 2255 motion by allowing her the following discovery requested in her Section 2255 motion as well as by examining Shannon T. Hanson as to the decisional process and whether there is a reasonable probability that she and the government would have accepted a nolo contendere plea.

Respectfully submitted,

Date: _____

_____

Amy Gonzalez
Movant
49619-379
P.O. Box 27137
Fort Worth, TX 76127

UNITED STATES DISTRICT COURT
DISTRICT OF DELAWARE
AT WILMINGTON

UNITED STATES OF AMERICA,	:	**Crim. No. 1:13-cr-83-GAM-3**
	:	**Civil No. 1:20-cv-800-GAM**
Plaintiff-Respondent,	:	**HON. GERALD MCHUGH**
	:	
vs.	:	
	:	**DECLARATION OF**
AMY GONZALEZ,	:	**AMY GONZALEZ**
	:	
Defendant-Movant.	:	

* * * * * * * * * *

I Amy Gonzalez being first duly sworn according to law, depose and say as follows:

1.) I am the Amy Gonzalez who is the Defendant-Movant in the above entitled case.

2.) During pretrial proceedings in this criminal case, I had no knowledge of nor was I ever advised by counsel of the existence of a plea of "no contest" or "nolo contendere". Consequently, I was never advised advised of the distinctions between a nolo contendere plea and a plea of guilty.

3.) During pretrial proceedings in this criminal case, I didn't know and was never advised that a nolo contendere plea would not require me to state that I was "guilty" or to admit "guilt".

4.) During pretrial proceedings in this criminal case, I didn't know and was never advised that a nolo contendere would not require me to "implicate" any other person. The absence of this information was material to me in my decision to refuse to plead "guilty"

5.) During pretrial proceedings in this criminal case, I didn't know and was never advised that the government could and would be able to state a "government version" of the offense in my Presentence Report and in appeal arguments and in pleadings such as in their current response to my Section 2255 motion, whether I was found guilty at trial or pleaded guilty with a "factual basis" or pleaded nolo contendere with an unobjected to proffer of facts from the government such as was used in United States v. Aitoro, 403 F. App'x 748, 750 (3d Cir. 2010) and United States v. Farrar, 876 F.3d 702, 706 * | 2017 U.S. App. LEXIS 24151 ** (5th Cir. 2017).

6.) Had I been advised by counsel of the foregoing facts and law, I would have asked counsel to pursue negotiations with the government with the goal of obtaining a plea of nolo contendere instead of proceeding to trial.

7.) Had I been advised by counsel of the foregoing facts and law, I would have pleaded nolo contendere to a favorable plea agreement.

8.) I specifically allege that a plea of nolo contendere could have been negotiated between myself and the government and that one of the judges in this case would have accepted the plea.

9.) I will testify to the foregoing under oath.

10.) I have read the foregoing and state that the facts are based on my personal knowledge and are true and correct.

Signed under penalty of perjury under the laws of the United States including 28 U.S.C. § 1746 this _____day of _____, 2021.

_____

Amy Gonzalez
49619-379
P.O. Box 27137
Fort Worth, TX 76127

UNITED STATES DISTRICT COURT
DISTRICT OF DELAWARE
AT WILMINGTON

UNITED STATES OF AMERICA,	:	**Crim. No. 1:13-cr-83-GAM-3**
	:	**Civil No. 1:20-cv-800-GAM**
Plaintiff-Respondent,	:	**HON. GERALD MCHUGH**
	:	**MAG.**
vs.	:	
	:	**SUPPLEMENTAL EXHIBITS**
AMY GONZALEZ,	:	**IN SUPPORT OF SECTION**
	:	**2255 MOTION**
Defendant-Movant.	:	

* * * * * * * * * *

COMES NOW DEFENDANT-MOVANT Amy Gonzalez and deposes and states as follows:

1.) I am the Defendant-Movant in the above entitled case and the instant proceedings pursuant to 28 U.S.C. § 2255.

2.) The attached documents are submitted as exhibits in support of my section 2255 motion. I have personal knowledge of the originals of the exhibits and state that the copies truly and accurately represent said originals.

3.) I have read the foregoing and state that it is true and correct.

Signed under penalty of perjury under 28 U.S.C. § 1746 this _____ day of _____, 2021.

_____

Amy Gonzalez
Movant
49619-379
P.O. Box 27137
Fort Worth, TX 76127

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Criminal Action No. 13-83-GAM
~~FILED UNDER SEAL~~
UNSEALED Per Order

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA,
Plaintiff,

v.

DAVID THOMAS MATUSIEWICZ,
LEONORE MATUSIEWICZ, and
AMY GONZALEZ.
Defendants.

GOVERNMENT'S TRIAL BRIEF AND
OMNIBUS MOTION IN LIMINE

DAVID C. WEISS
Attorney for the United States
Acting Under Authority Conferred
by 28 U.S.C. § 515

By: /s/ Jamie M. McCall
Jamie M. McCall
Assistant United States Attorney

By: /s/ Edward J. McAndrew
Edward J. McAndrew
Assistant United States Attorney

By: /s/ Shawn A. Weede
Shawn A. Weede
Assistant United States Attorney

Gonzalez Exhibit A1

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Gonzalez Exhibit A3

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA,	:	
	:	
Plaintiff,	:	
v.	:	Criminal Action No. 13-83-GAM
	:	FILED UNDER SEAL
DAVID THOMAS MATUSIEWICZ,	:	
LENORE MATUSIEWICZ, and	:	
AMY GONZALEZ,	:	
	:	
Defendants.	:	

GOVERNMENT'S TRIAL BRIEF AND
OMNIBUS MOTION IN LIMINE

The Defendants have been indicted with conspiracy, cyberstalking and interstate stalking offenses that stem from their three-year campaign to falsely assail Christine Belford's character and leave her in constant fear for her safety, which ultimately resulted in her murder. Trial in this matter is scheduled to begin on June 8, 2015, and is expected to last six weeks. The Government files this Trial Brief and Omnibus Motion in Limine to provide the Court with an outline of the evidence it intends to present at trial, and the legal framework governing the charged crimes, as well as to seek conditional pre-trial rulings with regard to the admissibility of several types of evidence, including: (1) "other act" evidence that is either intrinsic to the charges here or otherwise admissible pursuant to Federal Rule of Evidence 404(b); (2) the Defendants' statements, including those of co-conspirator Thomas Matusiewicz; and (3) statements made by Christine Belford shedding light on her emotional state resulting from the Defendants' stalking conduct.

UNITED STATES DISTRICT COURT
DISTRICT OF DELAWARE
AT WILMINGTON

UNITED STATES OF AMERICA,	:	**Crim. No. 1:13-cr-83-GAM-3**
	:	**Civil No. 1:20-cv-800-GAM**
Plaintiff-Respondent,	:	**HON. GERALD MCHUGH**
	:	**MAG.**
vs.	:	
	:	**CERTIFICATE OF FILING**
AMY GONZALEZ,	:	**AND SERVICE**
	:	
Defendant-Movant.	:	

* * * * * * * * * *

Pursuant to the principles of Houston v. Lack, 487 U.S. 266, 276 (1988), Ms Gonzalez has this day filed with the Court and served counsel for the opposing party with the required original and copies of the enclosed documents by depositing same in the prison legal mail collection box, in sealed envelopes, first class postage affixed and addressed to: **Clerk, U.S. District Court, 844 North King St Unit 18, Wilmington, DE 19801-3570** and to **United States Attorney, 1313 N Market St - PO Box 2046, Wilmington, DE 19801.**

Signed under penalty of perjury under 28 U.S.C. § 1746 this _____ day of _____, 2021.

_____

Amy Gonzalez
49619-379
P.O. Box 27137
Fort Worth, TX 76127