IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
BEAUFORT DIVISION

UNITED STATES OF AMERICA,)	CRIMINAL CASE NO.: 9:14-cr-54
)	
vs.)	DEFENDANT MARY MOONEY'S
)	MOTION TO WITHDRAW
MARY MOONEY,)	HER PLEA OF GUILTY AND
)	MEMORANDUM OF LAW
DEFENDANT)	
_____)	

The defendant, Mary Mooney, through her undersigned attorney, hereby moves this honorable court for an order allowing her to withdraw her previously entered plea of guilty.

This motion is made pursuant to the provisions of Rule 11(d) F. R. Crim. P., which provides in pertinent part that

> (d) Withdrawing a Guilty or *Nolo Contendere* Plea. A defendant may withdraw a plea of guilty or *nolo contendere:*
>
> . . .
>
> (2) after the court accepts the plea, but before it passes sentence if:
>
> . . .
>
> (B) The defendant can show a fair and just reason for requesting the withdrawal.

Ms. Mooney's request to be allowed to withdraw her plea of guilty is based upon the following:

A. Title 42 § 14944 did not apply to non-Hague Convention Cases before July 14, 2014.

B. The facts do not support the accusations in the Information.

C. Discovery of new exculpatory evidence, found after the plea was entered, shows actual innocence of the charges in the Information.

PROCEDURAL BACKGROUND

Ms. Mooney was one of four defendants charged in a one count Indictment filed on January 21, 2014, in the District of South Carolina, Beaufort Division.

The one count Indictment charged the four defendants with a conspiracy to defraud the United States, and any agency thereof, namely, the Department of State and the Department of Homeland Security, from at least in or about September, 2006, and continuing through at least in or about May, 2011, by impeding, impairing, obstructing, and defeating their lawful functions in transacting the official business of these departments by deceit, craft, trickery, and dishonest means, all in violation of Title 18, U. S. Code § 371.

Ms. Mooney was arrested and made her initial appearance in the Southern District of Florida on February 12, 2014. She was arraigned in U. S. District Court, Charleston, South Carolina, on February 25, 2014, at which time she was continued on a secured bond after entering a plea of not guilty.

After several delays, which included the appointment of two separate attorneys to represent Ms. Mooney, the case was scheduled for jury selection on Wednesday, January 14, 2015, with trial to begin on Monday, January 26, 2015.

On January 9, 2015, at a meeting among attorneys in Charleston, South Carolina, an alleged violation of 42 U.S.C. § 14944 was first discussed with the government. This was brought to the attention of the undersigned attorney with the filing of a Notice of Government Intent to Introduce Certain Evidence at Trial (Dkt #126). The government took the position that this evidence could be introduced pursuant to Rule 404(b), Federal Rules of Evidence, “or as inextricably intertwined with the charges

in the Indictment."

On January 12, 2015, in a meeting in Gaffney, South Carolina, between the undersigned attorney's private investigator and Ms. Mooney, she was first told about the proposed use of the Rule 404(b) evidence.

On January 13, 2015, the undersigned attorney, after first discussing a possible plea to a Section 14944 violation with Ms. Mooney, met with the government and discussed in some detail the possibility of a plea to the allegations first discussed in the Notice referred to above. On the morning of January 14, 2015, at approximately 9:30 am, the undersigned attorney met with Ms. Mooney and provided her with the first draft of the Information and plea agreement. This conversation resulted in extensive plea negotiations throughout the day which culminated in the signing of a plea agreement, waiver of presentation to the grand jury, and a plea of guilty to the Information, (Dkt #131), a copy of which is provided as Exhibit 1.

On or about February 10, 2015, Ms. Mooney instructed the undersigned attorney to file a motion to withdraw her guilty plea. Ms. Mooney's Motion to Withdraw her guilty plea is based upon the fact that, subsequent to entering a plea of guilty, it has been determined that Title 42, United States Code, § 14944 did not apply to adoptions from Ethiopia, until July 14, 2014, when the Universal Accreditation Act (UAA) (H.R. 6027) came into effect. See the affidavit of Ms. Mooney, Exhibit 2, which is incorporated herein by reference..

Title 42 U.S.C. § 14944 is part of the Inter-country Adoption Act of 2000 (IAA) (H.R. 2909), which came into effect on April 1, 2008. It covered only Hague Convention adoptions. Ms. Mooney and IAG were only involved in adoptions from Ethiopia.

Ethiopia is a non-Hague country. See Exhibits 3 and 4.

In 2014, the UAA made the regulations of the IAA cover all international adoptions, including non-Hague as well as Hague Convention countries. See Exhibits 5 and 6.

ADDRESSING THE FALSE AND FRAUDULENT STATEMENT AND MISREPRESENTATION IN THE INFORMATION

September 1, 2007. “Failure to include Alisa Bivens as one of IAG's employees providing adoption services”. Alisa Bivens was the Ethiopia Program Director for IAG as of September 1, 2007.

The Council on Accreditation (COA), a non-profit organization that reviews applications for accreditation and makes accreditation determinations for adoption services providers in the United States operating in certain countries, provided a form called “employee profile” to be completed by International Adoption Guides, Inc. (IAG). COA provided instructions for completion of this form. These instructions clearly state that agencies only include information that concerns Hague Convention countries.

The COA website provides that “This form is used to provide information about employees who are involved in the provision of services in Convention cases” This website link from COA gives instructions about 'what forms are needed”. http://coanet.org/accreditation/hague-accreditation-and-approval/accreditationguidelines/demonstrating-compliance-and-assembling-the-self-study/what-forms-need-to-becompleted/. See Exhibit 7.

The COA document “Hague Accreditation and Approval Application FAQ's” refers to other forms completed for the adoption process that state similar instructions

to include only matters related to Hague Convention Cases. See Exhibit 8.

> **Question**: When I check the boxes to specify which adoption services I provide, should I check boxes to reflect the work I do in domestic cases or cases that will not be subject to the Hague Convention?
> **Answer:** No, you only need to check the boxes to indicate which services you will provide for cases that involve Hague Convention countries.
> **Question:** Do I include providers we/I collaborate with on non-Convention cases on the Collaborative Relationships Profile?
> **Answer:** No, we are only concerned with your collaborative relationships for Convention cases.

COA requested on its application for COA accreditation for agencies to only use the money allocated in their budget for Hague Convention Cases. Their application states, " Please Check the Box that Most Accurately Reflects Your Organization's Total Hague Intercountry Adoption Budgeted Revenue". See Exhibit 9.

These documents show that the normal instructions for agencies when completing documents for COA to only use information that reflected services provided in Hague Convention Cases.

Charged in the Information as a violation of 42 U.S.C. § 14944 is the following: that on April 10, 2010, Ms. Mooney attested that "during the past year we have been in substantial compliance ... with all applicable Hague Accreditation Standards in 22 CFR Part 96, Subpart F, and that we continue to be in substantial compliance with all applicable Hague Accreditation standards".

In 2009, IAG signed a similar document to the one signed on April 10, 2010. This 2009 COA document was twenty-one pages long; on the last page, just before the signature, it states: "I, the undersigned hereby attest that our *Hague adoption service*

program(s) (emphasis added) is/are and has/have at all times during the last year remained in substantial compliance with all applicable Hague Accreditation/Approval Standards". In addition, "I attest to the truth and accuracy made in this document about our Hague intercountry adoption service program(s)." See Exhibit 10 (pages 1 and 21 of the document).

In 2010, COA changed to a one page form that only stated, "We the undersigned hereby attest, under penalty of perjury, that during the past year we have been in substantial compliance pursuant to the Substantial Compliance System with all applicable Hague Accreditation Standards Part 96, Subpart F, and that we continue to be in substantial compliance with all application Hague Accreditation Standards." Part 96 subpart F does not apply to non-convention cases. IAG was in compliance because Ethiopia was not a signatory and the law relied upon by the prosecution was not then in effect. See Exhibit 11.

On April 6, 2010, COA sent IAG a letter closing out a complaint that was filed concerning IAG's hiring of Jim Harding. The April 6, 2010, letter states, "Based on the findings in this investigation, there was insufficient evidence to conclude that International Adoption Guides, Inc. is not in substantial compliance with the standards in 22 CFR Part 96. Therefore, COA's investigation of this complainant is concluded." This letter was written by COA four days before Ms. Mooney signed the April 10, 2010, attestation noted in the Information. See Exhibit 12.

The third specific charge in the Information is that on November 21, 2011, Mary Mooney was the Executive Director of IAG and failed to disclose that James Harding was the functional executive running the company.

COA completed a full investigation concerning the employment of Jim Harding between Dec. 31, 2008, and April 6, 2010. In that investigation, COA required several documents, including Jim Harding's employment letter and his job description.

The requirements of COA or the South Carolina Department of Social Services (SCDSS) for an executive director do not indicate a certain number of hours per week of work or a certain salary. COA and SC DSS do require that the executive director have the education and experience to fill that position. Following a 16 month investigation, if COA found that Jim Harding should have been named the executive director, COA would have addressed that issue at that time. See Exhibit 12.

THE LAW

In 1991, the Fourth Circuit noted six factors to be considered when determining that the defendant had shown a fair and just reason for withdrawal of the defendant's guilty plea.

> Courts typically consider a variety of factors in determining whether a defendant has met his burden under Rule 32(d). The factors include (1) whether the defendant has offered credible evidence that his plea was not knowing or not voluntary, (2) whether the defendant has credibly asserted his legal innocence, (3) whether there has been a delay between the entering of the plea and the filing of the motion, (4) whether defendant has had close assistance of competent counsel, (5) whether withdrawal will cause prejudice to the government, and (6) whether it will inconvenience the court and waste judicial resources. See, e.g., United States v. Hurtado, 846 F.2d 995, 997 (5th Cir.), cert. denied, 488 U.S. 863, 109 S.Ct. 163, 102 L.Ed.2d 133 (1988); United States v. Carr, 740 F.2d 339, 343-44 (5th Cir. 1984), cert. denied, 471 U.S. 1004, 105 S.Ct. 1865, 85 L.Ed.2d 159 (1985); United States v. Kobrosky, 711 F.2d 449, 455-56 (1st Cir. 1983).

U.S. v. Moore, 931 F.2d 245 (4th Cir. 1991)

The Fourth Circuit has addressed the withdrawal of a plea of guilty as follows:

> A guilty plea is "a grave and solemn act," *Brady v. United States*, 397 U.S. 742, 748, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970), and "is an event of signal significance in a criminal proceeding," *Florida v. Nixon*, 543 U.S. 175, 187, 125 S.Ct. 551, 160 L.Ed.2d 565 (2004). It "is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment." *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). Guilty pleas "are indispensable in the operation of the modern criminal justice system," and the finality of such pleas is a matter of "particular importance." *United States v. Dominguez Benitez*, 542 U.S. 74, 82-83, 124 S.Ct. 2333, 159 L.Ed.2d 157 (2004).
>
> Consequently, a defendant awaiting sentencing does not have an absolute right to withdraw a guilty plea. *United States v. Bowman*, 348 F.3d 408, 413 (4th Cir. 2003). Rather, Federal Rule of Criminal Procedure 11(d)(2)(B) authorizes the withdrawal of a guilty plea before sentencing only if "the defendant can show a fair and just reason for requesting the withdrawal."

United States v. Thompson-Riviere, 561 F.3d 345, 347 (4th Cir. 2009).

In *Thompson-Riviere*, the Fourth Circuit further said

> "[T]he defendant bears the burden of demonstrating that withdrawal should be granted," *United States v. Dyess*, 478 F.3d 224, 237 (4th Cir.), *cert.* denied, ___ U.S. ___, 128 S.Ct. 707, 169 L.Ed.2d 556 (2007); in this regard, the defendant bears a "heavy burden of persuasion in showing that ... a fair and just reason exists," *United States v. Chavers*, 515 F.3d 722, 724 (7th Cir. 2008). "The decision to permit the defendant to withdraw a plea is discretionary, and our review is limited to the question of whether the district court abused its discretion." *United States v. Lambey*, 974 F.2d 1389, 1393 (4th Cir. 1992) (en banc). "A district court abuses its discretion when it acts arbitrarily or irrationally, fails to consider judicially recognized factors constraining its exercise of discretion, relies on erroneous factual or legal premises, or commits an error of law." *United States v. Delfino*, 510 F.3d 468, 470 (4th Cir. 2007), *cert. denied*, ___ U.S. ___, 129 S.Ct. 41, 172 L.Ed.2d 20

(2008).

Id at p. 348.

In *Thompson-Riviere*, the Court was faced with deciding if newly obtained DNA evidence, which indicated that the defendant may have actually been a United States citizen, and not an alien, was enough to allow the defendant to withdraw his guilty plea prior to sentencing.

The Court determined that the defendant's burden in that case was to

> . . . credibly assert his legal innocence: that is, to present evidence that (1) has the "quality or power of inspiring belief," *United States v. Welsh,* 774 F.2d 670, 672 (4th Cir. 1985) (citation and quotation marks omitted), and (2) tends to "defeat the elements in the government's *prima facie* case;" or to "make out a successful affirmative defense," *Sparks*, 67 F.3d at 1151; *see also United States v. Hamilton*, 510 F.3d 1209, 1214 (10th Cir. 2007) ("[T]he defendant must present a credible claim of legal innocence. In other words, the defendant must make a factual argument that supports a legally cognizable defense." (Citations omitted and emphasis in original)). Putting aside the issue of legitimacy for a moment, Thompson-Riviere clearly met this evidentiary burden. His evidence, if believed, tends to establish that he is the biological son of a United States citizen, David Hughes. If that fact is true, and if he is not required to prove that David Hughes legitimated him, then he is not an "alien." If he is not an alien, then he cannot be guilty of reentry under § 1326.

Id at p. 353.

Finally, after an extensive analysis, the Court concluded that

> Thompson-Riviere has made a credible assertion of legal innocence by presenting objective evidence that may prove he is a United States citizen under § 1403(a). Because the district court balanced the other plea withdrawal factors in Thompson-Riviere's favor and specifically denied the plea withdrawal based on its contrary conclusion regarding legal innocence, we hold that the

> district court abused its discretion. Therefore, we vacate the judgment and remand with instructions for the district court to permit Thompson-Riviere to withdraw his guilty plea.

Id at p. 355.

ARGUMENT

As required by *U.S. v. Moore* and *U.S. v. Thompson-Riviere*, Ms. Mooney has offered credible evidence that her plea was not knowing, or voluntary, because of the failure to realize that Title 42 U.S.C. § 14944 was not applicable to non-Hague Convention adoptions until 2014.

In her affidavit, Ms. Mooney has clearly and unambiguously shown that she is innocent of the charges in the Information.

Any delay in the filing of this motion was directly a result of ascertaining that 42 U.S.C. § 14944 did not apply to non-Hague adoptions. The exhibits to this motion further explain the complexity of this situation and confirm that during the times charged in the Information, this section did not apply to Ethiopian adoptions.

The undersigned counsel was not aware that the section under question did not apply until advised by Ms. Mooney that the information she had located, after January 14, 2015, appeared to show that the section would not have applied to her or IAG as charged in the Information.

Because the section did not apply to IAG or Ms. Mooney, it would be a legal impossibility for her to be guilty of violating the section.

This is a fair and just reason for allowing Ms. Mooney to withdraw her plea of guilty. It should not cause any prejudice to the government. To do justice should not be an inconvenience to the Court or a waste of judicial resources. Ms. Mooney

therefore respectfully requests that she be allowed to withdraw her plea of guilty.

Respectfully submitted,

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March 11, 2015
Kingstree, South Carolina

CERTIFICATE OF SERVICE

I hereby certify that on this date I caused one true copy of the written document to be served in the above-captioned case, via the court's e-noticing system, but if that means failed, then by regular mail, on all parties of record.

s/ G. Wells Dickson, Jr.
G. Wells Dickson, Jr.