

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA :
 :
 v. : CRIMINAL NO. 01-442-02
 :
 FRANCISCO HERRERA AMPARO :

MEMORANDUM ORDER

Defendant pled guilty on October 16, 2001 to conspiracy to distribute and possessing with intent to distribute heroin and crack cocaine within 1,000 feet of a school. Without a reduction for acceptance of responsibility and the downward departure motions filed by the government pursuant to the parties' plea agreement, defendant faced over fifteen years of imprisonment. A sentencing proceeding was scheduled for January 10, 2002. Just prior to that proceeding, the court received a motion signed by defendant asking for appointment of new counsel, to withdraw his guilty plea and to "dismiss" the presentence report.

The typewritten motion is in English, a language defendant does not speak or understand. Defendant is a citizen of the Dominican Republic and speaks only Spanish. It now appears that the motion was prepared by a jailhouse lawyer to whom defendant had complained about his attorney. The contents of the motion were not translated for defendant. The motion contains statements which contradict statements made by defendant

in his sworn plea colloquy, and which conflict with statements made by defendant at proceedings on January 10, 2002.

The motion attributes a statement to defendant that he was assured by his attorney that his sentence would be "approximately 18 months." Defendant himself, however, has now stated that he was actually told his sentence would be about 18 months by his wife whom, he states, was so advised at his arraignment by an unnamed associate of his counsel. Defendant's counsel is a sole practitioner and has no associates. Defendant now states that his attorney told him he would be sentenced at level 32 of the federal sentencing guidelines. Had the sentencing proceeded and had the court accepted the revised conclusion of the probation officer that defendant was not in fact a supervisor in the drug organization, his total offense level would have been 32. See U.S.S.G. § 2D1.1(b)(6). Any downward departure would have been from that level.

The motion suggests that defendant wishes to withdraw his guilty plea and proceed to trial. At proceedings on January 10, 2002, however, defendant reaffirmed his guilt and appeared to be interested only in obtaining the lowest sentence practicable. Defendant appeared to be unaware of the potentially far greater sentencing exposure he could face if the plea agreement is nullified and he is convicted in a trial.

Defendant ultimately made clear that the gravamen of his complaint is that his attorney had not adequately "explained things" to him. Defendant did affirm his desire for appointment of new counsel.

The court does not find fault with defense counsel. Defendant's attorney negotiated a favorable plea agreement in the face of strong evidence of guilt and secured downward departure motions under U.S.S.G. § 5K1.1 and 18 U.S.C. § 3553(e). He succeeded in obtaining the agreement of the probation officer and the prosecutor that an enhancement for a supervisory role should be removed. Counsel represents that he reviewed the PSR with defendant with the assistance of an experienced court interpreter and thought he had addressed all of defendant's questions.

Nevertheless, defendant now lacks confidence in current counsel from whom he maintains he has been unable to obtain an understanding of information related to sentencing which he regards as important. Within reason, the court wants to ensure that defendant has an opportunity to do so. The court will thus grant his request for appointment of new counsel.

The court, however, will deny the motion to withdraw the guilty plea. The motion was not dictated by or translated for defendant. It contains assertions incompatible with those now articulated by defendant himself. The motion will be denied without prejudice to defendant to file any submission deemed

appropriate after consultation with and advice from new counsel. Sentencing proceedings will be deferred pending appointment of new counsel and his apprising the court as to how defendant proposes to proceed.

ACCORDINGLY, this day of January, 2002, upon consideration of defendant's pro se Motion for New Defense Counsel and to Retract Guilty Plea (Doc. #44, all parts), after proceedings of January 10, 2002 pertinent thereto and consistent with the foregoing, **IT IS HEREBY ORDERED** that said Motion is **GRANTED** as to appointment of new counsel and is otherwise **DENIED** without prejudice.

BY THE COURT:

JAY C. WALDMAN, J.