

EMMET SULLIVAN INVITES MIKE FLYNN TO LIE UNDER OATH ONE MORE TIME

Yesterday, Mike Flynn asked for a delay in the deadline for his real motion to withdraw his guilty plea(s), pointing to recently obtained 302s of his so-called cooperation with the government to explain why the seven months since they first made it clear they were going to do this wasn't enough time to make a coherent argument.

Judge Emmet Sullivan granted Flynn precisely the deadlines he wanted.

But along with the delay, Sullivan ordered Flynn to brief the standards for withdrawing a plea in the DC Circuit and the need to have witnesses testify under oath to support that standard.

MINUTE ORDER as to MICHAEL T. FLYNN granting [157] Defendant's Second Motion to Continue Briefing Deadlines. The parties shall adhere to the following modified briefing schedule: (1) Mr. Flynn shall file his "Supplemental Motion to Withdraw for alternative additional reasons" by no later than 12:00 PM on January 29, 2020; (2) the government shall file its response to Mr. Flynn's motion and supplemental motion by no later than 12:00 PM on February 12, 2020; and (3) Mr. Flynn shall file his reply brief by no later than 12:00 PM on February 18, 2020. Mr. Flynn's supplemental motion and the government's response shall address the following: (1) the standard in this Circuit for a defendant seeking to withdraw a guilty plea before sentencing; and (2) the need for an evidentiary hearing where the parties

would present all testimony and evidence concerning the issue of whether Mr. Flynn can show that there is good cause to set aside his guilty pleas, see *United States v. Cray*, 47 F.3d 1203, 1206 (D.C. Cir. 1995), including testimony from Mr. Flynn and other witnesses under oath, subject to cross-examination, to show any “fair and just reason” for this Court to grant his motion to withdraw, Fed. R. Crim. P. 11(d). Signed by Judge Emmet G. Sullivan on 1/24/2020.

Flynn is fucked.

That’s true, because the precedent Sullivan pointed to is a case very similar to Flynn’s. A defendant pointed to a comment he had made to his probation officer, claiming he was not guilty of all the things he was pleading to, but the District Court found that the claim not only didn’t address what he had pled guilty to, but also did not offer enough to rebut his original guilty plea.

Cray points to a conversation with his probation officer, which was reflected in his presentence investigation report as follows: “[Cray] advised that while he is guilty of some of the offense behavior, he is not guilty of all he is charged with.” In response to questions from the court, Cray acknowledged that he had made this statement with reference to the original 11-count indictment, not to the two-count superseding information to which he ultimately pled guilty. Even if we take the statement as an assertion of his innocence of the charges to which he ultimately pled guilty, however, it comes up short. A defendant appealing the denial of his motion to withdraw a guilty plea, unlike a defendant who has not first pled guilty, must do more than make a general denial in order to put

the Government to its proof; he must affirmatively advance an objectively reasonable argument that he is innocent, see *Barker*, 514 F.2d at 226 n. 17, for he has waived his right simply to try his luck before a jury. Cray's claim falls far short of what we require before finding that a district court that committed no error under Rule 11 nevertheless abused its discretion in denying the defendant's motion to withdraw his guilty plea.

As it is, the claims Flynn is making about not being guilty of making false statements under FARA conflict with his sworn grand jury testimony, the testimony of Rob Kelner, and the notes of what he told Covington. So if he – and Kelner – were put under oath, the evidence would show that the reason he is offering is bullshit.

More importantly, Flynn has made no claim that he didn't lie to the FBI in his January 24, 2017 interview. In his filing the other day, he simply renewed claims he made in December 2018 that he already disavowed, under oath, before Judge Sullivan. So, like Lyman Cray, he's trying to withdraw his guilty plea by claiming he's innocent of just some of the things he pled guilty to.

Finally, Flynn will need to prove three things to withdraw his plea. One of those things is that he must show a substantial reason why the judge who originally accepted his plea committed an error.

Read together, *Barker* and Rule 32 set out three factors to consider in order to establish whether the district court abused its discretion when it refused to allow the defendant to withdraw his plea of guilty. First, a defendant generally must make out a legally cognizable defense to the charge against him. Second, and most important, the defendant must show either an error in

the taking of his plea or some “more substantial” reason he failed to press his case rather than plead guilty. Finally, if those two factors warrant, the court may then inquire whether the Government would have been substantially prejudiced by the delay in going to trial.

In this case, of course, Sullivan put Flynn under oath for his second guilty plea, and made him state that he didn’t think his complaints about his original FBI interview in any way negated his guilt.

In short, Sullivan is setting up this plea withdraw such that Flynn may be arguing he lied under oath twice: once in his grand jury appearance and once in his guilty plea in 2018.

It’s probably not a good way to get out of a charge of false statements, by claiming under oath that you lied under oath twice.