

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

UNITED STATES OF AMERICA

v.

RANDALL PARSONS,

Defendant.

CRIMINAL ACTION  
NO. 13-0104

**OPINION**

**Slomsky, J.**

**February 26, 2015**

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## **I. INTRODUCTION**

Before the Court is Defendant Randall Parsons's pro se Motion to Withdraw His Guilty Plea. (Doc. Nos. 141, 142.)<sup>1</sup> On January 7, 2014, while Defendant and the Government were in the midst of jury selection, Defendant chose to plead guilty to Count I of a Superseding Indictment charging him with attempted robbery of a CVS Pharmacy and aiding and abetting the attempted robbery in violation of 18 U.S.C. §§ 1951 and 2. (Doc. No. 117 at 3.) On September 12, 2014, the Court held a sentencing hearing. At the hearing, Defendant moved to withdraw his guilty plea and the sentencing did not occur.<sup>2</sup> Further briefing on Defendant's Motion followed. (See Doc. Nos. 141, 142, 171, 176). Defendant's Motion to Withdraw His Guilty Plea (Doc. Nos. 141, 142) is now ripe for a decision by this Court. For reasons that follow, the Motion will be denied.

## **II. BACKGROUND**

### **A. The Attempted Armed Robbery of the CVS Pharmacy**

On February 14, 2011, three masked men attempted to rob the CVS Pharmacy at 8525 Frankford Avenue in Philadelphia. (Doc. No. 86 at 3-4.) Two robbers entered the store, one armed with a handgun and the other with a BB gun. (*Id.* at 3.) The third robber, acting as a look-out and get-away driver, stood watch at the front door. (*Id.* at 3-4.) He was also armed with a handgun. (*Id.*) A CVS employee called 9-1-1, and officers from the Philadelphia Police Department sped to the scene. (*Id.* at 4.) The robber standing watch at the door fled when he

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<sup>1</sup> Defendant filed his Motion to Withdraw His Guilty Plea twice. Hence, the Motion appears on the Court's docket at Document Numbers 141 and 142.

<sup>2</sup> At the September 12, 2014 hearing, the Court granted Defendant's motion to represent himself. (Doc. No. 182 at 50:6-12.) His prior counsel, Nino Tinari, Esquire, was retained as stand-by counsel. (*Id.* at 35:11-21.)

heard or saw the responding police officers approaching. (Id.) When the police arrived, the other two robbers were still in the store. (Id.)

Police officers entered the store and proceeded to evacuate trapped employees and customers. (Id.) One robber fired his gun through the drive-through window at the rear of the store, and he and his confederate climbed through it and into an alley to get away. (Id.) There, officers confronted the two robbers and an exchange of gunfire ensued. (Id.) The robbers were pursued down the alley, but were able to climb over a fence and escape. (Id.) Thereafter, the Philadelphia Police Department and the Federal Bureau of Investigation investigated the attempted robbery, which led to the arrest of the three perpetrators, including Defendant Randall Parsons, who had acted as the look-out and get-away driver. (Id. at 4-5.)

**B. Defendant's Superseding Indictment, Change of Plea, and Oral Guilty Plea Agreement**

On April 11, 2013, a federal grand jury returned a three-count Superseding Indictment charging Defendant with taking part in the CVS robbery and with assaulting law enforcement officers while he was being arrested. (Doc. No. 15). Specifically, Defendant was charged in Count I with attempted robbery and aiding and abetting an attempted robbery in violation of 18 U.S.C. §§ 1951 and 2; in Count II with using and carrying and aiding and abetting the use and carrying of a firearm during a crime of violence in violation of 18 U.S.C. §§ 924(c) and 2; and in Count III with assault on a federal officer in violation of 18 U.S.C. § 111. (Id.)

On January 7, 2014, while the parties were in the midst of jury selection, Defendant's counsel, Nino Tinari, Esquire, informed the Court that Defendant wished to plead guilty to Count I of the Superseding Indictment pursuant to an oral plea agreement with the Government. (Doc. No. 117 at 3:7-21.) Count I of the Superseding Indictment reads as follows:

On or about February 14, 2011, in Philadelphia, in the Eastern District of Pennsylvania, defendant RANDALL PARSONS and Joseph Meehan and

Jonathan Andrews, each charged elsewhere, attempted to obstruct, delay, and affect commerce and the movement of articles and commodities in commerce, and attempted to do so, by robbery, in that, defendant RANDALL PARSONS, Joseph Meehan, and Jonathan Andrews attempted to unlawfully take and obtain, and aided and abetted the attempted unlawful taking and obtaining of, money and prescription drugs belonging to the CVS Pharmacy, in the presence of the employees of that business, and against their will, by means of actual and threatened force, violence, and fear of injury, immediate and future to their person and property, that is, by brandishing and discharging a handgun, demanding money, prescription drugs, and other items of value, and threatening the employees of CVS Pharmacy.

In violation of Title 18, United States Code, Sections 1951(a) and 2.

(Doc. No. 15 at 1-2.)

Tinari and Government counsel, Joseph Labar, Esquire, initially stated that Defendant would be entering an unconditional guilty plea to Count I of the Superseding Indictment. This discussion was as follows:

MR. TINARI: Your Honor, after a consultation with my client, and discussing this matter further, it's the position of Mr. Parsons, Your Honor, that he is going to offer the Court a change of plea.

A change of plea from not guilty to guilty, but only to Count I. And it will be an open plea before this Court, Your Honor, and he is prepared to answer all of the requisite questions regarding his understanding, and his knowledge, and his desire to plead guilty to that count.

THE COURT: All right. And Counts II and III will be dismissed at (indiscernable)?

MR. LABAR: Your Honor, that is correct.

THE COURT: All right. So the full extent of the plea agreement then is we have an unconditional open plea to Count I[,] and Count II and III will be dismissed at the time of sentencing?

MR. LABAR: Yes, sir.

THE COURT: And there's no other conditions of the plea agreement?

MR. LABAR: That's correct, sir.

(Doc. No. 117 at 3:7-4:4.)

After Defendant was placed under oath and the Court began the guilty plea colloquy, counsel for both parties clarified that Defendant's guilty plea was subject to one condition: The Government agreed to stipulate that there was no evidence that Defendant brandished or discharged a firearm during the robbery. (Id. at 4:5-10:9.)

THE COURT: All right. Mr. Labar, Mr. Tinari, are there any agreements or conditions other than those which you've stated on the record?

MR. LABAR: No, sir.

MR. TINARI: No, Your Honor. There was just some discussion that at the time of sentencing, there will be some information provided to the Court by the Government.

THE COURT: That the Government will submit information?

MR. LABAR: Your Honor, the discussion[] deals with the fact that the Government will in its statement of fact, and certainly at sentencing candidly set forth the facts of the case. And among those facts, which I believe are most pertinent to counsel's discussion at this point is that we agree that there is no evidence showing that the defendant brandished or discharged a firearm during the course of this crime.

THE COURT: All right.

MR. LABAR: In a nutshell that is the segment of the facts, and of course, there's going to be more facts than that, but that's the segment I think that counsel is really kind of focused on.

MR. TINARI: That is accurate, Your Honor.

THE COURT: All right. That's an important condition of the plea agreement in the context of this case, and with that modification, Mr. Parsons, has anyone promised you anything else to get you to plead guilty?

MR. PARSONS: No.

(Id. at 9:3-10:9.)

The Court then resumed the guilty plea colloquy.

**C. The Guilty Plea Colloquy**

During the hearing, in accordance with Rule 11(b) of the Federal Rules of Criminal Procedure, the Court questioned Defendant while he was under oath and determined that he understood, inter alia, the following:

- A. The government's right, in a prosecution for perjury or false statement, to use against the defendant any statement that the defendant gives under oath. (Doc. No. 117 at 4:24-5:6.)
- B. The right to plead not guilty, or having already so pleaded, to persist in that plea. (Id. at 22:24-23:3.)
- C. The right to a jury trial. (Id. at 23:4-15.)
- D. The right to be represented by counsel—and if necessary have the court appoint counsel—at trial and at every other stage of the proceeding. (Id. at 22:10-16.)
- E. The right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses. (Id. at 23:16-24:23.)
- F. The defendant's waiver of these trial rights if the court accepts a plea of guilty or nolo contendere. (Id. at 25:10-25.)
- G. The nature of each charge to which the defendant is pleading. (Id. at 26:1-36:1.)
- H. In determining a sentence, the court's obligation to calculate the applicable sentencing-guideline range and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. § 3553(a). (Id. at 17:15-21:23.)

The Court ensured that Defendant was fully satisfied with his counsel, and that he had enough time to discuss the plea agreement with him.

THE COURT: Are you fully satisfied with the representation by Mr. Tinari?

MR. PARSONS: Yes.

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THE COURT: All right. Have you had enough time to talk over with your lawyer the plea agreement that you entered into?

MR. PARSONS: Yes.

THE COURT: All right. If you need more time, I'll give you more time. Do you need more time?

MR. PARSONS: No.

(Id. at 7:14-16, 8:9-16.)

In determining Defendant's sentence, the Court stated that it would consider, among other factors, the federal sentencing guidelines. (Id. at 19:8-15.) The Court explained that it would calculate Defendant's federal sentencing guideline range after receiving a Presentence Report ("PSR") from the U.S. Probation Office. (Id.)

THE COURT: Now, I mention the federal sentencing guidelines. They are not mandatory. They're only advisory. They're just one factor among all these factors that I consider in determining what's an appropriate sentence.<sup>3</sup> And I can't calculate the advisory guideline sentence until after a presentence report has been prepared by the U.S. Probation office, they call that the [PSR].

MR. PARSONS: Right.

(Id. at 19:8-16.)

The Court stated that both Defendant and the Government would have the opportunity to challenge the facts and recommendations set forth in the PSR, but that Defendant would not be entitled to withdraw his guilty plea if he disagreed with either the PSR or the sentence ultimately imposed by the Court. (Id. at 20:12-21:2.)

THE COURT: And once [the PSR is prepared], you'll get a copy of it, the Government will get a copy, your lawyer will get a copy, and you and the Government have a right to challenge the facts and the application of the guidelines recommended by the probation officer. And only at sentencing, can I then decide after I hear what you have to say about what's in the presentence

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<sup>3</sup> The Court explained to Defendant all the factors a court must consider under 18 U.S.C. § 3553(a) before imposing a sentence. (Doc. No. 117 at 17:15-19:7.)

report, what the advisory guidelines are that apply to your case. Do you understand?

MR. PARSONS: Yes.

THE COURT: Now, after I make that determination, I have the authority in some circumstances to depart upward or downward from that range. Again, I'm going to examine all the statutory factors I've already gone over with you, and this could result in the imposition of a sentence that is either greater or lesser than the advisory guideline range. Do you understand?

MR. PARSONS: Yes.

THE COURT: All right. Now, do you understand that if I impose a more severe sentence than you expect, you will not be entitled to withdraw your guilty plea?

MR. PARSONS: Yes.

THE COURT: A probation officer will prepare a presentence report. Again, if you disagree with the report, you can contest the report with the probation officer, you can challenge the report or parts of the report with which you've disagreed before me, and the Government can also contest the report.

If you disagree with the report, your guilty plea will still be binding, and you cannot change your plea from guilty to not guilty, do you understand?

MR. PARSONS: Yes.

(Id. at 19:17-21:2.)

The Court also explained that Defendant would not be entitled to withdraw his guilty plea if the Court disagrees with any agreement on the facts made by the parties, or does not follow any recommendations, motions, or requests made by the parties.

THE COURT: All right. I want you to understand also that your attorney and the Government's attorney can agree on facts and make recommendations, motions and requests of me at sentencing, but I don't have to do what they ask me to do. Do you understand?

MR. PARSONS: Yes.

THE COURT: All right. Your guilty plea is still binding on you whether or not I agree with the facts and recommendations, or grant their motions and requests, do you understand?

MR. PARSONS: Yes.

(Id. at 21:3-14.)

The Court further stated that the sentence Defendant receives is ultimately up to the Court, after giving due consideration to the federal sentencing guidelines and the factors listed in 18 U.S.C. § 3553(a) that were mentioned earlier in the colloquy.

THE COURT: All right. Do you understand that your sentence is up to the Court, giving due consideration to the sentencing guidelines, all of the other relevant factors that I've mentioned, after reviewing the presentence report and hearing from your attorney, you and the Government.

MR. PARSONS: Yes.

THE COURT: Does --

MR. PARSONS: Yes, I understand.

(Id. at 21:15-21.)

Additionally, the Court explained each element of the offenses charged in Count I of the Superseding Indictment to which Defendant was pleading guilty, which were attempted robbery in violation of 18 U.S.C. § 1951 and aiding and abetting that attempt in violation of 18 U.S.C. § 2. (See Doc. No. 15 at 1-2; Doc. No. 117 at 26:15-32:24.) During the Court's explanation, Defendant reiterated that he did not brandish or discharge a firearm during the commission of the crime. (Doc. No. 117 at 28:10-13.)

THE COURT: All right. Now, let's look over Count I. I'm not going to read everything in it, but I want to go over it with you.

It starts out by saying that all relevant – at all times relevant the CVS Pharmacy located at 8525 Frankfurt Avenue in Philadelphia, Pennsylvania was a business engaged in and affecting interstate commerce, providing for the sale of the various items that are listed.

Which some – some of which were produced and transported from outside the commonwealth of Pennsylvania and sold to residents of the commonwealth of Pennsylvania and out of state residents. Do you see that?

MR. PARSONS: Yes.

THE COURT: And you've read Count I, have you not?

MR. PARSONS: Yes.

THE COURT: All right. And you've gone over it with your lawyer?

MR. PARSONS: Yes.

THE COURT: He explained to you what's in Count I and the elements of the offense?

MR. PARSONS: Yes.

THE COURT: All right. Paragraph 2 says, on or about February 14th in Philadelphia, in the Eastern District of Pennsylvania, you and two others attempted to obstruct, delay, and affect commerce and the movement of articles and commodities of commerce, and attempted to do so by robbery. In that, you and the others, attempted to unlawfully take and obtain and aided and abetted the attempted unlawful taking and obtaining of money and prescription drugs belonging to the CVS Pharmacy in the presence of the employees of that business and against their will by means of actual and threatened, forced violence and threat of injury immediate and future to their person and property, and that is by – it says here by brandishing and discharging a handgun[,] demanding money, prescription drugs, and other items of value and threatening the employees of CVS, in violation of Title 18, United States Code Section 1951(a) and 2. Do you see that?

MR. PARSONS: Yes.

THE COURT: All right. Now, the --

MR. PARSONS: There is one part of that that I do disagree with. That would be the part that says, "that is by brandishing and discharge of a handgun."

THE COURT: All right. Now --

MR. TINARI: The Judge is going to address that.

MR. PARSONS: Oh, okay, I'm sorry.

THE COURT: Now, the – one of the offenses that you're charged with here in Count I is a violation of 18 United States Code Section 2. And that's the aiding and abetting statute.

Let me explain to you what aiding and abetting is, okay. The – under federal law, if you aid and abet, counsel someone else to commit an offense under federal law, and you have the same object in your head as that person does to commit that crime, then under the law, you’re equally as guilty as the person who actually did it. Do you understand?

MR. PARSONS: Yes.

THE COURT: That’s what aiding and abetting is. In other words, if you willfully cause an act to be done, which had been directly performed by you, and it’s an offense against the United States, like the interstate robbery, which you’re pleading guilty to in Count I or the attempt to do that, then you’re equally guilty as the others who actually did it. Do you understand?

MR. PARSONS: Yes.

THE COURT: All right. So that’s what aiding and abetting is. Now, you’re pleading guilty to an attempted robbery, an attempt to unlawfully take the property of others that’s part of the robbery which interferes with interstate commerce, as charged in Section 1951.

So let me tell you what the elements are of Section 1951, and then I’ll tell you what the elements of attempt are, okay? In order to sustain its burden of proof for the underlying crime of interfering with interstate commerce by robbery, the Government has to prove beyond a reasonable doubt each of the following three elements.

Number one that you or one of the others took from the victim alleged in the indictment, the property described in Count I of the indictment that you did so knowingly and willfully by robbery, and that as a result of your actions, interstate commerce was obstructed, delayed, or affected. Do you understand?

MR. PARSONS: Yes.

THE COURT: All right. Now, the term robbery as used in Section 1951 is the unlawful taking or obtaining of personal property from the person or in the presence of another against his or her will, by means of actual or threatened force or violence or fear of injury, whether immediately or in the future, to his or her person or property, or property in his or her custody or possession at the time of the taking or obtaining. Do you understand?

MR. PARSONS: Yes.

THE COURT: All right. And as part of that, the Government has to prove beyond a reasonable doubt that the alleged victim’s property was unlawfully taken against his or her will by actual or threatened force, violence, or fear of injury, whether immediate or in the future, and the Government does not need to prove that force, violence, or fear are all used to threaten, and the Government satisfies

its burden of unlawful taking if the jury would unanimously agree or it's an element of the offense that the defendants employed any of the methods that I just said. Do you understand?

MR. PARSONS: Yes.

THE COURT: All right. And the third element that the Government has to prove beyond a reasonable doubt is that the conduct of you and the others affected interstate commerce, and the conduct affects interstate commerce if it in any way interferes with changes or alters the movement of transportation or flow of goods, merchandise, money, and other property in commerce between or among the states and the effect can be minimal. Do you understand?

MR. PARSONS: Yes.

THE COURT: All right. So those are the elements of the underlying crime. Now, you're pleading guilty to attempt to do that.

MR. PARSONS: Correct.

THE COURT: And I want to instruct you on what the elements of attempt are. In order to find you guilty of attempt to interfere with interstate commerce by robbery, the Government would be required to prove beyond a reasonable doubt each of the following two elements.

First, that you intended to commit the crime of interference with interstate commerce by robbery, as I have just defined it for you. Do you understand?

MR. PARSONS: Yes.

THE COURT: And second, that you performed an act constituting a substantial step towards the commission of the offense, which strongly corroborates or confirms that you intended to commit the crime. Do you understand?

MR. PARSONS: Yes.

(Id. at 26:15-32:24.)

After the Court finished its explanation, Defendant expressed a concern that he would be eligible for a seven offense level enhancement pursuant to United States Sentencing Guidelines ("U.S.S.G.") § 2B3.1(b)(2)(A) because one of his confederates discharged a firearm during the robbery. The Court stated that it interpreted the Government's stipulation to mean that the

Government agreed he should not get that enhancement. Government counsel then reiterated that it was only stipulating to the fact that Defendant did not brandish or discharge a firearm during the robbery, and it could not predict whether the probation officer would recommend that enhancement in the PSR. The Court clarified for Defendant that the probation officer could recommend the enhancement in the PSR, but the Court would make the decision on whether to apply that enhancement here. Defendant then indicated he had no further questions. (Id. at 32:25-36:1.) This exchange proceeded as follows:

THE COURT: All right. Now, that's the elements of the offense that you're pleading guilty to, the violation of Title 18 United States Code Section 1951 and 2. Do you have any question[s] about what you're charged [with] in Count I?

MR. PARSONS: On Count I, the only Count I, the aiding and abetting part --

THE COURT: Yes.

MR. PARSONS: -- I don't feel that I aided and abetted my co-defendants. I do agree to the attempt, but as far as aiding and abetting, I wouldn't say that I aided and abetted them.

THE COURT: Well, actually you're charged with aiding and abetting the attempt to commit the offense. So why don't you discuss that with Mr. Tinari.

(Pause)

MR. TINARI: Your Honor, if I may, there is this concern that in the pleading guilty to Count I which has the component that you've spoken about, it includes the brandishing and use of a firearm, where in essence, that is the opposite of what we're speaking about, is he being the one who's brandishing it. So that's the concern he has, when he speaks about the aiding and abetting.

Does the fact that he's pleading to what we've been speaking about in terms of what the Government and counsel has agreed to, that he was not the one brandishing, not the one that --

THE COURT: You have a plea agreement with the Government and in the plea agreement, the Government is agreeing you didn't brandish and discharge a handgun, and --

MR. TINARI: Right, that's it.

THE COURT: -- that --

MR. TINARI: That was his concern, Your Honor. I think he understands --

THE COURT: That's your plea agreement.

MR. PARSONS: Yeah, I was concerned about that, because under the guidelines, there is an enhancement for seven extra points --

THE COURT: No, I understand.

MR. PARSONS: Yeah, that's fine.

THE COURT: The Government's agreeing that you shouldn't get that under this plea agreement.

MR. PARSONS: Okay. Great, that's --

THE COURT: But I just have to make sure that you understand the elements of the offense that you're pleading guilty to.

MR. PARSONS: All right. I was taking it another way, I do understand now.

THE COURT: All right. You know, sometimes when a Judge explains the law of the elements, sometimes a defendant doesn't quite understand it at first blush. So I understand what your concern is.

MR. LABAR: And, Judge, what the Government is agreeing again, factually, is that the defendant did not brandish a gun, the defendant did not fire a gun.

THE COURT: All right.

MR. LABAR: And we -- I don't know what the presentence report is going to do, so obviously we can't predict the future.

THE COURT: Right. I mean, you know, in the presentence report, the probation officer could recommend those points when -- here's the element, you know, here's -- but it's up to me as to what I'm going to do. All right?

MR. PARSONS: Thank you, Your Honor, yes.

THE COURT: Okay. Now, the -- do you have any questions about the elements of the offense or what you're charged with in Count I?

MR. PARSONS: No.

(Id. at 32:25-36:1.)

Next, Joseph Labar, Esquire, counsel for the Government, recited the facts the Government contended it would prove beyond a reasonable doubt if the case went to trial. Government counsel explained that the facts would show that Defendant acted as a look-out and get-away driver during the CVS robbery, and was provided with a firearm. Before this description of the facts, the Court had instructed Defendant to listen carefully to what Government counsel recited as the facts, because at the end of the recitation the Court would ask him if he did what the Government says he did. When Government counsel finished, Defendant admitted to doing what the Government says he did. This part of the guilty plea colloquy was as follows:

THE COURT: All right. And at this point, I'm going to ask Mr. Labar to cite the facts the Government contends it would prove beyond a reasonable doubt if you were to go to trial. I want you to listen carefully to what he says because when he is finished, I'm going to ask if that is what happened, and if you did what he says you did. All right? You can remain seated, Mr. Labar.

MR. LABAR: Thank you, sir.

Your Honor, The Government will do a brief recitation of the facts, in addition to just kind of a verbal recitation, the Government would also like to incorporate the facts as they are set forth in -- just so we have something that's actually filed, we did file a trial memorandum.

THE COURT: All right. Just focus on February 14th, 2011.

MR. LABAR: Yes, sir. And the trial memorandum is at document 86, and we would ask to incorporate that.

In terms of the February 14th incident specifically, the evidence would prove first of all that on that date and all relevant dates, the CVS Pharmacy at 8525 Frankfurt Avenue in Philadelphia, Pennsylvania was engaged in interstate commerce, since they received goods and products from out of state, including narcotic drugs that they lawfully sold from Swedesboro, New Jersey.

The evidence would show that on February the 14th of 2011, the defendant joined in an agreement with two other people, them being Mr. Jonathan Andrews (ph)<sup>4</sup> and Mr. Joseph [Meehan]<sup>5</sup> to rob the CVS Pharmacy at 8525 Frankfurt Avenue, Philadelphia, Pennsylvania.

The evidence would show that the defendant's role was that of a look-out and get-away driver. The evidence would show that defendant -- pardon me, the testimony would be that the defendant was provided with a firearm. The testimony would further be that Mr. Joseph [Meehan] had a firearm. The testimony would further be that the defendant carried out his part of the agreement by backing a car up to the front of the CVS, where upon the two main robbers, Mr. Joseph [Meehan] and Mr. Jonathan Andrews disembarked, went into the CVS, and undertook a robbery.

At some point after Mr. [Meehan] and Mr. Andrews entered the CVS, Mr. Parsons left. While Mr. Andrews and Mr. [Meehan] were inside the CVS, they attempted to take narcotics, which they put into a garbage bag, ultimately abandoning that effort when Philadelphia police arrived. They attempted to take cash which Mr. Andrews got from cash registers, again I believe that none of that was actually successfully taken.

There came a time again when the Philadelphia police arrived, and by this point, Mr. Parsons had departed. The police attempted to apprehend Mr. [Meehan] and Mr. Andrews. There was an exchange of gunfire, Mr. [Meehan] and Mr. Andrews ultimately escaped; however, both were subsequently apprehended.

The evidence would show that the property taken from the pharmacy was taken from the possession of the pharmacist and the pharmacist assistant, and that this taking was carried out through the threatened use of force.

For purposes of the colloquy, those are the bare bones of this event.

THE COURT: All right. Just to -- with respect to the interstate element, what was --

MR. LABAR: Yes, sir.

THE COURT: -- that again?

MR. LABAR: Your Honor, the interstate commerce would be established through the testimony of the pharmacist who would authenticate documents showing that CVS receives its narcotic drugs from a company in Swedesboro called Cardinal, C-a-r-d-i-n-a-l, who [is] a distributor apparently of lawful narcotic drugs.

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<sup>4</sup> The abbreviated "ph" stands for "phonetic spelling."

<sup>5</sup> The transcriber mistakenly spelled Joseph Meehan's last name "Mean."

THE COURT: Mr. Parsons, did you hear what the Government said, that it would show at trial?

MR. PARSONS: Yes, I did, Your Honor.

THE COURT: All right. Is that what happened?

MR. PARSONS: Yes.

THE COURT: Do you admit to those facts?

MR. PARSONS: Yes.

THE COURT: Did you do what the Government says you did?

MR. PARSONS: Yes.

(Id. at 36:2-39:17.)

Then, the Court ensured that counsel for both Defendant and the Government were satisfied that there was a factual basis for Defendant's guilty plea.

THE COURT: All right. I want to ask counsel a series of questions, perhaps you can answer one-by-one [and] you can [remain] seated. Are counsel satisfied that there's a factual basis for the plea?

MR. TINARI: On behalf of the defense, yes, Your Honor.

MR. LABAR: Yes, sir.

THE COURT: Are counsel satisfied the defendant is competent to enter a plea?

MR. TINARI: Yes, Your Honor.

MR. LABAR: Yes, sir.

THE COURT: Are counsel satisfied that the defendant's willingness to plead guilty is voluntary?

MR. TINARI: Yes, sir.

MR. LABAR: Yes, sir.

THE COURT: [Are] [c]ounsel satisfied that the guilty plea is not based on any plea agreement or promise other than as contained in the written signed -- I'm sorry. Other than disclosed on this record?

MR. TINARI: Yes, Your Honor.

MR. LABAR: Yes, sir.

THE COURT: Are counsel satisfied that the guilty plea is being made with a full understanding by Mr. Parsons of the nature of the charges, the maximum possible penalty provided by law and his legal rights to contest the charges?

MR. TINARI: Yes, sir.

MR. LABAR: Yes, sir.

(Id. at 39:18-40:21.)

The Court then stated its finding that Defendant was fully alert, competent, and capable of entering a guilty plea, and again ensured that Defendant's decision to enter a guilty plea was made of his own free will.

THE COURT: I find that Mr. Parsons is fully alert, competent, and capable of entering an informed plea. I find that the plea is knowing and voluntary, and not [the] result[] of force or threats, or any promises, apart from the plea agreement disclosed here in open court. I find that the plea is supported by an independent basis in fact, containing each of the essential elements of the offense to which Mr. Parsons is pleading guilty. I find that he understands the charges, his legal rights, and the maximum possible penalty. And I find that he understands that he is giving up his right to a trial.

Mr. Parsons, do you now wish to plead guilty?

MR. PARSONS: Yes.

THE COURT: Again, is your decision to plead guilty being made of your own free will?

MR. PARSONS: Yes.

(Id. at 40:22-41:14.)

Next, the Clerk of the Court took Defendant's plea, and the Court accepted it. The Court then again explained to Defendant that he would have a chance to review the PSR and make objections to it before sentencing.

THE CLERK: Randall Parsons, you heretofore have plead not guilty to a bill of superseding indictment No. 13-104-1, charging you with Count I, attempted robbery which interferes with interstate commerce, aiding and abetting. As to Count I of this indictment, how do you plead now, guilty or not guilty?

MR. PARSONS: Guilty.

THE COURT: All right. Mr. Parsons, your plea of guilty is accepted. I find and adjudge him guilty of the offense.

Mr. Parsons, a presentence report will be prepared by the probation officer, and you're required to give information to assist the probation officer in his or her preparation of the presentence report. Is this the first time you've been in federal court?

MR. PARSONS: No, Your Honor.

THE COURT: All right. So you have familiarity with the presentence report.

MR. PARSONS: Yes, I do.

(Id. at 41:20-42:15.)

#### **D. Defendant Moves to Withdraw His Guilty Plea**

The Presentence Report was prepared on March 19, 2014 and revised on April 9, 2014. On April 25, 2014, Defendant submitted his sentencing memorandum detailing his objections to the Presentence Report. (Doc. No. 112.) On April 28, 2014, Defendant filed a supplement to his sentencing memorandum. (Doc. No. 113.) On July 15, 2014, the Government filed its sentencing memorandum. (Doc. No. 118.)

On July 18, 2014, a sentencing hearing commenced. During the hearing, the Court decided to continue sentencing to a later date because an issue arose concerning how one of

Defendant's prior offenses should factor into the calculation of his sentencing guidelines. (See Doc. No. 123 at 56:22-58:3.)

On August 9, 2014, Defendant sent a letter to Chambers informing the Court that he wanted to withdraw his guilty plea.<sup>6</sup> On September 12, 2014, the Court reconvened the sentencing proceeding. During this hearing, Defendant again stated his intention to move to withdraw his guilty plea. (Doc. No. 182 at 9:6-8.) Defendant also made known that he wished to proceed pro se, with Tinari acting as stand-by counsel. (Id. at 8:24-9:5, 35:13-21.) The Court granted his requests to proceed pro se and to retain Tinari as stand-by counsel. (Id. at 50:6-12.)

On September 19, 2014, Defendant filed his pro se Motion to Withdraw His Guilty Plea. (Doc. Nos. 141, 142.) On December 29, 2014, the Government filed its Response in Opposition. (Doc. No. 171.) On January 7, 2015, Defendant filed his pro se Reply in Further Support of his Motion (Doc. No. 176) along with an Affidavit in Support of the Motion (Doc. No. 177) and Exhibits (Doc. No. 178).

### **III. STANDARD OF REVIEW**

Under Federal Rule of Criminal Procedure 11(d)(2)(B), a defendant may withdraw a guilty plea after the court accepts the plea, but before it imposes a sentence, if the defendant can show a "fair and just reason" for requesting withdrawal. A defendant's burden to demonstrate a "fair and just" reason is substantial. United States v. Hyde, 520 U.S. 670, 676-77 (1997); United States v. Jones, 336 F.3d 245, 252 (3d Cir. 2003). A guilty plea "may not automatically be withdrawn at the defendant's whim." United States v. Brown, 250 F.3d 811, 815 (3d Cir. 2001). "A shift in defense tactics, a change of mind, or the fear of punishment are not adequate reasons

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<sup>6</sup> A codefendant who the Government anticipated would testify against Defendant was sentenced on May 15, 2014. See Judgment, Crim. No. 11-440-2 (E.D. Pa. May 15, 2014), Doc. No. 208. As will be discussed infra at Part IV.C, the Government would be prejudiced if Defendant was allowed to withdraw his guilty plea after his codefendant was sentenced.

to impose on the government the expense, difficulty, and risk of trying a defendant who has already acknowledged his guilt by pleading guilty.” Brown, 250 F.3d at 815 (citation and internal quotation marks omitted).

When deciding whether a defendant has asserted a “fair and just” reason for withdrawing a guilty plea, a district court must consider: (1) whether the defendant asserts his innocence; (2) the strength of the defendant’s reasons for withdrawing the plea; and (3) whether the government would be prejudiced by the withdrawal. Jones, 336 F.3d at 252.

#### **IV. ANALYSIS**

For reasons that follow, Defendant has not adequately asserted his innocence or shown strong reasons to withdraw his guilty plea. Moreover, the Government would be prejudiced if the Court permitted Defendant to withdraw his guilty plea. Therefore, Defendant has not carried his burden to assert a “fair and just” reason to withdraw his guilty plea, and his Motion to Withdraw the Plea will be denied.

##### **A. Defendant Has Not Adequately Asserted His Innocence**

When deciding whether to allow withdrawal of a guilty plea, the first factor a district court must consider is whether a defendant adequately asserts his innocence. Jones, 336 F.3d at 252. “Bald assertions of innocence” and contentions that are “wholly incredible” do not constitute a meaningful assertion of innocence. Blackledge v. Allison, 431 U.S. 63, 74 (1977); Jones, 336 F.3d at 252. “Assertions of innocence must be buttressed by facts in the record that support a claimed defense.” Brown, 250 F.3d at 818. A defendant must also “give sufficient reasons to explain why contradictory positions were taken before the district court and why permission should be given to withdraw the guilty plea and reclaim the right to trial.” Jones, 336 F.3d at 253 (citation and internal quotation marks omitted).

Here, Defendant has buttressed his assertion of innocence with facts in the record, but has not sufficiently explained why he took contradictory positions before the Court. As such, he has not adequately asserted his innocence.

**1. Defendant buttresses his assertion of innocence with facts on the record**

In his Motion, Defendant has done more than make a bald assertion of his innocence or a contention that is wholly incredible. He has pointed to facts in the record that he argues prove his innocence. First, Defendant claims that CVS surveillance video vitiates the Government's claims that he backed his car up to the front door of CVS and possessed a weapon during the robbery. (Doc. No. 141 at 1, 5; Doc. No. 176 at 5.) Second, he claims that cellular telephone location data shows that he was in a stationary location, at Fat Pete's Bar, during the time the Government says he was driving away rapidly from the CVS robbery. (Doc. No. 177 at 3; Doc. No. 178 at 1-4.)

In deciding the present Motion, the Court will not speculate about how a finder of fact would weigh this evidence in the context of the Government's case at trial. The Government represents that its case would rely on more than CVS surveillance video and cellular telephone location data. (Doc. No. 86 at 5-10.) The Court, however, at this stage of the proceeding does not evaluate the Government's evidence, but only considers whether Defendant has done more than make a bald assertion of innocence or argue a contention that is wholly incredible. For purposes of this Motion, Defendant has carried his burden by identifying facts in the record that he argues point to his innocence.

**2. Defendant's reason for taking contradictory positions is not sufficient**

A court must also consider the reasons a defendant gives for taking contradictory positions before the court. Here, Defendant claims that at the guilty plea hearing he did not

admit to doing what the Government says he did. (Doc. No. 177 at 2.) He asserts that he thought he was only agreeing to what the Government said it would show at trial. (Id.)

Defendant's claim is unavailing because the record shows that Defendant agreed, under oath, that he did what the Government says he did. At the guilty plea hearing, the Court asked Government counsel to "cite the facts the Government contends it would prove beyond a reasonable doubt if [the case] were to go to trial." (Doc. No. 117 at 36:2-5.) The Court instructed Defendant to "listen carefully to what [Government counsel] says because when he is finished, I'm going to ask if that is what happened, and if you did what he says you did. All right?" (Id. at 36:2-9.)

Government counsel then recited the facts of the case, describing Defendant's role during the CVS robbery as a look-out and get-away driver who had a firearm. (Id. at 36:19-38:19.) When Government counsel finished his recitation, the Court asked Defendant if he did what the Government says he did. Defendant said that he did.

THE COURT: Mr. Parsons, did you hear what the Government said, that it would show at trial?

MR. PARSONS: Yes, I did, Your Honor.

THE COURT: All right. Is that what happened?

MR. PARSONS: Yes.

THE COURT: Do you admit to those facts?

MR. PARSONS: Yes.

THE COURT: Did you do what the Government says you did?

MR. PARSONS: Yes.

(Id. at 39:6-17.)

In addition, the Court explained to Defendant the offenses that he was accused of committing in Count I of the Superseding Indictment, including each element that the Government would be required to prove beyond a reasonable doubt at trial to obtain a conviction. (Id. at 26:15-32:24.) The Court also ensured that Defendant was pleading guilty to these offenses of his own free will. (Id. at 40:22-41:14.)

Given the questioning of Defendant before he entered his guilty plea, his claim that he never admitted to doing what the Government says he did is unconvincing, and does not serve as a sufficient explanation for why he has taken contradictory positions before the Court. Since Defendant has failed to give a sufficient explanation, he has not carried his burden to adequately assert his innocence here. Therefore, this factor weighs against allowing Defendant to withdraw his guilty plea.

**B. Defendant Has Not Asserted Strong Reasons to Permit Him to Withdraw His Guilty Plea**

Defendant asserts several reasons he should be permitted to withdraw his guilty plea. Not one is availing. Each will be addressed seriatim.

**1. The Government did not breach the Plea Agreement**

Defendant asserts that the Government breached the Plea Agreement by recommending that he receive a five offense level enhancement pursuant to United States Sentencing Guidelines (“U.S.S.G.”) § 2B3.1(b)(2)(C) for possessing a firearm during the CVS robbery. (Doc. No. 141 at 304; Doc. No. 176 at 1-2.) The Government recommended that Defendant receive this enhancement in its Sentencing Memorandum because Defendant admitted in his guilty plea colloquy that he had a firearm during the robbery. (Doc. No. 118 at 4-5.) For the following reasons, the Government did not breach the Plea Agreement by recommending that Defendant receive this enhancement.

A court's analysis of whether the government breached a plea agreement proceeds in three steps. See United States v. Nolan-Cooper, 155 F.3d 221, 225 (3d Cir. 1998). First, a court will identify the terms of the plea agreement and the alleged improper conduct of the government. (Id.) Second, the court will determine whether the government violated its obligations under the plea agreement. (Id.) Third, the court will fashion an appropriate remedy for any violations that occurred. (Id.)

In this case, there is no written plea agreement between Defendant and the Government. Rather, the terms of the Plea Agreement were disclosed on the record at the guilty plea hearing.<sup>7</sup> At issue is the Government's stipulation that "there is no evidence showing that the defendant brandished or discharged a firearm during the course of this crime." (Doc. No. 117 at 9:18-21.)

Defendant contends that he understood this stipulation to mean that the Government would not recommend the five offense level enhancement pursuant to U.S.S.G. § 2B3.1(b)(2)(C), which is applicable to a defendant who "brandished or possessed" a firearm during a robbery.<sup>8</sup> He claims that the Government deceived him by not explaining that this enhancement could still apply if the facts show that he merely "possessed" a firearm, but did not "brandish" it. (Doc. No. 176 at 3.)

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<sup>7</sup> Defendant also argues that he should be permitted to withdraw his guilty plea because his Plea Agreement with the Government was not in writing. (Doc. No. 141 at 5.) Federal Rule of Criminal Procedure 11 does not require a guilty plea agreement to be in writing. As detailed above, the Court conducted a full colloquy at the guilty plea hearing which included all the terms of the Plea Agreement being placed on the record in accordance with the requirements of Rule 11.

<sup>8</sup> "Possess" and "brandish" have different meanings. To "possess" means to "take into one's possession." Merriam-Webster's Collegiate Dictionary 968 (11th ed. 2004). To "brandish" means "to shake or wave (as a weapon) menacingly." Id. at 150. Therefore, a person could possess a firearm but not brandish it during a robbery even if he keeps it concealed. Section 2B3.1(b)(2)(C) of the United States Sentencing Guidelines provides for a five offense level enhancement if a firearm was "brandished or possessed" during a robbery.

Defendant's argument is unavailing because the transcript of the guilty plea hearing shows that the Government was careful to limit its stipulation to the fact that Defendant did not "brandish or discharge" a firearm. The Government never agreed at the plea hearing that Defendant did not "possess" a firearm or that the guideline enhancement for "possession" would not apply. It was never even mentioned at the guilty plea hearing at which Defendant was represented by counsel.<sup>9</sup>

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<sup>9</sup> As noted above, during the guilty plea hearing, Defendant questioned whether he would be eligible for a seven offense level enhancement pursuant to U.S.S.G. § 2B3.1(b)(2)(A). (Doc. No. 117 at 33:5-34:15.) He did this on two occasions. First, as to his personal conduct, the parties agreed that he did not discharge or brandish a firearm. Second, Defendant was concerned that as an aider and abettor he would be eligible for this enhancement. (Id.)

The Court told Defendant that it interpreted the Government's stipulation to mean that the Government agreed that this enhancement should not apply to Defendant. (Id. at 34:20-21.) But the Court also noted that the probation officer could recommend this enhancement in the Presentence Report, and reiterated that it was ultimately up to the Court to decide whether to apply the enhancement. (Id. at 35:16-20) ("Right. I mean, you know, in the presentence report, the probation officer could recommend those points . . . but it's up to me as to what I'm going to do. All right?"). Earlier in the hearing, the Court had informed Defendant that his sentence would be determined by the Court, and that the Court was not bound by any agreements between the parties. That exchange was as follows:

THE COURT: All right. I want you to understand also that your attorney and the Government's attorney can agree on facts and make recommendations, motions and requests of me at sentencing, but I don't have to do what they ask me to do. Do you understand?

MR. PARSONS: Yes.

THE COURT: All right. Your guilty plea is still binding on you whether or not I agree with the facts and recommendations, or grant their motions and requests, do you understand?

MR. PARSONS: Yes.

THE COURT: All right. Do you understand that your sentence is up to the Court, giving due consideration to the sentencing guidelines, all of the other relevant factors that I've mentioned, after reviewing the presentence report and hearing from your attorney, you and the Government. (Continued on next page)

For these reasons, the Government did not violate its obligations under the Plea Agreement by recommending the five offense level enhancement. Moreover, despite the Government's recommendation, the Court will determine at sentencing whether the enhancement applies.

**2. Defendant's claim that he was not provided with discovery is unconvincing**

Defendant claims that he never received any discovery from either the Government or his attorney before he entered his guilty plea, and that he should be allowed to withdraw his plea on this basis. (Doc. No. 177 at 3.) He argues that not being provided with discovery prejudiced him because cellular telephone location data that the Government planned to use against him at trial actually proves his alibi that he was at a bar while the CVS robbery was occurring. (Id.) He explains that he was recently able to obtain the cellular telephone location data because "an inmate coming on my block who was housed with [one of his codefendants] mistakenly mixed up [their] discovery CDs." (Id.) For the following reasons, Defendant's claim that neither the Government nor his attorney provided him discovery is unconvincing. Moreover, even if he was not personally provided with discovery, he is not entitled to withdraw his guilty plea on this basis. Defendant's claim is therefore not a sufficient reason to permit him to withdraw his guilty plea.

A review of the pro se motions Defendant has filed in this case undercuts Defendant's claim that he was never provided with discovery. Between July and September 2013, Defendant filed four pro se Motions to suppress evidence, at a time when he was represented by counsel

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MR. PARSONS: Yes.

(Id. at 21:3-21.)

(Doc. Nos. 44, 45, 55, 65).<sup>10</sup> In one Motion, he asked the Court to suppress cellular telephone location data (Doc. No. 55). It is not credible that Defendant would have filed this Motion without knowledge of this data. Additionally, in another Motion (Doc. No. 65), filed on September 3, 2013, Defendant admits that he reviewed the Government's evidence against him. (Id. at 1.) He writes, "A review of the discovery and video evidence reveal[s] that the government has no direct evidence linking the defendant to the crime on 2/14/2011." (Id.) Therefore, Defendant's contention that he was never personally provided with discovery is not credible.

Moreover, a defendant represented by counsel does not have a right under either the Constitution or the Federal Rules of Criminal Procedure to be provided with discovery personally. See e.g., Carillo v. United States, 995 F. Supp. 587, 591 (D.C. Virgin. Is. 1998) ("[T]here is no constitutional duty to share discovery documents with petitioner. Petitioner cites no case law for this proposition, and this court finds none."); United States v. Stork, Crim. No. 3:10-132, 2014 WL 1766966, at \*6 (N.D. Ind. May 1, 2014) (explaining that the government fulfills its discovery disclosure obligations under Federal Rule of Criminal Procedure 16 when it produces discovery to defense counsel).<sup>11</sup> Defendant was represented by counsel until

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<sup>10</sup> The Court denied all of Defendant's pro se Motions to suppress evidence. (Doc. Nos. 47, 99, 103.)

<sup>11</sup> United States v. Stork also notes that under Indiana Rule of Professional Responsibility 4.2, it would be improper for the government to communicate directly with a represented defendant. 2014 WL 1766966, at \*6. Therefore, the government would not be permitted to directly provide a represented criminal defendant with discovery. Id. Indiana Rule of Professional Responsibility 4.2, which is identical to the Pennsylvania rule applicable in this case, reads as follows:

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another

September 12, 2014, which is over nine months after he entered his guilty plea on January 7, 2014.<sup>12</sup> As such, Defendant was not entitled to personally receive any discovery materials. Therefore, even if Defendant was not personally given the discovery, this is not a sufficient reason to permit him to withdraw his guilty plea.<sup>13</sup>

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lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

Ind. Rules of Prof'l Conduct R. 4.2.

<sup>12</sup> Defendant has not made any claim of ineffective assistance of counsel. To the contrary, Defendant stated at the guilty plea hearing that he was satisfied with his attorney. (Doc. No. 117 at 7:14-16.) The exchange was as follows:

THE COURT: Are you fully satisfied with the representation by Mr. Tinari?

THE DEFENDANT: Yes.

(Doc. No. 117 at 7:14-16.) Defendant also requested that his attorney remain as stand-by counsel when he moved to proceed pro se. (Doc. No. 182 at 35:11-21.)

THE COURT: . . . Do you feel competent that you can represent yourself pro se?

THE DEFENDANT: Yes. I wouldn't have any objections, Your Honor, though, if Mr. Tinari stayed on as standby.

THE COURT: Well, if you have irreconcilable differences with him --

THE DEFENDANT: That's only on some issues that he don't want to file that I would like to get on the record. That's the main problem that I was having.

(Id. at 35:11-21.)

<sup>13</sup> The Government writes in its response to Defendant's pro se Motion to Compel Discovery (Doc. No. 160) that "discovery was provided as required by [Federal Rule of Criminal Procedure] 16 and the applicable precedents." (Doc. No. 172 at 10-11.) This claim is bolstered by the fact that defense counsel filed only one Motion to Compel Discovery (Doc. No. 88) over the course of the case. Defense counsel filed this Motion in an attempt to obtain a security camera video from a bar where Defendant claimed he was located while the CVS robbery was occurring. (Id.) (Continued on next page)

Thus, Defendant's claim that he never was provided with discovery is unconvincing. Moreover, he would not be entitled to the relief requested by him even if he was not personally given the discovery by his attorney.

**3. Defendant is not entitled to withdraw his guilty plea because he disagrees with the Presentence Report**

Defendant argues that he is entitled to withdraw his guilty plea because the Presentence Report states that he pled guilty to "robbery" instead of "attempted robbery." (Doc. No. 141 at 4-5.) Count I of the Superseding Indictment, to which Defendant pled guilty, charges him with attempted robbery and aiding and abetting an attempted robbery. (Doc. No. 15 at 1-2.) Further, the Court informed Defendant at the guilty plea hearing that he was pleading guilty to attempted robbery and aiding and abetting an attempted robbery, and explained the elements of these crimes.<sup>14</sup> (Doc. No. 117 at 26:15-32:24.) Although the Presentence Report does state that

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At the January 6, 2014 hearing, Government's counsel explained to the Court that the FBI investigated this claim and learned from employees of the bar that the video did not show Defendant to be at the bar when the robbery occurred. These employees told the FBI that Defendant had contacted them after the robbery and asked them to retain the security camera video so Defendant could prove that he was at the bar when the robbery occurred, which was at approximately 8:30 p.m. on February 14, 2011. The employees told the FBI that they thereafter reviewed the video and it did not show Defendant to be there at that time. The employees said they told this to Defendant, and Defendant thereafter made no attempt to obtain the video. After Defendant made no attempt to retrieve the video, the bar did not keep it and therefore could not turn it over to the FBI. After hearing the Government's explanation, the Court denied Defendant's Motion to obtain the video as moot since the video did not exist. (Doc. No. 104.)

<sup>14</sup> Defendant also argues that an attempted robbery is insufficient to establish a Hobbs Act violation because it does not sufficiently affect interstate commerce. (Doc. No. 177 at 1.) This argument is meritless. "The Hobbs Act, by its own terms, encompasses the inchoate offenses of attempt and conspiracy to extort [or rob]. Convictions for these offenses have been sustained notwithstanding the absence of any evidence of an actual effect on interstate commerce." United States v. Jannotti, 673 F.2d 578, 592 (3d Cir. 1982). "[I]f defendants' conduct produces any interference with or effect upon interstate commerce, whether slight, subtle or even potential, it is sufficient to uphold prosecution under [the Hobbs Act]." United States v. Walker, 657 F.3d 160, 179 (3d Cir. 2011); see also United States v. Gonzalez, 470 F.

Defendant pled guilty to robbery, this misstatement is merely a clerical error by the probation officer that will be corrected at sentencing.

This error in describing the offense is not a valid reason for the Court to permit Defendant to withdraw his guilty plea. Defendant was aware that he would not be allowed to withdraw his guilty plea if he disagreed with the Presentence Report. This was explained to Defendant at the guilty plea hearing.

THE COURT: A probation officer will prepare a presentence report. Again, if you disagree with the report, you can contest the report with the probation officer, you can challenge the report or parts of the report with which you've disagreed before me, and the Government can also contest the report.

If you disagree with the report, your guilty plea will still be binding, and you cannot change your plea from guilty to not guilty, do you understand?

MR. PARSONS: Yes.

(Id. at 20:17-21:2.)

The record shows that Defendant knew what crimes he was pleading guilty to, and understood that he would not be entitled to withdraw his guilty plea based on a disagreement with the content of the Presentence Report. The alleged error in the Presentence Report can be easily corrected at sentencing and does not entitle him to withdraw his guilty plea.

**4. Defendant will not be permitted to withdraw his guilty plea because he believes there is insufficient evidence to sustain his conviction**

Defendant also argues that the Court should permit him to withdraw his guilty plea because there is insufficient evidence to sustain his conviction. (Doc. No. 141 at 5.) He claims that CVS surveillance video of the robbery proves that the Government's allegations are false.

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App'x 2, 4 (2d Cir. 2012) (in upholding conviction for attempted Hobbs Act robbery, explaining that the "jurisdictional requirement of the Hobbs Act may be satisfied by a showing of a very slight effect on interstate commerce. Even a potential or subtle effect will suffice." (citation and internal quotation marks omitted)). Here, Defendant's attempted robbery of a CVS Pharmacy that sold goods that travelled in interstate commerce is sufficient to satisfy the jurisdictional requirement of the Hobbs Act.

(Id.) Defendant admitted under oath, however, that he committed the crimes that he is charged with in the Superseding Indictment. Moreover, his counsel and the Court agreed that there was a factual basis for Defendant's plea. Defendant's reassessment of the strength of the case against him is insufficient to permit him to withdraw his guilty plea.

As the Supreme Court has stated:

The representations of the defendant, his lawyer, and the prosecutor at [a guilty plea] hearing, as well as any findings made by the judge accepting the plea, constitute a formidable barrier in any subsequent collateral proceeding. Solemn declarations in open court carry a strong presumption of verity.

Blackledge v. Allison, 431 U.S. 63, 74 (1977).

The fact that Defendant has changed his mind, and now believes that he would prevail at trial, is insufficient to overcome his sworn admission of guilt. At the guilty plea hearing, after the Government's counsel recited the facts of the case, Defendant admitted to those facts.

THE COURT: Mr. Parsons, did you hear what the Government said, that it would show at trial?

MR. PARSONS: Yes, I did, Your Honor.

THE COURT: All right. Is that what happened?

MR. PARSONS: Yes.

THE COURT: Do you admit to those facts?

MR. PARSONS: Yes.

THE COURT: Did you do what the Government says you did?

MR. PARSONS: Yes.

(Doc. No. 117 at 39:6-17.)

Defense counsel and Government counsel also stated that they were satisfied that there was a factual basis for the guilty plea.

THE COURT: All right. I want to ask counsel a series of questions, perhaps you can answer one-by-one [and] you can [remain] seated. Are counsel satisfied that there's a factual basis for the plea?

MR. TINARI: On behalf of the defense, yes, Your Honor.

MR. LABAR: Yes, sir.

(Id. at 39:18-24.)

Additionally, the Court found that there was a factual basis for the plea, and ensured that Defendant was entering his guilty plea of his own free will.

THE COURT: I find that Mr. Parsons is fully alert, competent, and capable of entering an informed plea. I find that the plea is knowing and voluntary, and not [the] result[] of force or threats, or any promises, apart from the plea agreement disclosed here in open court. I find that the plea is supported by an independent basis in fact, containing each of the essential elements of the offense to which Mr. Parsons is pleading guilty. I find that he understands the charges, his legal rights, and the maximum possible penalty. And I find that he understands that he is giving up his right to a trial.

Mr. Parsons, do you now wish to plead guilty?

MR. PARSONS: Yes.

THE COURT: Again, is your decision to plead guilty being made of your own free will?

MR. PARSONS: Yes.

(Doc. No. 117 at 40:22-41:14.)

Defendant's reassessment of the evidence against him is not sufficient to overcome his sworn admissions of guilt, the representations of counsel, and the findings of the Court. Accordingly, Defendant's reasons for withdrawing his guilty plea are not strong enough to warrant this kind of relief. In sum, they are not persuasive at all.

**C. The Government Would Be Prejudiced if the Court Permitted Defendant to Withdraw His Guilty Plea<sup>15</sup>**

The Government would be prejudiced if Defendant was permitted to withdraw his guilty plea and proceed to trial. This factor, therefore, weighs in favor of denying Defendant's Motion to withdraw his plea.

Defendant entered his guilty plea after jury selection had commenced, when the Government was ready to proceed to trial with the testimony of the robbery victims, law enforcement officers who responded to the robbery and participated in the investigation that followed, and a cooperating codefendant. (Doc. No. 171 at 13-14.) Since then, the codefendant has been sentenced, rendering his cooperation as a witness in a future trial uncertain. See Judgment, Crim. No. 11-440-2 (E.D. Pa. May 15, 2014), Doc. No. 208; Gov't of Virgin Islands v. Berry, 631 F.2d 214, 221 (3d Cir. 1980) (holding that the government is prejudiced if a cooperating codefendant has been sentenced). In addition, the FBI Special Agent originally assigned to the case has been transferred to a different part of the country. (Id. at 14.) Moreover, the traumatized robbery victims, who were ready to testify in January 2014 and have since moved on with their lives, would have to be re-called to testify in any future trial.

For these reasons, the Government would be prejudiced if the Court permitted Defendant to withdraw his guilty plea and proceed to trial. Therefore, this factor weighs against permitting Defendant to withdraw his plea.

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<sup>15</sup> Pursuant to Third Circuit precedent, "the government is not required to show prejudice when a defendant has shown no sufficient grounds for permitting withdrawal of a plea." United States v. Martinez, 785 F.2d 111, 115 (3d Cir. 1986). As discussed above, Defendant has not put forth sufficient grounds for permitting withdrawal of his plea. Therefore, the Court may deny Defendant's Motion without addressing whether the Government would be prejudiced by the withdrawal of Defendant's plea. Even so, the Court finds it appropriate to briefly discuss why the Government would be prejudiced if the Court permitted Defendant to withdraw his plea.

## **V. CONCLUSION**

For the reasons set forth above, Defendant has not demonstrated a “fair and just” reason to withdraw his guilty plea. Defendant has neither adequately asserted his innocence nor put forth strong reasons for wishing to withdraw his guilty plea. Moreover, the Government would be prejudiced if the Court permitted Defendant to withdraw his plea. Defendant’s Motion to Withdraw His Guilty Plea will therefore be denied. An appropriate Order follows.