

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

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	
v.	:	
	:	
JOHN BROWN	:	NO. 17-113-2

M E M O R A N D U M

GENE E.K. PRATTER, J.

FEBRUARY 8, 2019

INTRODUCTION

As between the “advice” of fellow detainees in the Federal Detention Center¹ on the one hand and a federal judge’s detailed, on-the-record colloquy to ascertain a criminal defendant’s knowing and voluntary decision to plead guilty on the other, the efficacy, understanding and consequences of a guilty plea properly depend upon the latter.

John Brown contrives to withdraw his guilty plea because, he now says, his prior lawyer led him to believe he had an undisclosed and undocumented “deal” that guaranteed not only that he would not be at risk for a life sentence as permitted by statute and recommended by the sentencing guidelines, but that his sentence would be fixed between 20 and 25 years. Allowing Mr. Brown to withdraw his guilty plea would render the Court’s step-by-step guilty plea colloquy superfluous, if not altogether meaningless. The explanation that Mr. Brown offers is not credible. No matter how much he tries to justify his attempt to renege on his plea agreement, he will not be permitted to do so by this Court.

¹ Mr. Brown, as will be discussed below, claims that he did not understand the significance of his guilty plea until fellow pre-trial or pre-sentencing detainees on a particular block at the Federal Detention Center explained it to him well after his plea had been entered in open court.

BACKGROUND²

John Brown and Lawrence Jamieson were charged in a 42-count indictment with a host of child pornography-related claims, including manufacturing and distributing child pornography, enticing a minor to engage in sexually explicit conduct, transferring obscene matter to a minor, and possession of child pornography. The charges arose from Mr. Brown's participation in the filming of his own sexual abuse and exploitation of Mr. Jamieson's 15-year-old step-daughter during 2015 and 2016, as well as the distribution over the Internet of child pornography depicting other victims.

Mr. Brown was arrested in August 2016. He was indicted on March 2, 2017. The statutes that authorize the charges specifically against Mr. Brown did then and do now carry a maximum sentence of life in prison. Mr. Brown does not claim he is not guilty of the charges to which he entered a guilty plea on September 6, 2017. Rather, Mr. Brown argues that the Court should exercise its discretion to permit him to withdraw his guilty plea because, he says, his prior lawyer was not experienced with federal sentencing matters and caused him to believe there was a deal extant by which he would be sentenced to prison for between 20 and 25 years, most likely 24 years. Then, he continues to argue, after he entered his plea, Mr. Brown claims he learned or came to realize that no such deal was in place, that such a deal supposedly would make no in-roads into his potential sentence, and that he was at risk for such sentencing enhancements as would lead to the sentencing guidelines recommending a life sentence. Accordingly, he now claims that he never should have accepted the terms of the actual written plea agreement because, essentially,

² The factual background recounted in this Memorandum is drawn from the September 6, 2017 guilty plea hearing (GP Hrg. N.T. at___), Defendant's Motion to Withdraw Guilty Plea (Doc. No. 90) (Def. Mot. ¶___), Defendant's Supplemental Motion To Withdraw Guilty Plea (Doc. No. 94) (Def. Supp. Mot. ¶___), Government's Response To Defendant's Motion To Withdraw Guilty Plea (Doc. No. 99), status hearing of September 14, 2018 (Status Hrg. N.T.__), and the January 24, 2019 Hearing on the Motion (Mot. Hrg. N.T.__). In addition, certain exhibits were offered, discussed and admitted on the record during the January 24, 2019 hearing, and to the extent the Court considers such exhibits, they are referenced with appropriate detail. Certain other undisputed background information is readily available from the docket in this case.

there was really nothing in it for him. So, Mr. Brown argues that he “got nothing” by signing the Guilty Plea Agreement (Doc. No. 99, Ex. A) and actually lost the opportunity to dispute the host of enhancements that the Pre-Sentence Investigation Report proposes (and that the Government contends) should apply to Mr. Brown. Hence, the pending dispute.

After his arrest, Mr. Brown’s family retained Diane Tosta, a lawyer who was Mr. Brown’s mother’s neighbor. Ms. Tosta had been a lawyer for some years and had handled state law criminal matters but not “federal sentencing for these particular types of [child pornography] crimes.” Status Hrg. N.T. 4. Ms. Tosta has told the Court that “I have done everything that I can to make myself knowledgeable.” Id. Ms. Tosta had a number of interactions with Assistant U.S. Attorney Michelle Rotella concerning the case. In an August 8, 2017 early morning email exchange between the two lawyers about a potential proffer and the sentencing guidelines possibly applicable to Mr. Brown’s case, Ms. Rotella expressed confidence that the applicable guidelines put Mr. Brown squarely in line for a life sentence. It appears that Ms. Tosta was “horrified” by Ms. Rotella’s confidence. Def. Supp. Mot. Ex. C, Tosta 8/8/17 e-mail of 7:25 a.m. The lawyers then had a testy electronic volley which does not confirm any sentencing-related agreement or even a proposal.

The next day, August 9, 2017, Mr. Brown and Ms. Tosta met for a “proffer” session with Ms. Rotella, two township police detectives and a Staff Operations Specialist, as well as Special Agent Jennifer Morrow. Special Agent Morrow drafted a six-page Form 302 account of the meeting. Mot. Hrg. Gov’t Ex. 1. The notes from the proffer session contain a description of AUSA Rotella’s review with Mr. Brown, in his lawyer’s presence, of the sentencing guidelines specific to the charges against Mr. Brown in the indictment. Ms. Rotella even presented a chart, Mot. Hrg. Gov’t Ex. 2, that laid out the charges against Mr. Brown, the guideline grouping of those charges, the sentencing guidelines’ enhancements triggered by the specific charges and the

corresponding points attendant to the charges and guidelines' enhancements. Under all of the combinations and calculations presented to Mr. Brown verbally and on the chart and, as recounted in the Form 302, in Ms. Rotella's experience-based estimation, the sentencing guideline range for the charges against Mr. Brown were well into the lifetime sentence range. Nowhere on the chart or in the Form 302 is there any reference to, or calculation of, a combination of guideline provisions, or considerations that result in, or otherwise suggest, or could be reasonably understood - - or misunderstood - - as a sentence (proposed or otherwise) for Mr. Brown of between 20 and 25 years. Likewise, there is no mention of a 24-year deal, proposal or possibility.

Roughly a week after the proffer session (during which session Mr. Brown had not provided any meaningful assistance to the Government as to other possible matters of interest to the Government), Mr. Brown executed a Guilty Plea Agreement and an Acknowledgement of Rights. Doc. No. 99, Ex. A. Then, on September 6, 2017, Mr. Brown, with his attorney, Ms. Tosta, appeared in court and entered a guilty plea to Counts 23, 30, 37-39, and 42 of the indictment. Mr. Brown acknowledged that these charges arose from his sexual abuse and exploitation of his co-defendant's minor step-daughter, his photographing and videotaping that sexual abuse, his distribution of those images over the Internet to others and his collection of images and videos of other children being sexually abused and assaulted that he had obtained from the Internet.

Of course, Mr. Brown swore, under oath, to speak truthfully to the Court during the guilty plea hearing. GP Hrg. N.T. 3. He expressly acknowledged the significance of his oath and the risks associated with responding untruthfully to the Court. GP Hrg. N.T. 6-7. Acknowledging some natural nervousness, Mr. Brown nonetheless confirmed that he had no impairments to thinking clearly during the hearing. GP Hrg. N.T. 10-12. He stated without equivocation or ambiguity that he was satisfied with Ms. Tosta and with her advice. GP Hrg. N.T. 12-13.

At the Court's directive, the Government's counsel summarized the material terms of the plea agreement, including specifically the stipulations and the Government's reservation of the right urge the applicability of pertinent sentencing guidelines provisions. In fact, Ms. Rotella recounted many guideline levels, enhancements and the like. GP Hrg. N.T. 16–18. At the end of this lengthy recitation, the Court addressed Mr. Brown directly: “[A]re these the terms of your plea agreement as you understand it?” He answered, “Yes ma’am,” as did his lawyer, Ms. Tosta, GP Hrg. N.T. 20–21, who was and is, as a lawyer, an officer of the court and hence obliged, ethically and legally, to speak truthfully and with candor to the Court. See, e.g., Pennsylvania Rule of Professional Conduct 3.3. She also confirmed, in Mr. Brown's presence, that there were no agreements or conditions other than those set forth in the plea agreement. GP Hrg. N.T. 20–21.

The Court next went into greater detail to confirm that Mr. Brown read, signed and believed he understood the agreement and his Acknowledgment of Rights. GP Hrg. N.T. 21–22. Then, after a detailed recitation of the trial-related rights he had but which would be relinquished if he pleaded guilty, the Court asked Mr. Brown directly:

“Did anybody make any threats or promises or assurances to you of any kind other than what's set forth in the agreement to get you to sign it?”

Mr. Brown's response was prompt and unambiguous:

“No ma’am.”

GP Hrg. N.T. 23. And he affirmed his intention to plead guilty of his own free will.

Thereafter, Mr. Brown admitted having committed the criminal acts recounted by the prosecutor. He accepted that the Government planned to present evidence proving each of the applicable laws' essential elements. Mr. Brown acknowledged the severe curtailment of his appellate rights if he accepted the guilty plea agreement. GP Hrg. N.T. 29–30. He declined the invitation to discuss again the foregoing matters either with his lawyer or the Court, so the

colloquy continued, and the Court began a direct discussion about sentencing.

Specifically, the Court began by telling Mr. Brown that he would surely be sentenced to prison. Moreover, the Court also told him that even if his sentence was longer or tougher than he expected,

“...you will still be stuck with your plea[.]”

His reply: “Yes ma’am, I understand.”

GP Hrg. N.T. 42. The Court went on:

“... Mr. Brown, do you understand that nobody . . . can guarantee you what sentence I will determine you have earned?”

GP Hrg. N.T. 46. Again Mr. Brown answered that he understood, including his understanding that he could risk being sentenced up to the maximum permitted by law. GP Hrg. N.T. 47. The Court then directed Ms. Rotella to describe aloud the maximum and minimum penalties for the crimes to which Mr. Brown was pleading. She did so, crime-by-crime and in the aggregate:

“So all told, he’s looking at life imprisonment with a 15-year minimum mandatory term of incarceration, a minimum of five years of supervised release up to a lifetime supervised release, a \$1.5 million fine, \$600 in special assessments. . . .³
... [T]he one other thing I wanted to point it out . . . in terms of what the base offense level and all of the enhancements to his sentence is, puts him at a **Guideline range that he’s agreeing to, even with this plea, at starting with life imprisonment.**”

GP Hrg. N.T. 48–49 (emphasis supplied).

Both defense counsel, Ms. Tosta, and the defendant himself told the Court in straightforward terms that the prosecutor’s recitation of the “tough” applicable punishments was accurate and understood. GP Hrg. N.T. 50. Then, to again emphasize that sentencing responsibility resided with the Court and not with the lawyers, singly or together, the Court spelled out for Mr. Brown that the Court alone would decide how the sentencing guidelines relate to Mr.

³ The recitation also included a discussion (not relevant here) about restitution and the possible financial implications of Mr. Brown possibly (or likely) being found to be indigent.

Brown and his conduct, including sentencing guidelines' enhancements that, by entering into the guilty plea agreement, Mr. Brown had accepted. GP Hrg. N.T. 51–52. Again, Mr. Brown was reminded by the Court of the possible lifetime punishment:

“And do you understand that the Court can impose a sentence that is more severe or less severe than the sentence that the Guidelines recommend - - although it's hard to figure out a more severe sentence than the life-in-jail guidelines that appear to be recommended here in your case.”

GP Hrg. N.T. 52.

Mr. Brown's answer: “I understand.”

And, again,

The Court: “. . . and if you were ever released from prison, there will be conditions of supervision. . . . So do you understand that on the basis of a guilty plea, you could earn yourself a sentence up to the maximum permitted by law, which is life in prison . . . ?”

Mr. Brown: “. . . Yes ma'am, I understand.”

GP Hrg. N.T. 54.

To be sure, yet again:

The Court: “Has anybody threatened you, coerced you, or forced you in any way to plead guilty?”

Mr. Brown: “No ma'am.”

The Court: “And do you think you've got any kind of a deal other than what's been described for me here today?”

Mr. Brown: “No, ma'am.”

GP Hrg. N.T. 56

Both attorneys echoed Mr. Brown's certainty:

The Court: “Let me ask you some questions of the lawyers here. . . . Are you satisfied that [Mr. Brown's] willingness to plead guilty is entirely voluntary?”

[Both counsel]: “Yes, Your Honor.”

The Court: “Are you satisfied that a guilty plea is not based on any plea agreement except as disclosed on this record?”

Ms. Rotella: “Yes, Your Honor.”

Ms. Tosta: “That’s correct, Your Honor.”

The Court: “And are you satisfied that any guilty plea is being made with a full understanding by [Mr. Brown] of the nature of the charges, the maximum possible penalty, the mandatory minimum penalties, and all other aspects of the potential sentence as proposed by law . . . ?”

[Both Counsel]: “Yes, Your Honor.”

GP Hrg. N.T. 57–58.

Mr. Brown did enter his guilty plea, and the Court accepted it. At the very conclusion of the lengthy hearing, Mr. Brown had no questions and the Court set a date for sentencing.

Some months later, as the first scheduled sentencing date approached, Mr. Brown wrote to the Court seeking to have a court-appointed lawyer replace Ms. Tosta. The Court scheduled a status hearing on September 14, 2018, attended by Government counsel, by Ms. Tosta and by Mr. Brown. Apparently, as then re-counted by Ms. Tosta, prior to the hearing she had received word from Mr. Brown that he was or was intending to discharge her. Ms. Tosta did acknowledge that her criminal law experience was limited to state cases, and that she was not familiar with sentencing for federal child pornography charges. Status Hrg. N.T. 4. Ms. Tosta stated that Mr. Brown, who was “looking at a very lengthy sentence,” wanted counsel who was more experienced with federal sentencing matters. Ms. Tosta made an oral motion to withdraw as Mr. Brown’s counsel, and the Court appointed the Federal Community Defender Office for the Eastern District of Pennsylvania to represent Mr. Brown. In doing so, however, the Court admonished Mr. Brown, reminding him again that “sentencing is the Court’s job,” and it was not “dependent upon who you are represented by.” Mr. Brown said he understood the admonition. Status Hrg. N.T. 12–13.

At no time during the September 14th status hearing (before which Mr. Brown and Ms. Tosta had already had access to the Pre-Sentence Report containing the proposed guidelines levels and calculations) did anyone (Mr. Brown, Ms. Tosta or Ms. Rotella) mention, describe, refer to or even intimate to the Court, or to each other for that matter, the existence of any “deal” other than as previously disclosed to the Court, or any “promises” about sentencing, or that Mr. Brown had ever told Ms. Tosta that his decision to plead guilty was prompted by a belief about some sentencing deal or bargain, or any prior argument between counsel about sentencing, or any reference to Mr. Brown’s alleged misunderstanding about what was or was not included in his plea agreement.

Thereafter, now represented by new counsel, on November 1, 2018, Mr. Brown filed a motion to withdraw his guilty plea because, he claims, Ms. Tosta provided ineffective assistance to him when counseling him about the plea agreement or a possible guilty plea, and she had convinced him to accept the plea agreement. Mr. Brown claims in his Motion and Supplemental Motion (filed on December 14, 2018) that Ms. Tosta’s lack of knowledge or experience with federal sentencing bespeaks her ineffectiveness and erodes his guilty plea to the point of making it involuntary and not intelligently rendered.

For unexplained and no obvious reasons, after Ms. Tosta had been discharged by Mr. Brown and her appearance in this case withdrawn, Ms. Tosta apparently went to the F.D.C. to meet Mr. Brown on November 20, 2018. Def. Supp. Mot. ¶ 13. Although Ms. Tosta had not responded to earlier requests from new defense counsel for materials from the case, she seems to have sent, after this visit, an email to new counsel with information supposedly pertinent to the background of the plea.⁴ This email seems to have prompted the Defendant’s Supplemental Motion. Def. Supp. Mot. ¶¶ 14–15.

⁴ Mr. Brown’s new counsel presented an unsigned, unauthenticated email letter ostensibly from Ms. Tosta to new counsel dated November 29, 2018, transmitting copies of a brief string of emails dated August 8, 2017 between Ms. Tosta and Ms. Rotella. None of these emails make any direct or indirect mention of any sentencing agreement or sentencing-related deal.

Given the nature of Mr. Brown's claim about his former lawyer and in view of the Government's opposition, the Court held a hearing on January 24, 2019 during which Ms. Rotella and Mr. Brown testified. Ms. Tosta did not appear as either a live or video witness. No affidavit from her was offered. Ms. Rotella's testimony was consistent with the description of the events already recounted above. She reiterated that during the August 9, 2017 proffer session just a week before Mr. Brown signed the guilty plea agreement she "went over every specific enhancement and Guideline" with Mr. Brown. Mot. Hrg. N.T. 19. She concluded her testimony with her recollection of the proffer session that Mr. Brown "understood that he was looking at life whichever way we resolved this case." Mot. Hrg. N.T. 25.

Mr. Brown then testified. He said that when he first met Ms. Tosta she informed him she had little federal criminal case experience. He and she discussed the sentencing guidelines but not in detail. According to Mr. Brown, Ms. Tosta told him she was "discussing with Ms. Rotella a plea deal for between 20 to 25 years." Mot. Hrg. N.T. 34. He admitted that she did not tell him how she arrived at that number, but he claimed Ms. Tosta spoke to him of the "20 to 25 years" deal "[m]aybe 2 or 3 times." Mot. Hrg. N.T. 34-35; 36. Thus, Mr. Brown now claims he thought such a deal required him to plead guilty. See Mot. Hrg. N.T. 35. ("She never told me that there was never a deal. . . ."). See also Mot. Hrg. N.T. 40.

Perhaps most curiously, Mr. Brown claims that, notwithstanding his admission that at least AUSA Rotella reviewed the sentencing guidelines with him on August 9, 2017, not to mention the Court's repeated reference to the sentencing guidelines during the plea hearing, he only came to understand and appreciate the impact or operation of the guidelines "from what [he has] been told from other [F.D.C.] inmates really," Mot. Hrg. N.T. 38-39, particularly the inmates on the F.D.C. unit block where alleged and/or convicted sex offenders are housed. Mot. Hrg. N.T. 41-43. He claims it was only these fellow F.D.C. inmates who educated him about sentencing guidelines and

enhancements (not his lawyer, not AUSA Rotella, and not the Court). He persisted unabashedly that his epiphany about the guidelines occurred sometime *after* the proffer session with Ms. Rotella when she described the possible operations of the guidelines in his case with the visual aid of the chart laying out guidelines, enhancements, levels, and resulting sentencing ranges and *after* the Court, during the lengthy plea colloquy, cautioned Mr. Brown repeatedly that a guilty plea would put him at risk for lifelong incarceration.

Still, Mr. Brown did - - and does - - claim that he was led to plead guilty by an ineffective lawyer. His excuse: during the plea hearing when the Court went through the risks of a guilty plea with him, his mindset was “just get through the process” because he believed he “was getting the deal that Diane Tosta had told [him he] was going to get, between 20 and 25 years.” Mot. Hrg. N.T. 48. Under cross-examination Mr. Brown admitted that Ms. Rotella had informed him that, with or without a plea agreement, she would be pursuing imposition of a life sentence. Mot. Hrg. N.T. 49. He admitted to never having told the Court during the plea hearing - - despite being under oath and despite several invitations or opportunities to do so - - about any 20-to-25 year deal or any deal other than the disclosed written plea agreement. Mot. Hrg. N.T. 51–63.

Furthermore, Mr. Brown admitted having heard and understood the Court at his plea hearing before he entered a guilty plea that even if the lawyers had agreed on the handling of sentencing matters and even if they made joint requests of the Court, the Court was under no obligation to accept the lawyers’ recommendations, requests or motions. Mot. Hrg. N.T. 63–64. He even admitted recalling from the guilty plea hearing that he told the Court at that time he did not think he had any deal that had not been described to the Court during the plea hearing. Mot. Hrg. N.T. 66.

To urge the Court to grant his motion now, Mr. Brown’s approach in the face of these recitations at the plea hearing and again at the recent Motion Hearing is to essentially skirt the significance of the guilty plea colloquy, the testimony of AUSA Rotella, the absence of Ms. Tosta,

the silence of documents in terms of the supposed deal but, instead, to continue to claim that he signed the plea agreement because Ms. Tosta told him to and that he gave the answers to the Court that he did at the plea hearing because he “was lost,” “overwhelmed,” “nervous,” and the like. Mot. Hrg. N.T. 71–72. Although he does not claim that he had spoken untruthfully at his lengthy plea hearing, he labors to try to reconcile his answers to the repeated direct questions then with his position now. He is left with finally trying to say only “[a]t that time, I believed I was telling you the truth.” Mot. Hrg. N.T. 71. Of course, that does not reconcile his Motion with his own plea hearing sworn testimony, much less with the other evidence.

DISCUSSION

Mr. Brown’s current counsel endeavors passionately and persistently that Mr. Brown ought to be permitted to withdraw his guilty plea, not because he is not guilty of the crimes, not because there was ever a 20-to-25-year “deal” in place (counsel admits there was no such deal), not because Mr. Brown himself was materially impaired during the plea hearing, not because there has been a change in the law, not even because he has been sentenced to an illegal or unreasonably high sentence (indeed, he has not yet been sentenced at all). Rather, the argument is variously that the Government “disingenuously” presented a proposed plea agreement and, because Mr. Brown’s lawyer had no prior federal child pornography case sentencing experience, she was somehow “duped into thinking that there was a benefit for Mr. Brown.” Mot. Hrg. N.T. 76–77. From this, Mr. Brown’s position becomes that he had ineffective counsel and he should be able to withdraw his plea in spite of the candid admission that there is no intention to claim he is not guilty even if he was permitted to withdraw his plea. Mot. Hrg. N.T. 78, 80. It seems he intends to “plead open.”

Mr. Brown has no automatic or absolute right to withdraw his guilty plea. United States v. Martinez, 785 F. 2d 111, 113 (3rd Cir. 1986); United States v. Trott, 779 F.2d 912, 915 (3rd Cir.

1985). Indeed, given the solemn thoroughness required by the Federal Rules of Criminal Procedure for the evaluation of the tendering and acceptance of a guilty plea, it is understandable that a defendant such as Mr. Brown may not lightly or easily withdraw a guilty plea. United States v. Hyde, 520 U.S. 670, 676–77 (1997); Brady v. United States, 397 U.S. 742, 748 (1970); see also United States v. Siddons, 660 F.3d 699, 703 (3d Cir. 2011) (“A defendant seeking to withdraw a guilty plea bears a substantial burden of showing a fair and just reason for the withdrawal of his plea.”) (citations and quotations omitted). The Court has a responsibility to maintain the integrity of the attendant process while, of course, making an objective assessment of a defendant’s arguments.

Mr. Brown bears the heavy burden of establishing that there are valid grounds for withdrawing his guilty plea and “that burden is substantial.” United States v. Jones, 336 F. 3d 245, 252 (3rd Cir. 2003). Pursuant to Federal Rule of Criminal Procedure 11(d)(2)(B), Mr. Brown must demonstrate a “fair and just” reason to withdraw his guilty plea. As part of that burden, Mr. Brown must also present a persuasive reason why he took certain positions under oath at his guilty plea hearing that he now wants to disavow, lest other defendants be tempted to tie up the criminal justice system with disingenuous, and then recanted, Rule 11 statements. See United States v. King, 604 F.3d 125, 140 (3d Cir. 2010) (rejecting request to withdraw guilty plea where defendant apparently “suffered from ‘pleader’s remorse’ once he learned of the proposed Guidelines range in his Presentence Investigation Report”); see also Blackledge v. Allison, 431 U.S. 63, 73–74 (1977); United States v. Jones, 979 F. 2d 317, 318 (3rd Cir. 1992).

To determine whether a defendant has met this substantial burden, the Court normally must weigh three factors: (1) whether the defendant asserts his innocence; (2) whether the Government would be prejudiced by the withdrawal; and (3) the strength of the reasons for seeking to withdraw the plea. United States v. Brown, 250 F. 3d 811, 815 (3rd Cir. 2001); United States v. Trott, 779

F. 2d 912, 915 (3rd Cir. 1985). “A shift in defense tactics, a change of mind, or the fear of punishment are not adequate reasons” Brown, 250 F. 3d at 815 (quotation omitted); see also Jones, 979 F. 2d at 318; Masciola v. United States, 469 F. 2d 1057, 1058–59 (3rd Cir. 1972). A bald, bare bones claim such as Mr. Brown’s, i.e., that he entered a guilty plea because of a supposed but undisclosed belief in a “deal” that never existed, is analyzed under the third factor - - the strength of the reasons for seeking to withdraw the plea.

Mr. Brown maintains that his initial lawyer, Ms. Tosta, who represented him after his arraignment and at his guilty plea hearing, was ineffective for supposedly having told Mr. Brown that the Government had extended a plea offer of a sentence of between 20 and 25 years and that based on this supposed offer Mr. Brown claims he reasonably understood that he would serve 24 years in jail, not the life time sentence authorized by statute and recommended by the sentencing guidelines. He now contends that he may not have pleaded guilty if he had known that there was no such deal or that his sentence could far exceed that time period and may be as long as for his lifetime.

Mr. Brown relies on an unsigned, after-the-fact November 29, 2018 email letter ostensibly from Ms. Tosta to replacement counsel in which it appears that there is effort to claim that there actually had been a 20-to-25-year deal struck. See Def. Supp. Mot. Ex. C, Tosta 11/29/18 e-mail of 11:59 a.m. (“ . . . the original 20-25 year sentence” . . . “the plea based on the original 20-25 years”). Reliance on such a writing is puzzling and unpersuasive for a number of reasons, including the fact that Ms. Tosta did not come to the Court to explain it, the writing is unsigned, the idea that there was an “original 20-25 year sentence” deal is belied by present counsel’s acknowledgement that there was no such agreement, by Ms. Rotella’s testimony, by the written plea agreement and by the utter silence about any such sentence deal or discussion during the plea hearing. Even the August 8, 2017 emails between Ms. Tosta and Ms. Rotella that are said to have

been transmitted by the November 29, 2018 communication make no mention of it.

There is no support in the record or in logic for any believable assertion that Mr. Brown reasonably believed that by signing the guilty plea agreement and pleading guilty he was securing for himself a sentence between 20 and 25 years rather than risking a lifetime sentence.

The lack of merit of Mr. Brown's argument is confirmed by the Court's colloquy with him under oath at his guilty plea hearing on September 6, 2017. The Court advised him at the outset that it would assume that his answers would be truthful and that if he should give false answers he would be subject to possible prosecution for perjury, that is, lying under oath. He replied that he understood. He also answered that he understood that he faced a total statutory maximum of a life sentence and that the Court would not determine how the advisory sentencing guidelines or other applicable law would be applied until after a presentence report had been prepared and both the Government and Mr. Brown had an opportunity to challenge it.

The Court also advised him that it could "impose a sentence which is more severe or less severe than the sentence which the advisory sentencing guidelines recommend" GP Hrg. N.T. 52. Mr. Brown was told that it was always possible that he could earn a sentence up to the maximum permitted by law and that he could not withdraw any guilty plea if his sentence turned out to be more severe than he expected or anyone else recommended. He agreed that no one had threatened him, coerced him, or forced him to plead guilty. Significantly, he answered "No" when asked if there were agreements - - or if he believed there were any agreements - - which had not been disclosed to the Court. Two officers of the Court, namely Ms. Rotella and Ms. Tosta, likewise assured the Court in Mr. Brown's presence that the only agreement was that which was described on the record that day. Neither lawyer said anything expressly or implicitly about any discussion about 20 to 25 years as a sentence, much less a "deal" of those other terms. Even if, as he now suggests, Mr. Brown was addled during the hearing or had been induced by Ms. Tosta to

sign the agreement, his argument now means necessarily that two lawyers were actively and deliberately misleading the Court. Alternatively, his argument would have to be, at least, that as he was in court on September 6, 2017, he was seeing and hearing his own lawyer mislead the Court. Accepting that scenario suggests that that occurrence would and should have been time to conclude, or at least suspect, that his lawyer was “ineffective.” Mr. Brown readily acknowledged to the Court that his decision to change his plea to guilty was made of his own free will and that he was pleading guilty because he was in fact guilty as charged.

In sum, Mr. Brown’s responses at the guilty plea hearing make it clear that he knew there was no side deal or promise that he would receive a sentence of between 20 and 25 years if he pleaded guilty. If Mr. Brown had been promised a 20-25 year prison sentence, he had every opportunity to have made this known to the Court at his guilty plea hearing. Yet he remained silent. The Court’s observation of Mr. Brown at that time caused the Court no concern that Mr. Brown was frightened, inattentive, trying to evade or mislead or was confused.

Moreover, Mr. Brown has not established that he was prejudiced or that his lawyer’s performance was deficient. He has not shown that he would not have pleaded guilty and instead would have pleaded with an open plea or gone to trial, had his lawyer acted differently.

Strickland v. Washington, 466 U.S. 668, 694–96 (1984).⁵

CONCLUSION

Mr. Brown’s reason for seeking the withdrawal of his guilty plea is directly, repeatedly and

⁵ During the hearing on Mr. Brown’s motion the Court posed the question to counsel as to whether the claim of the ineffectiveness of Ms. Tosta was yet ripe because, as suggested by analysis and application of Strickland, no sentence has yet been imposed on Mr. Brown and, so, one cannot yet credibly argue that any definable or measurable prejudice has been visited upon Mr. Brown. Without addressing how, if at all, a resolution of the pending motion as presently framed may pertain to any future applications by Mr. Brown premised on the “ineffectiveness” issue, the Court accepts that Mr. Brown has presented his argument and asks the Court to rule upon it.

thoroughly contradicted by the guilty plea hearing of September 6, 2017. He was not intimidated. He was not tricked. He was not misled. He was not rushed. He was competent, cognizant, deliberate and adamant. He pleaded guilty and remains so.

The Motion of Mr. Brown to withdraw his guilty plea is denied.

BY THE COURT:

/s/ Gene E.K. Pratter
GENE E.K. PRATTER
United States District Judge

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

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	
v.	:	
	:	
JOHN BROWN	:	No. 17-113-2

ORDER

AND NOW, this 8th day of Febuary, 2019, upon consideration of the Defendant John Brown’s Motion to Withdraw Guilty Plea (Doc. No. 90) and Supplemental Motion to Withdraw Guilty Plea (Doc. No. 94), and the Government’s response (Doc. No. 99), and following a hearing and oral argument conducted in open court on January 24, 2019, it is **ORDERED** that the s Motion is **DENIED** for the reasons presented in the Court’s Memorandum of the same date.

BY THE COURT:

/s/ Gene E.K. Pratter
GENE E.K. PRATTER
United States District Judge