

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

UNITED STATES OF AMERICA : CRIMINAL ACTION  
 :  
 v. :  
 :  
 SALAHUDIN SHAHEED : NO. 15-187-2

MEMORANDUM

Bartle, J.

June 28, 2019

On July 2, 2015, a grand jury returned an indictment charging defendant Salahudin Shaheed ("Shaheed"), along with co-defendants Basil Buie ("Buie") and Khayree Gay ("Gay"), with conspiracy to commit robbery which interferes with interstate commerce and attempted robbery which interferes with interstate commerce, in violation of 18 U.S.C. § 1951(a), kidnapping, in violation of 18 U.S.C. § 1201, and aiding and abetting, in violation of 18 U.S.C. § 2. Shaheed entered a plea of guilty the day after the trial began and thereafter was sentenced to a term of imprisonment of 365 months. He then moved to withdraw his guilty plea, which this court denied. The Court of Appeals affirmed the denial of Shaheed's motion to withdraw his guilty plea, and the Supreme Court denied his petition for a writ of certiorari. See United States v. Shaheed, 688 F. App'x 120, 121 (3d Cir. 2017), cert. denied, 138 S. Ct. 1311 (2018).

Before the court is the motion of Shaheed to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255.

I

We take the following facts from the change of plea hearing, which Shaheed admitted accurately summarize his crimes. From approximately November 2014 through April 4, 2015, Shaheed formulated a plan to rob the National Watch and Diamond Exchange, a retail business engaged in selling watches and jewelry located in Philadelphia. Shaheed recruited his cousin, Buie, and his friend, Gay, to assist with the robbery. Shaheed and his accomplices traveled to the area around National Watch on several occasions to surveil the store and its employees.

On April 4, 2015, Shaheed and his accomplices drove a van owned by Gay to a parking garage across from National Watch and waited for the store to close for the day. They then jumped out of the van and ambushed the victim store employee. Shaheed shot her with a Taser and all three men violently forced her into the back of the van. She was restrained with zip ties and beaten. The co-conspirators demanded that the victim provide the alarm and safe codes for the store. When the victim was unable to provide this information, Shaheed became enraged. He punched and kicked the victim and told her she was going to die.

Shaheed then drove the van onto Interstate 95 South, while Buie held the victim down in the back of the van using his body weight. The defendants drove the victim to a gasoline station where they used her debit card to purchase gasoline for

the van. They then drove to Mount Lawn Cemetery, where they dumped the victim, still restrained, into a ditch and covered her with a sheet.

While Shaheed and his co-conspirators were attempting to exit the cemetery, the van became stuck in the mud. They put the van in reverse and returned to the place where they had dumped the victim. They then abducted the victim for a second time. This time, Shaheed and his co-conspirators placed metal handcuffs onto her wrists and shackles on her ankles. They again beat and tortured her. Thereafter, they dumped her in the cemetery for a second time, covered her with a sheet, and left.

During the kidnapping, the three defendants stole the victim's purse and the contents thereof. A few hours later, Buie used the victim's debit card to make cash withdrawals totaling \$600 from an ATM near his home. Although the victim survived this harrowing experience, she suffered severe and permanent physical and psychological injuries, including partial vision loss and short-term memory loss.

## II

Trial in this matter began with jury selection on October 6, 2015. That same day opening statements were made and the Government called its first witness, a good Samaritan who had found the victim after she had somehow managed to extricate herself from the cemetery to a public road.

On October 7, 2015, before the Government was set to call the victim as its next witness, Shaheed elected to plead guilty to all counts charged pursuant to a written plea agreement.<sup>1</sup> This court accepted his guilty plea after an extensive colloquy in which the court found that the plea was knowing, voluntary, and intelligently made. At trial and the change of plea hearing, Shaheed was represented by Lawrence J. Bozzelli, Esquire.

On December 22, 2015, Shaheed sent the court a pro se letter motion seeking to withdraw his plea. The court appointed Kenneth C. Edelin, Esquire, to represent him. The court held an evidentiary hearing on January 13, 2016. During that hearing, Shaheed asserted that he had pleaded guilty because his former counsel had told Shaheed that his mother wanted him to plead guilty and because his sister had been threatened. He also asserted that he had been unable to read the plea agreement because he did not have his glasses and that he was under mental, emotional, and physical distress such that he did not comprehend the change of plea hearing.

The court denied Shaheed's motion to withdraw his guilty plea in a ruling from the bench the next day, January 14,

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1. Gay elected to plead guilty prior to trial pursuant to a cooperation plea agreement with the Government. Buie began trial with Shaheed and thereafter entered a guilty plea pursuant to a written agreement on the morning of October 7, 2015, shortly before Shaheed's change of plea hearing.

2016. The court found that Shaheed had failed to explain away the significant evidence of his guilt, including evidence that Shaheed had purchased the Taser used to assault the victim. It also found that no one had threatened, coerced, or forced Shaheed to plead guilty and that his allegations to the contrary were not credible. Instead, Shaheed was an intelligent individual who was thirty-four years old at the time of his plea and who had run several businesses. He knowingly and voluntarily entered into the guilty plea agreement and never advised the court of any emotional, mental, or physical issues. The court also found that the Government would be prejudiced if trial were to be rescheduled given the need to call the victim, who had been emotionally traumatized by the kidnapping, as well as the many other Government witnesses who would need to be contacted, prepared, and called to testify. Thereafter, Shaheed filed pro se motions for reconsideration, which were denied.

On February 5, 2016, the court imposed a sentence of 240 months' imprisonment on each of counts one and two (the conspiracy to commit and attempted robbery counts), and 365 months' imprisonment on count three (the kidnapping count), with all sentences to run concurrently. Shaheed filed a timely appeal challenging the denial of his motion to withdraw his guilty plea. On May 5, 2017, our Court of Appeals affirmed this court's denial of the motion to withdraw the plea. See Shaheed,

688 F. App'x at 121. Shaheed's petition for a writ of certiorari with the Supreme Court was denied. See 138 S. Ct. at 1311. His timely motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255 followed.

### III

Shaheed raises in his motion nineteen grounds for relief. In grounds one, two, and seven, Shaheed directly challenges several actions of this court. Specifically, he asserts that this court improperly denied his request for substitute counsel shortly before trial in violation of his rights under the Sixth Amendment to the United States Constitution. Shaheed also alleges in ground two that he received fewer preemptory challenges than the Government, in violation of Rule 24(b) of the Federal Rules of Criminal Procedure and the Equal Protection Clause. In ground seven, Shaheed contends that this court provided "conflicting information regarding the plea," specifically about whether he would be able to withdraw his guilty plea after entering it. Shaheed did not raise any of these issues on direct appeal.

It is the general rule that claims not raised on direct appeal may not be raised on collateral review unless the petitioner shows cause and prejudice, or actual innocence. Massaro v. United States, 538 U.S. 500, 504 (2003); Bousley v. United States, 523 U.S. 614, 622 (1998). "[C]ause for a

procedural default on appeal ordinarily requires a showing of some external impediment preventing counsel from constructing or raising the claim." Murray v. Carrier, 477 U.S. 478, 492 (1986). For example, a defendant may show that "the factual or legal basis for a claim was not reasonably available to counsel" or that "some interference by officials" made compliance impracticable, to establish cause. Id. at 488 (citations omitted). Prejudice requires a showing that the error "worked to [defendant's] actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." United States v. Frady, 456 U.S. 152, 170 (1982) (emphasis omitted). To establish actual innocence, a defendant must demonstrate that, "in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him." Bousley, 523 U.S. at 623 (quoting Schlup v. Delo, 513 U.S. 298, 327-28 (1995)) (internal quotations and citation omitted).

Shaheed has raised these issues for the first time in the instant § 2255 motion. He cannot establish cause and prejudice sufficient to overcome procedural default of these claims. Shaheed has offered no explanation as to why his new counsel could not have raised these issues on direct appeal. His bare allegations that he would have gone to trial absent these alleged errors is not sufficient to establish prejudice.

Furthermore, given the overwhelming record evidence supporting his conviction, he has not established actual innocence. His self-serving statements to this effect do not suffice. Accordingly, these claims were procedurally defaulted.

In any event, these claims are barred by Shaheed's guilty plea agreement, which limits his right to attack collaterally his conviction and sentence. That agreement provides in relevant part:

In exchange for the promises made by the government in entering this plea agreement, the defendant voluntarily and expressly waives all rights to appeal or collaterally attack the defendant's conviction, sentence, or any other matter relating to this prosecution, whether such a right to appeal or collateral attack arises under 18 U.S.C. § 3742, 28 U.S.C. § 1291, 28 U.S.C. § 2255, or any other provision of law.

- a. Notwithstanding the waiver provision above, if the government appeals from the sentence, then the defendant may file a direct appeal of his sentence.
- b. If the government does not appeal, then notwithstanding the waiver provision set forth in this paragraph, the defendant may file a direct appeal or petition for collateral relief but may raise only a claim, if otherwise permitted by law in such a proceeding:

- (1) that the defendant's sentence on any count of conviction exceeds the statutory maximum for that count as set forth in paragraph 3 above;

- (2) challenging a decision by the sentencing judge to impose an "upward

departure" pursuant to the Sentencing Guidelines;

(3) challenging a decision by the sentencing judge to impose an "upward variance" above the final Sentencing Guideline range determined by the Court;

(4) that an attorney who represented the defendant during the course of this criminal case provided constitutionally ineffective assistance of counsel.

If the defendant does appeal or seek collateral relief pursuant to this subparagraph, no issue may be presented by the defendant in such a proceeding other than those described in this subparagraph.

Rule 11 of the Federal Rules of Criminal Procedure requires that "[b]efore accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement)." Fed. R. Crim. P. 11(b)(2). The court must also ensure that the defendant is aware of certain rights, the nature of the charges against him, the maximum possible penalty, and any mandatory minimum penalty, among other things, and that there is a factual basis for the plea. Id. at (b)(1), (b)(3). Our Court of Appeals has enumerated three factors to be considered when the Government invokes an appellate waiver:

(1) whether the waiver "of the right to appeal [the] sentence was knowing and voluntary;" (2) "whether one of the specific

exceptions set forth in the agreement prevents the enforcement of the waiver;” i.e., what is the scope of the waiver and does it bar appellate review of the issue pressed by the defendant; and (3) “whether enforcing the waiver would work a miscarriage of justice.”

United States v. Goodson, 544 F.3d 529, 536 (3d Cir. 2008)

(quoting United States v. Jackson, 523 F.3d 234, 243-44 (3d Cir. 2008)).

In signing the agreement, Shaheed acknowledged that he had discussed the plea agreement fully with his counsel and that he was agreeing to plead guilty because he was in fact guilty. He also stated under oath during his colloquy at the guilty plea hearing that he had read and understood the plea agreement and had discussed it with counsel. Shaheed further affirmed that his decision to plead guilty was made of his own free will and that he had not been threatened, coerced, or forced to plead guilty. This court specifically called to Shaheed’s attention the waiver of appellate rights provision, and Shaheed replied that he understood it.

On this record we have no trouble concluding that Shaheed’s waiver of appellate rights was knowingly and voluntarily made. None of the narrow exceptions to the waiver applies to his claims raised here. There are also no extraordinary circumstances that would amount to a miscarriage of justice necessary to invalidate the waiver. See United

States v. Khattak, 273 F.3d 557, 562 (3d Cir. 2001).

Accordingly, we conclude that these claims are barred by the terms of Shaheed's plea agreement.

But even if this court were to reach the merits, these claims would fail. As to ground one, this court did not improperly deny Shaheed the right to substitute counsel. To the contrary, the court held a hearing on Shaheed's request for substitute counsel, at which the court conducted a lengthy colloquy with Shaheed regarding the reasons for Shaheed's dissatisfaction with attorney Bozzelli. Shaheed detailed various arguments or motions that Bozzelli had allegedly failed to make. The court explained that, in some instances, Bozzelli had in fact filed the motions or raised the arguments suggested by Shaheed. As to the others, the court explained why the motions or arguments would have been rejected by the court and would not have changed the outcome of the proceeding. Thus, the court concluded that Shaheed had not shown good cause for appointment of new counsel and Shaheed proceeded with attorney Bozzelli.<sup>2</sup>

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2. Shaheed also alleges that this court violated his constitutional rights by failing to advise him at the hearing of his ability to proceed pro se. "Courts must indulge every reasonable presumption against a waiver of counsel." Buhl v. Cooksey, 233 F.3d 783, 790 (3d Cir. 2000). To overcome this presumption and conduct his own defense, Shaheed was required to clearly and unequivocally ask to proceed pro se. See id.

As to ground two, Shaheed received the proper number of preemptory challenges. The Federal Rules of Criminal Procedure provide that “[t]he government has 6 preemptory challenges and the defendant or defendants jointly have ten preemptory challenges.” Fed. R. Crim. P. 24(b)(2) (emphasis added). During jury selection, Shaheed was required to share the ten preemptory challenges with his co-defendant Basil Buie, who had not yet pleaded guilty. Thus, the court did not err.

And as to ground seven, the court did not provide conflicting information regarding the guilty plea. The court never stated that Shaheed would be entitled to withdraw his guilty plea. Instead, as discussed more fully above, the court engaged Shaheed in a fulsome colloquy in which it ensured that the plea was knowing, voluntary, intelligent, and not the product of any undisclosed threats, promises, or coercion. The court further informed Shaheed of the rights he would forever waive by pleading guilty, including his right to a trial in this matter. Shaheed agreed that he wished to proceed with the entry of the plea and that he was, in fact, guilty.

Accordingly, the court will deny Shaheed’s motion as to grounds one, two, and seven.

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Shaheed failed to do so and thus there was no constitutional error.

IV

We turn now to the remaining sixteen grounds raised by Shaheed in his motion, in which Shaheed alleges that he received ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution. Such claims are not barred by the appellate waiver contained in his plea agreement.

To succeed on such a claim, Shaheed must meet the standard set forth by the Supreme Court in Strickland v. Washington. 466 U.S. 668 (1984). First, he must show that his counsel's performance was deficient. Id. at 687. This requires a "showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. Second, Shaheed must show that the deficient performance prejudiced him, that is, that counsel's errors were so serious as to deprive Shaheed of a fair trial with a reliable result. Id. In the context of a guilty plea, the "prejudice" prong requires the petitioner to "show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, 59 (1985).

"Judicial scrutiny of counsel's performance must be highly deferential." Strickland, 466 U.S. at 689. In evaluating a claim that counsel was ineffective, "a court must

indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id. (quoting Michel v. Louisiana, 350 U.S. 91, 101 (1955)).

In ground five, Shaheed alleges that his trial counsel was ineffective "when he failed to communicate the plea offer from the prosecution regarding sentence." Shaheed further explains that his attorney did in fact meet with him in August 2015 to convey an offer from the Government for a conditional guilty plea for a seventeen-year sentence under Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure. The conditional plea offer, made months before trial, was tentative in nature and was never reduced to writing. Shaheed elected to proceed to trial. On the second day of trial, Shaheed and the Government entered into an open plea agreement after this court advised that it would not accept a conditional plea under Rule 11(c)(1)(C) given the serious nature of the offenses and the need to conduct an independent inquiry into the appropriate sentence after reviewing the presentence report.<sup>3</sup>

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3. The undersigned had similarly advised counsel that it does not accept conditional plea agreements under Rule 11(c)(1)(C) in connection with the change of plea of Shaheed's co-defendant Buie.

Shaheed alleges that he was never "advised by counsel of this revised and/or alternative method of resolving this legal proceeding, which exposed [him] to this 30 year sentence that he eventually received." This claim of ignorance as to the nature of his plea is contradictory to the clear record. During the hearing on Shaheed's motion to withdraw his guilty plea, Bozzelli testified that he met with Shaheed and reviewed each paragraph of the guilty plea agreement that Shaheed ultimately signed. That agreement was not conditioned upon any specific sentence but rather provided that this court could impose a sentence up to the maximum permitted by law, which in Shaheed's case was life imprisonment. It further acknowledged that "[n]o one has promised or guaranteed to [Shaheed] what sentence the Court will impose." The agreement also stated that there were no additional promises, agreements, or understandings other than those set forth in the written plea agreement and that no additional promises, agreements, or understandings will be entered into unless in writing and signed by all parties.

This court also performed an extensive colloquy before accepting Shaheed's plea, as detailed above. During that colloquy, Shaheed stated under oath that he had read, understood, and discussed the plea agreement with counsel. Shaheed acknowledged his signature on the agreement. The Government, at the request of the court, stated in open court

the maximum penalty applicable to Shaheed, which as noted above was life imprisonment. In response to the court's questioning, Shaheed responded that he understood the enormous possible sentence he was facing. Thereafter, the court informed Shaheed that he "could receive a sentence up to the maximum permitted by law" and that he would "not be entitled to withdraw any guilty plea if [the court] should impose a more severe sentence than you expect or that anyone else recommends." Shaheed again replied that he understood. He then affirmed that he still wished to give up his right to a trial and to plead guilty.

Shaheed also contends that he could not read the plea agreement because of a "visual impairment" and that his trial counsel spoke too softly when reading him the plea. This same argument was raised—and rejected—on appeal. See Shaheed, 688 F. App'x at 123. As stated above, Shaheed agreed that he had read and understood the plea agreement and had discussed it with counsel. His counsel also stated both at the change of plea colloquy and the hearing on Shaheed's subsequent motion to withdraw his guilty plea that he had read the plea agreement to Shaheed and that Shaheed had indicated that he understood. We found Shaheed not credible on this issue and have no reason now to make a contrary finding. In sum, Shaheed's allegation that he was unaware or uninformed that he was entering into a plea

agreement not conditioned on a specific sentence is without merit.

In grounds three, four, and fifteen of the motion, Shaheed alleges that Bozzelli was ineffective during the October 7, 2015 change of plea hearing. Specifically, he alleges that Bozzelli permitted Shaheed to enter the plea with insufficient time to evaluate his options, failed to explain that the plea agreement waived Shaheed's right to contest violations of the Double Jeopardy Clause, and that Bozzelli falsely informed the court that Shaheed had read the plea agreement. These allegations are also contradicted by the record. As stated above, during the change of plea colloquy Shaheed testified to this court under oath that he had read the plea agreement, understood it, and had discussed it with Bozzelli. He also affirmed that he was satisfied with Bozzelli's representation. The court ensured that Shaheed was knowingly and voluntarily entering the plea:

Q Having heard from me what your rights are if you plead not guilty and what may occur if you plead guilty, do you still wish to give up your right to a trial and plead guilty?

A Yes, sir, Your Honor.

Q Has anyone threatened you, coerced you, or forced you in any way to plead guilty?

A No, sir, Your Honor.

Q Has any plea agreement been entered into or any promises made other than what has already been stated on the record here?

A No, sir.

Q Mr. Shaheed, has the decision to change your plea to guilty been made of your own free will?

A Yes, sir.

The court also brought to Shaheed's attention the waiver of appellate rights contained in the plea agreement, which barred any claim under the Double Jeopardy clause:

Q Do you understand, Mr. Shaheed, that the document contains what we call an Appellate waiver that severely restricts your right to appeal any sentence which I should impose, and there are only very limited circumstances when you would have a right to appeal any sentence or to what we call collaterally attack that sentence at a later time?

A Yes, sir, Your Honor.

A few minutes later, the court again reminded Shaheed of his waiver of appellate rights:

Q As we discussed a few minutes ago, do you understand that if you plead guilty, you'll be giving up your right under almost all circumstances to file an appeal of any sentence which I should impose or to file any collateral proceeding attacking that sentence?

A Yes, sir, Your Honor.

Thus, the record contradicts Shaheed's claims and establishes that Bozzelli's performance was not deficient. Accordingly,

Shaheed may not attack his conviction and sentence on these grounds.

Next, in grounds six, fourteen, sixteen, and seventeen Shaheed challenges several of Bozzelli's strategic decisions. Specifically, Shaheed alleged that Bozzelli was ineffective for (1) failing to request a mistrial after the district court relayed "extrinsic information . . . before the jury"; (2) failing to request a mistrial because the court did not question jurors about racial bias; (3) failing to request a severance from co-defendant Buie; and (4) failing to request dismissal of the indictment due to prosecutorial misconduct before the grand jury.

Shaheed's allegations fail. As stated above, under Strickland, a court is precluded from finding that counsel was ineffective unless it finds both that counsel's performance fell below an objectively unreasonable standard and that the defendant was prejudiced by that performance. 466 U.S. at 687. Courts are "highly deferential" to counsel's reasonable strategic decisions. Marshall v. Hendricks, 307 F.3d 36, 85 (3d Cir. 2002) (quoting Strickland, 466 U.S. at 689-90). Moreover, "[t]here can be no Sixth Amendment deprivation of effective counsel based on an attorney's failure to raise a meritless argument." United States v. Sanders, 165 F.3d 248, 253 (3d Cir. 1999). Indeed, "defense counsel can not be faulted for failing

to make a request that was not likely to be granted.” Jackson v. Carroll, 161 F. App’x 190, 194 n.3 (3d Cir. 2005).

The “extrinsic evidence” to which Shaheed refers, namely the court’s questioning of counsel whether Shaheed wanted to plead guilty, occurred outside the jury’s hearing at a sidebar with counsel. The jury did not overhear these remarks and thus there was no basis for requesting a mistrial on that ground. Accordingly, attorney Bozzelli was not ineffective for failing to request a mistrial on that ground.

Attorney Bozzelli also was not ineffective for failing to move for a mistrial based on the voir dire. As stated above, Shaheed contends that counsel should have requested a mistrial after this court failed to ask a specific question about racial prejudice given that he was “a black defendant charged with a violent crime against a white person” and also a question about “the attitude of jurors toward the Nation of Islam (Black Muslims) due to [his] religious persuasion.” The court has considerable discretion regarding voir dire, and there is no requirement that the court ask a specific question about racial or religious bias. See Waldorf v. Shuta, 3 F.3d 705, 710 (3d Cir. 1993). Nonetheless, this court did ask jurors if there was “any religious, philosophical, moral, or other reason” why they could not sit as jurors in this action. Moreover, the court instructed all jurors after they were empaneled that they

"should also not be influenced by any person's race, color, religion, [or] national ancestry." Jurors are presumed to follow the court's instructions. See, e.g., Weeks v. Angelone, 528 U.S. 225, 234 (2000); United States v. Bornman, 559 F.3d 150, 156 (3d Cir. 2009).

Bozzelli's failure to request a severance was also a reasonable strategic decision that cannot give rise to Shaheed's ineffective assistance of counsel claim. Defendants seeking to sever bear a "heavy burden" and must demonstrate that the denial of severance would lead to "clear and substantial prejudice resulting in a manifestly unfair trial." United States v. Urban, 404 F.3d 754, 775 (3d Cir. 2005) (internal citations and quotations omitted). A defendant is not entitled to a severance merely because he would have a better chance of acquittal in a separate trial or because he may face some prejudice in a joint trial.<sup>4</sup> Id. at 775-76.

Nor was Bozzelli ineffective for failing to request a mistrial because of alleged prosecutorial misconduct before the grand jury. Shaheed alleges that the Government engaged in misconduct by eliciting testimony from his co-conspirator Gay about "uncharged and unrelated conduct," specifically that

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4. Although Bozzelli did not file a motion for severance, he did move for a mistrial on the second day of trial after Buie elected to plead guilty. This court denied the motion and stated that a curative instruction would be given instead.

Shaheed had sold heroin and cocaine and that Shaheed had suggested he shot someone in the head for selling him a fake Rolex watch. Dismissal of an indictment is a "drastic remedy." United States v. Gagliardi, 285 F. App'x 11, 17 (3d Cir. 2008) (quoting United States v. Morrison, 449 U.S. 361, 366 n.2 (1981)). Here, the testimony elicited by the Government served to provide content for "the development of the relationship between the co-conspirators." See id. Moreover, it did not undercut the "abundance of competent evidence supporting [the] indictment." See United States v. Riccobene, 451 F.2d 586, 587 (3d Cir. 1971). Accordingly, there would be no basis for Bozzelli to have moved to dismiss the indictment.

In grounds eight, ten, eleven, and thirteen, Shaheed alleges that attorney Edelin was ineffective during the hearing on Shaheed's motion to withdraw his guilty plea. Shaheed asserts that Edelin improperly failed to: (1) argue that the court "abused it's [sic] discretion by granting the government's motion 'in limine' to preclude irrelevant, non-criminal conduct"; (2) argue that the "court abused it's [sic] discretion by allowing a more prejudicial in courtroom identification"; (3) raise a "meritorious double jeopardy issue"; and (4) "submit exculpatory or mitigating evidence on behalf of his client."

Shaheed has failed to explain how these shortcomings affected the disposition of his motion to withdraw his guilty

plea. Under the Federal Rules of Criminal Procedure, a defendant may withdraw a plea of guilty if he "can show a fair and just reason for requesting the withdrawal." Fed. R. Crim. P. 11(d)(2)(B). The defendant bears the burden of demonstrating a "fair and just reason" for withdrawal. United States v. Jones, 336 F.3d 245, 252 (3d Cir. 2003). A district court must consider three factors when evaluating a motion to withdraw a guilty plea: "(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." Id. (citing United States v. Brown, 250 F.3d 811, 815 (3d Cir. 2001)).

None of the issues raised by Shaheed would have been relevant at the hearing on Shaheed's motion to withdraw his guilty plea. Thus, it is clear that Shaheed was not prejudiced by his counsel's failure to raise them. The record shows that Shaheed's counsel performed competently at the hearing on the motion to withdraw. He presented evidence that Shaheed was asserting in his innocence, that Shaheed had been coerced into pleading guilty or had been under duress, and also asserted that the Government would not be prejudiced by the withdrawal. However, after reviewing the evidence this court found Shaheed not credible and determined that he had not presented a "fair and just reason" for withdrawal. None of the issues raised by

Shaheed would have changed that outcome. Accordingly, we reject the ineffective assistance of counsel claims raised in grounds eight, ten, eleven, and thirteen.<sup>5</sup>

In ground nine, Shaheed further contends that Edelin provided ineffective assistance of counsel because he failed "to obtain and investigate [the] case/file from prior counsel Bozzelli." Had Edelin adequately reviewed the case file, Shaheed maintains he would have discovered: (1) co-conspirator Gay's testimonial inconsistencies; (2) the absence of any fingerprint or DNA evidence; and (3) the "willfulness of [the victim] to offer testimony" despite the Government's contrary allegations.

Again, Shaheed's allegations are without merit. Edelin repeatedly referenced the lack of forensic evidence during the hearing on the motion to withdraw Shaheed's guilty plea. Regardless, as our Court of Appeals noted in this case, "[t]he lack of DNA or fingerprint evidence does not meaningfully suggest Shaheed's innocence; many criminal cases have no such evidence." Shaheed, 688 F. App'x at 122.

Our Court of Appeals affirmed this court's finding that the Government would have been prejudiced had Shaheed been

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5. Shaheed is also incorrect that Edelin failed to raise a "meritorious" double jeopardy claim. It is well-established that convictions for both conspiracy to commit robbery and attempted robbery do not violate the Double Jeopardy clause. See Callanan v. United States, 364 U.S. 587, 593-94 (1961).

permitted to withdraw his guilty plea. See id. at 124. It first recognized the prejudice to the Government if it had to call the victim. Shaheed's allegation that the victim would have been willing to testify at a criminal trial "because she filed a civil suit against movant Ash-Shaheed" misses the mark. There is no dispute that the victim was willing to testify in this matter—she was in fact present at trial and ready to be called by the Government as its next witness when Shaheed elected to plead guilty. This does not mean that the act of testifying would not cause her to suffer emotional distress if she had to gear up again for trial after Shaheed's guilty plea had been withdrawn. This court, along with our Court of Appeals, also considered the prejudice the Government would suffer by being forced to call many other civil and law enforcement witnesses after already making those preparations once. See id.

Simply put, Shaheed has not shown a "reasonable probability that . . . the result of the proceeding would have been different." Strickland, 466 U.S. at 694. His ineffective assistance of counsel claim based on attorney Edelin's alleged failure to review the case file fails.

In grounds twelve and eighteen, Shaheed contends that Edelin provided ineffective assistance of counsel at the sentencing hearing and on direct appeal by failing to object to

two sentencing enhancements. At sentencing, Shaheed received a two-level enhancement as "an organizer, leader, manager, or supervisor in any criminal activity." U.S.S.G. § 3B1.1(c). In applying this enhancement, courts consider several factors, including "the recruitment of accomplices," "the degree of participation in planning or organizing the offense," and "the degree of control and authority exercised over others." U.S.S.G. § 3B1.1 cmt. n.4; see also United States v. Johnson, 628 F. App'x 124, 132 (3d Cir. 2015). Shaheed also received a four-level enhancement because "the victim sustained permanent or life-threatening bodily injury." U.S.S.G. § 2A4.1(b)(2)(A). For purposes of this enhancement, this means "injury involving a substantial risk of death; loss or substantial impairment of the function of a bodily member, organ, or mental faculty that is likely to be permanent; or an obvious disfigurement that is likely to be permanent." U.S.S.G. § 1B1.1 cmt. n.1(K).

"[W]here defense counsel fails to object to an improper enhancement under the Sentencing Guidelines, counsel has rendered ineffective assistance." Jansen v. United States, 369 F.3d 237, 244 (3d Cir. 2004). However, counsel is not obligated to raise challenges to sentencing enhancements that are unlikely to succeed and thus would be a waste of time and resources to pursue. See United States v. Lawrence, 214 F.

Supp. 3d 401, 413 (E.D. Pa. 2016) (citing Woods v. Lamas, 631 F. App'x 96, 100 (3d Cir. 2015)).

The sentencing enhancements applied to Shaheed were proper, and thus Edelin was not ineffective for failing to object to them.<sup>6</sup> As the court found at sentencing, the victim here suffered permanent partial loss of vision and neurological issues, including permanent loss of short-term memory. And as Shaheed admitted when he agreed with the recitation of facts offered by the Government at his change of plea hearing, he recruited his accomplices. He also orchestrated the attack through meticulous planning, including by organizing surveillance of National Watch and by purchasing the Taser used to terrorize the victim. Shaheed's ineffective assistance of counsel claims in grounds twelve and eighteen fail.

Finally, in ground nineteen, Shaheed alleges that both Bozzelli and Edelin were ineffective for failing to request a hearing on Shaheed's competency to plead guilty. Counsel's

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6. To the extent he seeks to withdraw his guilty plea, Shaheed's objections to the sentencing enhancements are irrelevant. The enhancements merely affected his sentence. At the change of plea hearing, the court advised Shaheed that it would "not be able to determine how the advisory sentencing guidelines or other applicable law will be applied in your case until after a presentence report has been completed." He was also advised that the court could impose a sentence which is more severe or less severe than the sentence which the advisory sentencing guidelines recommend and, as discussed above, that the court could impose a sentence up to the maximum penalty permitted under law, which was life imprisonment.

failure to request a competency hearing or evaluation violates the defendant's right to effective assistance of counsel only where "there are sufficient indicia of incompetence to give objectively reasonable counsel reason to doubt the defendant's competency," and "there is a reasonable probability that the defendant would have been found incompetent to stand trial had the issue been raised and fully considered." Jermyn v. Horn, 266 F.3d 257, 283 (3d Cir. 2001). Here, there were no "indicia of incompetence." Shaheed never advised his lawyer or the court of any mental health problem or other health issue. Moreover, this court observed Shaheed and engaged him in a colloquy. It was satisfied that he was competent to plead guilty. Accordingly, the ineffective assistance claim raised in ground nineteen of the motion fails.

V

For the reasons stated above, the motion of Shaheed to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255 will be denied. We determine that the motion and record in this action show conclusively that Shaheed is not entitled to relief. As a result, we decline to hold an evidentiary hearing. See United States v. Lilly, 536 F.3d 190, 195 (3d Cir. 2008).

We will not issue a certificate of appealability since Shaheed has not "made a substantial showing of the denial of a

constitutional right.” See 28 U.S.C. § 2253(c)(2); Slack v. McDaniel, 529 U.S. 473, 483 (2000).

