

II. BACKGROUND

On May 12, 2009, Mr. Burnett was charged in a third superseding indictment [Doc. No. 90] with one count of conspiracy to commit Hobbs Act robberies, in violation of 18 U.S.C. 1951(a) (Count 1); two counts of Hobbs Act robbery, and aiding and abetting the commission of Hobbs Act robbery, in violation of 18 U.S.C. §§ 1951(a) and 2 (Counts 2 and 4); and two counts of using and carrying a firearm, and aiding and abetting the using and carrying of a firearm, during and in relation to a crime of violence, in violation of 18 U.S.C. §§ 924(c)(1) and 2 (Counts 3 and 5). These charges were brought after Mr. Burnett conspired with others to rob a number of pharmacies in Pennsylvania and Maryland to obtain prescription drugs for resale on the street [Doc. No. 90].

Mr. Burnett proceeded to trial on these charges on July 13, 2009. The next day, during jury selection for his trial, Mr. Burnett chose to enter into a plea agreement pursuant to Rule 11(c)(1)(C). After extensive negotiations, and in consultation with his attorney, Mr. Burnett decided to plead guilty to the conspiracy count, the two Hobbs Act robbery counts, and one of the § 924(c) offenses. July 14, 2009 Tr. at 13:19-24 (hereinafter “Plea Tr.”). The parties stipulated to a sentence that included 25-years’ imprisonment. Plea Tr. at 14:18-21. By entering into this agreement, Mr. Burnett avoided a mandatory sentence of an additional, consecutive 25-year prison term for conviction of the second § 924(c) offense with which he was charged. 18 U.S.C. § 924(c)(1)(C)(i); *see* Plea Tr. at 58:18-24.

After Mr. Burnett’s counsel withdrew from the case [Doc. No. 174], Mr. Burnett filed a *pro se* motion to withdraw his guilty plea on October 7, 2009 [Doc. No. 184]. Following a

hearing, the Court dismissed the motion to withdraw the plea without prejudice on October 14, 2009 [Doc. No. 191].

On December 23, 2009, Mr. Burnett's new counsel moved to withdraw his guilty plea [Doc. No. 202]. After a hearing, the Court denied the motion [Doc. No. 217] and imposed the agreed-upon sentence of 25 years' imprisonment [Doc. No. 223]. Mr. Burnett appealed this sentence [Doc. No. 224], and the Court of Appeals for the Third Circuit affirmed the denial of his motion to withdraw his plea. *United States v. Barnett*, 452 F. App'x 81, 81 (3d Cir. 2011).

On April 11, 2013, Mr. Burnett filed the instant motion seeking this Court's recusal, in anticipation of his filing a petition for habeas corpus relief under 28 U.S.C. § 2255 [Doc. No. 246], which he later filed on April 26, 2013 [Doc. No. 247].

In Mr. Burnett's motion for recusal, he targets the following four comments made by the Court during the guilty plea proceeding (out of a 73-page transcript of the proceeding) as demonstrating the Court's partiality towards his plea and plea agreement:

"Let me interrupt at this point, just so there's no misunderstanding here. Mr. Burnett, I'm aware of discussions between Mr. Cannon and Ms. Marston³ and the proposed agreed-upon sentence. If I thought that was not a sentence I could get comfortable with, I would tell you now. Okay?" (Plea Tr. at 15:17-24)

"Just to remind Mr. Burnett [of] the value of his negotiated deal here, would you, Ms. Marston, take a moment and remind him of the maximum penalties it could have been?" (Plea Tr. at 57:9-12)

"The reason why I ask that, Mr. Burnett, is it's obvious that there is a significant sentence here. But if you have a background that included some serious prior convictions, I would want to know that before I told you that I was comfortable with the sentence, with the deal that's been crafted for you, because it is a significant savings for you on the sentence." (Plea Tr. at 62:9-17).

³ At the time of the guilty plea proceeding, Mr. William T. Cannon represented Mr. Burnett, and Ms. Karen S. Marston represented the United States.

“I don’t know if it may be worth anything to you, but I think that the deal that was negotiated for you is a pretty darn good one from your perspective, okay?” (Plea Tr. at 72:22-25).

These comments were made during a plea colloquy conducted pursuant to Rule 11. Before a court may accept a guilty plea, Rule 11(b)(1) mandates that the court “inform the defendant of, and determine that the defendant understands,” a number of considerations relating to the plea and its consequences, including but not limited to “any maximum possible penalty, including imprisonment, fine, and term of supervised release.” Fed. R. Crim. P. 11(b)(1)(H).

III. DISCUSSION

Mr. Burnett alleges that the comments above warrant this Court’s recusal from considering his habeas corpus petition under 28 U.S.C. § 455(a), which provides that:

Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

28 U.S.C. § 455(a). Under § 455(a), the relevant inquiry is “whether a reasonable person knowing all the circumstances would harbor doubts concerning the judge’s impartiality.” *Mass. School of Law at Andover, Inc. v. Am. Bar Ass’n*, 107 F.3d 1026, 1042 (3d Cir. 1997). This inquiry is an objective one, requiring the party seeking recusal to identify facts that “might reasonably cause an objective observer to question [the Judge’s] impartiality.” *Washington v. Sobina*, 471 F. Supp. 2d 511, 515 (E.D. Pa. 2007) (citing *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 865 (1988)). A party seeking recusal need not demonstrate any actual bias, but rather need only show the appearance of bias or partiality. *Liteky v. United States*, 510 U.S. 540, 553 (1994). Where a litigant fails to identify a sufficient basis for questioning the judge’s impartiality, then the judge has an “affirmative duty to retain the case.” *Schwartz v. Hosp. of*

Univ. of Pa., No. 91-3267, 1992 U.S. Dist. LEXIS 7381, at *8 (E.D. Pa. May 4, 1992) (citing *Grand Entm't Grp. Ltd. v. Arazy*, 676 F. Supp. 616, 619 (E.D. Pa. 1987)).

A party moving for recusal under § 455(a) generally must allege an “extrajudicial source” as the basis for disqualification. *Liteky*, 510 U.S. at 551. In other words, absent a “deep-seated favoritism or antagonism” displayed by a judge during proceedings, “neither judicial rulings nor opinions formed by the judge on the basis of facts introduced or events occurring during current or prior proceedings are grounds for recusal.” *Id.* at 551. Likewise, a judge’s remarks during a judicial proceeding “that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge” unless they stem from an extrajudicial source or reveal “a high degree of favoritism or antagonism.” *Washington*, 471 F. Supp. 2d at 515 (citing *Liteky*, 510 U.S. at 555). As the Court of Appeals for the Third Circuit has repeatedly recognized, a judge’s comments made during a judicial proceeding rarely warrant recusal. *See In re Shusterman*, 394 F. App’x 888, 890 (3d Cir. 2010); *United States v. Wecht*, 484 F.3d 194, 220-21 (3d Cir. 2007); *SEC v. Antar*, 44 F. App’x 548, 551-52 (3d Cir. 2002); *Mass. School of Law*, 107 F.3d at 1043; *United States v. Bertoli*, 40 F.3d 1384, 1413 (3d Cir. 1994); *but see United States v. Antar*, 53 F.3d 568, 576 (3d Cir. 1995) (recusal required where “the district judge, in stark, plain and unambiguous language, told the parties that his goal in the criminal case, from the beginning, was . . . improper”).

Mr. Burnett has not alleged any basis of extrajudicial bias, but rather rests his motion for recusal solely on four remarks made during the plea colloquy. These comments include an inquiry into the maximum penalties available for the charges levied against Mr. Burnett, and an assessment of the agreed-upon sentence in relation to such maximum penalties. Plea Tr. at 57: 9-12, 72: 22-25. Detached from the context and purpose of the Rule 11 plea colloquy, Mr. Burnett

contends that these comments evince improper partiality towards entry of his guilty plea. However, the full context of the plea colloquy demonstrates that these comments derived only from the Court's required assessment of the validity of Mr. Burnett's plea pursuant to Rule 11. Fed. R. Crim. P. 11(b)(1). Contrary to Mr. Burnett's allegations, the remarks do not demonstrate any bias favoring entry of the plea, much less show any "deep-seated favoritism or antagonism" as would be required for recusal. *In re Shusterman*, 394 F. App'x at 890-91 (comments made by district judge during plea withdrawal hearing stemmed solely from the evidence before the court and did not warrant recusal from § 2255 habeas corpus proceeding) (citing *Liteky*, 510 U.S. at 551).

For example, Mr. Burnett points to the following remark as evidencing partiality towards the negotiated plea: "Just to remind Mr. Burnett [of] the value of his negotiated deal here, would you, Ms. Marston, take a moment and remind him of the maximum penalties it could have been?" Tr. at 57: 9-12. To the contrary, however, Rule 11 specifically requires the court to "inform the defendant of, and determine that the defendant understands" any "maximum possible penalty" that may apply to the charges against the defendant before the court may accept a plea to the charges. Fed. R. Crim. P. 11(b)(1)(H). Read in the context of the plea colloquy mandated under Rule 11(b)(1), these isolated remarks, including the reference to a "significant savings," constitute merely an assessment of the negotiated sentence in light of the fact that Mr. Burnett's agreement enabled him to avoid a mandatory, additional 25-year prison term for the second § 924(c) offense with which he was charged. *See* 18 U.S.C. 924(c)(1)(C)(i); Plea Tr. at 62:9-17.

Mr. Burnett's motion for recusal further appears to allege that these comments demonstrate the Court's "participation" in the negotiation of his plea, in violation of Rule 11(c)(1). Such an allegation is without merit. Rule 11(c)(1) prohibits judges from participating

in the negotiation of a plea agreement, but imposes no prohibition on judicial participation in the entry of a plea *already negotiated* by the parties. Fed. R. Crim. P. 11(c)(1) (“An attorney for the government and the defendant’s attorney . . . may discuss and reach a plea agreement. The court must not participate in these discussions.”). Further, Rule 11(b)(1) explicitly requires courts to engage in a plea colloquy with the defendant preceding entry of a guilty plea in order to ensure that the defendant is aware of and understands the nature and consequences of the plea. Fed. R. Crim. P. 11(b)(1). Mr. Burnett apparently concedes that by the time of his plea colloquy, he had already reached a plea agreement with the government following extensive negotiations in which the Court had no role.⁴ Mot. to Recuse, at 1-2 [Docket No. 246]; *see* Plea Tr. at 13:4-10.

No objective observer, aware of the total circumstances of this action, including the plea colloquy underlying Mr. Burnett’s motion, would reasonably conclude that the Court’s comments showed any “deep-seated favoritism or antagonism” such as would preclude a fair and impartial assessment of Mr. Burnett’s habeas petition. Accordingly, Mr. Burnett’s motion for recusal is denied.

An Order consistent with this Memorandum follows.

⁴ Mr. Burnett’s reliance on *United States v. Cano-Verela*, 497 F.3d 1122, 1132-34 (10th Cir. 2007) is misplaced. In *Cano-Verela*, the court determined that the judge violated the prohibition against judicial participation in plea negotiations under Federal Rule of Criminal Procedure 11(c)(1)(C) by “comparing, *before* [the defendant] and the government had reached a plea agreement, the potential penal consequences of pleading guilty versus going to trial.” 497 F.3d at 1123 (emphasis added). Unlike in *Cano-Verela*, here, any remarks comparing the penal consequences of the negotiated sentence versus going to trial occurred *after* the parties had negotiated the plea and agreed to a sentence.

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

UNITED STATES OF AMERICA,	:	CRIMINAL ACTION
Plaintiff,	:	NO. 08-201
v.	:	
	:	CIVIL ACTION
DENNIS BURNETT,	:	NO. 13-2231
Defendant.	:	

ORDER

AND NOW, this 22nd day of May, 2013, upon consideration of Defendant’s Motion for Recusal (Docket No. 246) and Plaintiff’s Response thereto (Docket No. 248), it is hereby **ORDERED** that Defendant’s Motion (Docket No. 246) is **DENIED**.

BY THE COURT:

S/Gene E.K. Pratter
GENE E.K. PRATTER
UNITED STATES DISTRICT JUDGE