United States Court of Appeals
For the Eighth Circuit

No. 16-4008

United States of America

Plaintiff - Appellee

v.

Robert Carl Sharp

Defendant - Appellant

Appeal from United States District Court
for the Northern District of Iowa - Cedar Rapids

Submitted: September 21, 2017
Filed: January 5, 2018

Before SMITH, Chief Judge, WOLLMAN and GRUENDER, Circuit Judges.

GRUENDER, Circuit Judge.

Robert Carl Sharp pleaded guilty after a grand jury returned a three-count superseding indictment charging him with (1) conspiracy to manufacture and distribute a controlled substance, in violation of 21 U.S.C. § 846; (2) possession with intent to distribute a controlled substance, in violation of 21 U.S.C. § 841(a)(1); and (3) possession with intent to distribute, and aiding and abetting the possession with

intent to distribute, a controlled substance, in violation of 21 U.S.C. § 841(a)(1). Sharp subsequently filed a motion to withdraw his guilty plea. The district court[1] denied the motion and sentenced Sharp to thirty years' imprisonment. He now appeals the judgment, arguing that the district court abused its discretion in denying the motion and that it plainly erred in failing to reconsider the motion *sua sponte* in light of evidence presented at the sentencing hearing. For the reasons that follow, we affirm.

I.

In 2012, Sharp was released from federal prison after serving a sentence for possession with intent to distribute cocaine base. While on supervised release, he began manufacturing and selling synthetic cannabinoids in Illinois and then Iowa.

Sharp purchased synthetic-cannabinoid chemicals in bulk from various suppliers, and he and his employee would apply them to leafy substances. They would then package and label these "herbal incense" products for sale. The packaging included a warning that the products were not fit for human consumption, even though Sharp knew that customers would smoke them. Sharp admitted to knowing that his products caused "disorientation" and had "no other good use," although he added that they did not produce "a euphoric high" like marijuana. Notably, Sharp paid his employee in cash, and his emails ordering a chemical he called "THJ-011" included the heading "AB-FUBINACA."

According to Sharp, he and another incense dealer named Hadi Sharairi hired attorney Joel Schwartz for advice about what products were legal to sell and to ensure

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[1]The Honorable Linda R. Reade, United States District Judge for the Northern District of Iowa, adopting the report and recommendation of the Honorable Jon Stuart Scoles, United States Magistrate Judge for the Northern District of Iowa, now retired.

that they complied with all federal and state laws. Sharp also stated that Schwartz failed to warn him that the government had scheduled AB-FUBINACA as a controlled substance. Sharp said that he informed Schwartz of this oversight and complied with Schwartz's instruction to dispose of all products that contained the chemical. Sharp also claimed that he sent Schwartz a sample of a substance that he believed was THJ-011 for testing along with a $900 money order. Sharp maintained that when he asked for the results, Schwartz responded "that he could no longer have products tested."

Schwartz's recollection of the attorney-client relationship differed. During the hearing on Sharp's motion to withdraw his guilty plea, Schwartz testified that Sharp sought representation "for a potential future criminal case" after a previous encounter with law enforcement—not advice about how to sell synthetic drugs legally. Schwartz explained that he warned Sharp "that everything synthetically that causes impairment of the brain either was listed or was an analog or would be soon thereafter." As a result, he informed Sharp that "if he were charged with something, he would be a career offender and this was too dangerous a game for him to play and he should stop."

Nonetheless, Schwartz acknowledged that he did offer Sharp advice on whether certain substances were legal. In particular, in response to a query from Sharp, Schwartz searched for THJ-011 on the website of the Drug Enforcement Agency and on Google. Although he did not find anything indicating that it was illegal, he did not inform Sharp that the substance was therefore legal. And though Schwartz could not recall specifically advising Sharp that it was illegal, he nevertheless warned him that "everything that's selling as synthetics either is now or will soon be illegal once the Government finds that you have it." Schwartz also advised Sharp that he was violating FDA regulations by selling misbranded products. In addition, Schwartz testified that he had no recollection of Sharp giving him a

sample for testing and that, if Sharp had, he would have destroyed it because "I'm not going to have something that might be an illegal narcotic in my office."

In early 2014, law enforcement began investigating Sharp's activities. Investigators sent a confidential source to make purchases at Sharp's store. An employee told the source that Sharp was not in and "probably took [the herbal incense] with him." The employee said that, with "raids happening everywhere," Sharp was "just being smart." A subsequent controlled purchase provided probable cause that Sharp was selling controlled substances, and law enforcement officers executed search warrants on his residence, his vehicle, a storage unit that he acquired under a false name, and his employee's residence. They found products containing AB-FUBINACA, which is a Schedule I controlled substance, as well as $88,663 in cash proceeds from the cannabinoids. The grand jury then returned the three-count superseding indictment.

Just before trial was to begin, Sharp pleaded guilty to all three counts without a plea agreement. During the plea colloquy, Sharp admitted his involvement in and knowledge of a conspiracy to manufacture and distribute AB-FUBINACA (Count 1). For the possession with intent to distribute counts (Counts 2 and 3), however, Sharp insisted that he thought that he was distributing THJ-011 rather than AB-FUBINACA. Nevertheless, he pleaded guilty to Counts 2 and 3 under a theory of willful blindness. *See Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 769 (2011).

In December 2015, Sharp retained new counsel and moved to withdraw his guilty plea. Following an evidentiary hearing at which both Sharp and Schwartz testified, the magistrate judge issued a report and recommendation concluding that Sharp's motion should be denied. The district court overruled Sharp's objections, adopted the magistrate judge's report and recommendation, and denied Sharp's

motion to withdraw his guilty plea. Following an evidentiary hearing,[2] Sharp was sentenced to thirty years' imprisonment.

II.

We review the denial of a motion to withdraw a guilty plea for an abuse of discretion. *United States v. Van Doren*, 800 F.3d 998, 1001 (8th Cir. 2015). A defendant may withdraw a plea of guilty before the court imposes a sentence if "the defendant can show a fair and just reason for requesting the withdrawal." Fed. R. Crim. P. 11(d)(2)(B). "While the standard is liberal, the defendant has no automatic right to withdraw a plea." *United States v. Heid*, 651 F.3d 850, 853 (8th Cir. 2011). A defendant bears the burden of establishing a fair and just reason. *United States v. Cruz*, 643 F.3d 639, 642 (8th Cir. 2011). We conclude that the district court did not abuse its discretion in denying Sharp's motion to withdraw his guilty plea.

A. Conflict of interest and ineffective assistance of counsel

Sharp first argues that the district court abused its discretion in refusing to allow him to withdraw his guilty plea because his lawyer had a conflict of interest and provided him ineffective assistance of counsel. In particular, Sharp argues that Schwartz had a conflict of interest because he was a vital fact witness as to Sharp's *mens rea*. *See United States v. Merlino*, 349 F.3d 144, 152 (3rd Cir. 2003) (explaining that the possibility of counsel's "being called as a witness was a . . . source of potential conflict, as it is often impermissible for an attorney to be both an advocate and a witness"). In this circuit, it is unclear whether this sort of alleged conflict of interest requires a defendant to show deficient performance and prejudice

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[2]At the hearing, Hadi Sharairi testified about a letter Sharp wrote urging him to make false statements. In addition, Sharp introduced recordings of several conversations he had with Schwartz when Sharp was in jail awaiting trial.

under *Strickland v. Washington*, 466 U.S. 668, 687 (1984), or whether it is sufficient for a defendant to show that a conflict of interest "adversely affected his lawyer's performance," *see Caban v. United States*, 281 F.3d 778, 781-84 (8th Cir. 2002) (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980)). We need not choose between the *Strickland* and *Cuyler* standards because Sharp's claim fails under both.

Under *Cuyler*, Sharp must identify "some actual and demonstrable adverse effect on the case, not merely an abstract or theoretical one." *See Covey v. United States*, 377 F.3d 903, 908 (8th Cir. 2004). He must show that "the conflict caused the attorney's choice." *See id.* According to Sharp, Schwartz could have testified that Sharp thought the substance was THJ-011 and that he investigated whether it was on the drug schedules. Sharp maintains that Schwartz's testimony would have established that he did not satisfy the two elements of willful blindness: "(1) the defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact." *Global-Tech*, 563 U.S. at 769; *see also United States v. Hansen*, 791 F.3d 863, 868 (8th Cir. 2015) ("[T]he jury may find willful blindness only if the defendant was aware of facts that put him on notice that criminal activity was probably afoot and deliberately failed to make further inquiries, intending to remain ignorant."). Had he realized that Schwartz was a potential witness, Sharp claims he would have gone to trial instead of pleading guilty.

As the Supreme Court has explained, the Government can prove knowledge under 21 U.S.C. § 841(a) through either direct or circumstantial evidence:

> Direct evidence could include, for example, past arrests that put a defendant on notice of the controlled status of a substance. Circumstantial evidence could include, for example, a defendant's concealment of his activities, evasive behavior with respect to law

> enforcement, [and] knowledge that a particular substance produces a "high" similar to that produced by controlled substances . . . .

McFadden v. United States, 135 S. Ct. 2298, 2304 n.1 (2015) (citation omitted).

Inasmuch as Schwartz's testimony would have probative value under this standard, Sharp has not shown that such a strategy would have been "objectively reasonable under the facts of this case," nor has he shown that Schwartz's advice to plead guilty "was linked to the actual conflict." *See Covey*, 377 F.3d at 908. Schwartz reasonably expected that the Government could prove beyond a reasonable doubt that Sharp knowingly possessed a controlled substance. Indeed, in his testimony at the plea withdrawal hearing, Schwartz mentioned the undercover purchase attempt where Sharp's employee stated that Sharp took the herbal incense out of the store at night; Sharp's emails ordering THJ-011 under the heading of AB-FUBINACA; the alias Sharp used to purchase a storage locker for the incense; his paying his employee in cash; and his labeling the incense as not for human consumption even though Sharp knew his customers were smoking it. In addition, Sharp knew that the substance had a disorienting effect, and his prior drug conviction demonstrates some familiarity with the drug laws. Moreover, had Schwartz testified, he would have explained that he told Sharp that synthetic drugs were either illegal or would soon be classified as illegal. He also would have stated that he told Sharp that this business was "too dangerous" and that Sharp should stop.[3] If anything, such

[3]Sharp's failure to heed Schwartz's instruction to stop selling synthetic cannabinoids also precludes Schwartz's testimony as part of an advice-of-counsel defense strategy. To rely upon an advice-of-counsel defense, a defendant must show that he "(i) fully disclosed all material facts to his attorney before seeking advice; and (ii) actually relied on his counsel's advice in the good faith belief that his conduct was legal." *United States v. Rice*, 449 F.3d 887, 897 (8th Cir. 2006). Even assuming Sharp satisfied the first element, Schwartz's testimony establishes that he failed to satisfy the second element.

testimony would burnish the Government's case that Sharp *did* know that his product was illegal. Given these facts, the alleged conflict did not adversely affect Schwartz's performance in advising Sharp to plead guilty. For the same reasons, Sharp also fails to establish deficient performance and prejudice under *Strickland*'s more stringent standard. *See* 466 U.S. at 687; *see also Hill v. Lockhart*, 474 U.S. 52, 59 (1985) (explaining that there is prejudice under *Strickland* when, but for counsel's errors, defendant would not have pleaded guilty and would have insisted on going to trial).

In addition to alleging that Schwartz had a conflict of interest, Sharp further argues that Schwartz provided ineffective assistance of counsel because Schwartz misinformed him about willful blindness. For this second claim, Sharp must show both deficient performance and prejudice. *See Strickland*, 466 U.S. at 687. He argues that Schwartz incorrectly advised him that he was willfully blind *merely* because he did not have the chemical tested. Sharp points out that testing may not have been a realistic option because most laboratories would not accept potentially illegal substances.

In light of the evidence against Sharp, Schwartz's advice concerning willful blindness was neither deficient nor prejudicial. Sharp professed his ignorance of the true identity of THJ-011 even though Schwartz's reasonable assessment of the evidence indicated that the Government would be able to prove his *actual* knowledge beyond a reasonable doubt. Nonetheless, in the face of Sharp's insistence that he thought the chemical was THJ-011, Schwartz reasonably concluded that the Government could also establish Sharp's *mens rea* under a theory of willful blindness. *See Global-Tech*, 563 U.S. at 769 ("[A] willfully blind defendant is one who . . . can almost be said to have actually known the critical facts."); *United States v. Galimah*, 758 F.3d 928, 931 (8th Cir. 2014) ("A deliberate ignorance or a willful blindness instruction is a mechanism for inference, not a substitute for knowledge." (internal quotation marks omitted)).

Despite the Government's strong case, Sharp might have been able to refute the inference that he had the requisite knowledge if a reputable lab had tested the substance. *Cf. United States v. Makkar*, 810 F.3d 1139, 1147-48 (10th Cir. 2015) (explaining that evidence that defendants asked state law enforcement agents to test the incense they were selling was relevant to *mens rea*). However, his failure to have the substance tested made it almost impossible for him to rebut the Government's case. In other words, the mere failure to test was not enough to establish willful blindness, but Sharp's failure to have the substance tested in the face of such overwhelming evidence indicated that he was, at the very least, "burying [his] head in the sand." *See United States v. Florez*, 368 F.3d 1042, 1044 (8th Cir. 2004) ("Ignorance is deliberate if the defendant was presented with facts that put her on notice that criminal activity was particularly likely and yet she intentionally failed to investigate those facts."). As a result, Schwartz's advice concerning willful blindness was not deficient and did not prejudice Sharp. *See Evans v. Luebbers*, 371 F.3d 438, 445 (8th Cir. 2004) ("[S]trategic and tactical decisions made by counsel, though they may appear unwise in hindsight, cannot serve as the basis for an ineffective-assistance claim under *Strickland*.").

For all these reasons, the district court did not abuse its discretion in refusing to allow him to withdraw his guilty plea.

B. Factual basis for guilty plea

Sharp also argues that the district court abused its discretion in refusing to allow him to withdraw his guilty plea because the plea lacks an adequate factual basis. Federal Rule of Criminal Procedure 11(b)(3) mandates that, "[b]efore entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea." A defendant establishes a fair and just reason for withdrawing his guilty plea by demonstrating that his plea is not supported by an adequate factual basis. *United*

States v. Heid, 651 F.3d 850, 855-56 (8th Cir. 2011). "A guilty plea is supported by an adequate factual basis when the record contains sufficient evidence at the time of the plea upon which a court may reasonably determine that the defendant likely committed the offense." *United States v. Cheney*, 571 F.3d 764, 769 (8th Cir. 2009) (internal quotation marks omitted). Because there was no plea agreement or stipulated facts, the district court relied on the Government's Rule 11 letter and the plea colloquy to determine whether there is a sufficient factual basis.

The Government had to establish that Sharp *knowingly* possessed a controlled substance. *See* 21 U.S.C. § 841(a). Sharp needed to know that he possessed a substance listed on the controlled substance schedules, even if he did not know the particular substance. *See McFadden*, 135 S. Ct. at 2304. Alternatively, the knowledge requirement would be met if Sharp knew the particular substance he possessed, even if he did not know that it was illegal. *See id.*

But Sharp insisted that he thought the substance was THJ-011, which is not listed on the federal drug schedules, and not AB-FUBINACA, which is listed. As a result, he was unwilling to plead guilty on either of the two grounds established in *McFadden*. Instead, he pleaded under the alternative theory of willful blindness. During the plea colloquy, the magistrate judge therefore inquired whether he "believed there was a high probability that the substance in [his] possession was subject to federal drug laws and [if he] took deliberate action to avoid learning the true identity of the substances." Though Sharp answered affirmatively, he now argues that the record lacks a factual basis for either prong of willful blindness. *See Global-Tech*, 563 U.S. at 769.

First, Sharp argues that there is an insufficient factual basis that he believed that there was a high probability that the substance in his possession was a controlled substance. In *McFadden*, the Supreme Court rejected the Government's proposed

jury instruction stating that the knowledge requirement would be met if the "defendant knew he was dealing with an illegal or regulated substance *under some law*." *McFadden*, 135. S. Ct. at 2306 (emphasis added and internal quotation marks omitted). The Court explained that Section 841(a) instead "requires that a defendant knew he was dealing with 'a controlled substance.' That term includes only those drugs listed on the federal drug schedules or treated as such by operation of the Analogue Act. It is not broad enough to include all substances regulated by any law." *Id.* (citation omitted).

During the plea colloquy, the magistrate judge did not use the phrase "controlled substance" or refer specifically to the Controlled Substances Act ("CSA"), the federal drug schedules, or the Analogue Act. Instead, he asked, "Did you believe there was a high probability that those—that substance or substances were subject to federal drug laws?" Sharp answered, "Under some federal drug law, yes." Because there are federal drug laws besides the CSA and the Analogue Act, including federal labeling regulations, Sharp argues that his response was too broad and that his conviction violates *McFadden*.

Furthermore, Sharp maintains that, because he was prosecuted for possessing a controlled substance under 21 U.S.C. § 841(a)—and not under the Analogue Act—the Government must meet a stricter *mens rea* requirement. Specifically, Sharp contends that the Government must establish that he knew (or was willfully blind to) the identity of the substance he possessed—which Sharp has denied knowing—or that he knew (or was willfully blind to the fact) that the substance was on the controlled substance schedules. Sharp therefore argues that the Government cannot rely on evidence that he believed (or was willfully blind to the fact) that the substance was treated as a controlled substance by operation of the Analogue Act because it was "substantially similar" to a substance on the drug schedules. *See* 21 U.S.C. § 802(32)(A). In effect, Sharp maintains that the plea colloquy would have been

insufficient even if the magistrate judge had specifically asked whether Sharp believed there was a high probability that the substance in his possession was "listed on the federal drug schedules *or treated as such by operation of the Analogue Act*," the very language proposed by *McFadden*. Instead, Sharp claims that the plea colloquy must provide specific evidence for his belief that there was a high probability that the substance in his possession was on the federal drug schedules.

We disagree and find an adequate factual basis for the plea. First, the magistrate judge's reference to "federal drug laws" avoids the overbreadth concern identified in *McFadden*. The magistrate judge did not ask Sharp if he thought there was a high probability that the substances were regulated by "any law." Instead, he referred to "federal drug laws." The meaning of this phrase was sufficiently clear in the context of the proceeding. Indeed, in denying Sharp's motion to withdraw his plea, the district court explained that the words "can be understood in context to refer to the Controlled Substances Act or the Controlled Substance Analogue Enforcement Act of 1986." Moreover, the Supreme Court itself used the shorthand "federal drug schedules." *See McFadden*, 135 S. Ct. at 2306.

We also disagree that the district court needed to find that Sharp knew that there was a high probability that the substance was specifically on the controlled substance schedules. Evidence in the record that Sharp believed that there was a high probability that the substance was an analogue is sufficient for establishing willful blindness. Under federal law, analogues are themselves treated as controlled substances. *See* 21 U.S.C. § 813 ("A controlled substance analogue shall, to the extent intended for human consumption, be treated, for the purposes of any Federal law as a controlled substance in schedule I."). Moreover, the Government needs to establish only general criminal intent to obtain a conviction under Section 841(a). As we have explained, "The Government is not required to prove that the defendant actually knew the exact nature of the substance with which he was dealing. The

'knowingly' element of the offense refers to a general criminal intent, i.e., awareness that the substance possessed was a controlled substance of some kind." *United States v. Ramos*, 814 F.3d 910, 915 (8th Cir. 2016) (internal quotation marks and alterations omitted), *cert. denied*, 137 S. Ct. 177 (2016). In other words, when the Government proves beyond a reasonable doubt that a defendant believed that a substance was an analogue intended for human consumption, that defendant cannot escape liability because the substance turned out to have been on the controlled substance schedules. The belief that he possessed an analogue establishes the defendant's knowledge. Therefore, the magistrate judge's generalized reference to the CSA and the Analogue Act was sufficient to establish a factual basis for the plea.[4]

Second, after establishing that Sharp thought that there was a high probability that the substances in his possession were controlled substances, the magistrate judge asked if Sharp took "deliberate action to avoid learning the true identity of the substance and whether or not, in fact, it was subject of a federal drug law?" Sharp answered, "By not getting it tested, yes, yes, I did." Sharp now argues that this answer is insufficient to support willful blindness because he admitted only that he had not had the product tested, mistakenly believing that this in itself established willful blindness. He now maintains that this assumption was wrong because there is not an affirmative obligation to have a product tested.

As mentioned above, a factual basis requires only that "the record contains sufficient evidence at the time of the plea upon which a court may reasonably determine that the defendant likely committed the offense." *Cheney*, 571 F.3d at 769

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[4]The Government's Rule 11 letter also contains additional information suggesting Sharp had the requisite knowledge. It describes how Sharp's employee told the confidential source who visited Sharp's store that Sharp was not in and "probably took it with him." The employee added that, with "raids happening everywhere," Sharp was "just being smart."

(internal quotation marks omitted). The magistrate judge explicitly asked whether Sharp took deliberate action to avoid learning the true identity of the substance. Sharp answered yes and provided an example of a relevant omission. As a result, the district court's conclusion that there is a sufficient factual basis is reasonable. *See Florez*, 368 F.3d at 1044.

For these reasons, Sharp's guilty plea rests on an adequate factual basis and the district court did not abuse its discretion in denying his motion.

C. Court's failure to reconsider the motion *sua sponte*

Finally, Sharp argues that the district court should have reconsidered his motion to withdraw the guilty plea *sua sponte* at sentencing. Because he failed to renew his motion to withdraw his guilty plea at sentencing, we review for plain error. *See United States v. Pate*, 518 F.3d 972, 975 (8th Cir. 2008). Under plain error review, Sharp must prove that (1) there was error, (2) that was plain, and (3) affected substantial rights. *See United States v. Adejumo*, 772 F.3d 513, 538 (8th Cir. 2014). If these three conditions are met, we may exercise our "discretion to correct the forfeited error if the error seriously affects the fairness, integrity or public reputation of judicial proceedings." *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1343 (2016) (internal quotation marks omitted).

Sharp maintains that the telephone recordings of his conversations with Schwartz and the testimony of several witnesses corroborate his claims of innocence and show that the district court was wrong to credit Schwartz's testimony over his own. As a result, he suggests that the district court should have reconsidered his motion to withdraw his guilty plea even though he did not renew it. Though much of this evidence echoes Sharp's insistence that he believed the substance was THJ-011, it nevertheless fails to rehabilitate his credibility. Above all, Hadi

Sharairi's testimony—suggesting that Sharp urged him to lie to the police—undermines Sharp's protestations of innocence.

Because the evidence elicited at sentencing neither rehabilitates Sharp's credibility nor undermines the evidence of his guilt, the district court did not plainly err in failing to reconsider the motion to withdraw the guilty plea *sua sponte*.

III.

Accordingly, we affirm Sharp's conviction because the district court did not abuse its discretion in denying Sharp's motion to withdraw his guilty plea or plainly err in refusing to reconsider that motion *sua sponte* at sentencing.

UNITED STATES OF AMERICA, Plaintiff, vs. ROBERT CARL SHARP, Defendant.
UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA, CEDAR RAPIDS DIVISION
2016 U.S. Dist. LEXIS 59024
No. 15-CR-31-LRR
May 4, 2016, Decided
May 4, 2016, Filed

Editorial Information: Subsequent History

Affirmed by United States v. Sharp, 2018 U.S. App. LEXIS 265 (8th Cir. Iowa, Jan. 5, 2018)

Editorial Information: Prior History

United States v. Sharp, 2016 U.S. Dist. LEXIS 60099 (N.D. Iowa, Mar. 17, 2016)

Counsel For Robert Carl Sharp, Defendant: Joel J Schwartz, Nathan Theodore Swanson, LEAD ATTORNEYS, PRO HAC VICE, Rosenblum, Schwartz, Rogers & Glass, PC, Clayton, MO.

For USA, Plaintiff: Dan Chatham, LEAD ATTORNEY, US Attorney's Office, Cedar Rapids, IA.

Judges: LINDA R. READE, CHIEF UNITED STATES DISTRICT JUDGE.

Opinion

Opinion by: LINDA R. READE

Opinion

ORDER

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I. INTRODUCTION

The matter before the court is Defendant Robert Carl Sharp's "Objections to Report and Recommendation Regarding Motion to Withdraw Guilty Plea" ("Objections") (docket no. 196) filed in response to United States Chief Magistrate Judge Jon S. Scoles's Report and Recommendation (docket no. 189), which recommends that the court deny Defendant's "Motion to Withdraw Guilty Plea" ("Motion") (docket no. 173).

II. RELEVANT PROCEDURAL HISTORY

On September 22, 2015, the grand jury returned a three-count Superseding Indictment (docket no. 99), charging Defendant with (1) conspiracy to manufacture and distribute a controlled substance, in violation of 21 U.S.C. § 846; (2) possession with intent to distribute a controlled substance, in violation of 21 U.S.C. § 841(a)(1); and (3) possession with intent to distribute, and aiding and abetting the possession with intent to distribute, a controlled substance, in violation of 21 U.S.C. § 841(a)(1). A jury trial was scheduled to begin on October 5, 2015. *See* Amended Trial Scheduling Order (docket no. 122). On October 4, 2015, Defendant entered a Notice of Intent to Plead Guilty

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(docket no. 131), and, on October 5, 2015, Defendant entered pleas of guilty to all three counts of the Superseding Indictment. *See* October 5, 2015 Minute Entry (docket no. 135) (change of plea hearing); October 5, 2015 Order (docket no. 138) (accepting Defendant's guilty pleas).

From approximately December of 2013-prior to the return of the initial Indictment (docket no. 3) on March 31, 2015-through Defendant's pleas of guilty and the filing of the final Presentence Investigation Report ("PSIR") (docket no. 163), Defendant was represented by Joel Schwartz. On December 31, 2015, Michael Lahammer entered an appearance on behalf of Defendant. *See* Notice of Appearance (docket no. 160). On January 21, 2016, Mr. Schwartz withdrew from representing Defendant. *See* Joint Motion to Withdraw (docket no. 169); January 21, 2016 Order (docket no. 170).

On January 22, 2016, Defendant filed the Motion. On February 5, 2016, the government filed a Resistance (docket no. 183). On February 5, 2016, Judge Scoles held a hearing on the Motion. *See* February 5, 2016 Minute Entry (docket no. 184). On March 17, 2016, Judge Scoles issued the Report and Recommendation, recommending that the court deny the Motion. On April 14, 2016, Defendant filed the Objections.1 The matter is fully submitted and ready for decision.

III. RELEVANT FACTUAL BACKGROUND

A. Defendant's Synthetic Drug Operation

Defendant's prosecution arose from his sale of AB-FUBINACA, a controlled substance, at a head shop he operated in Iowa City, Iowa. Defendant would receive chemical shipments from suppliers, which he sprayed onto leafy substances. Defendant would then package the sprayed leafy substance (hereinafter, "synthetic drugs") into packaging that bore a label stating "not for human consumption." Despite the label, Defendant knew that his customers would smoke the synthetic drugs that he sold them and that they would experience a "disorientation" effect as a result. *See* Official Transcript of Motion to Withdraw Guilty Plea Proceedings ("Motion Hearing Transcript") (docket no. 193) at 5. Defendant does not believe that the effect from smoking the synthetic drugs was similar to the effect from smoking marijuana.

When Defendant ordered and received shipments of chemicals, he was told by his suppliers that the shipments contained THJ-011 and that such substance was legal. *See* Government Exhibit 2 (docket no. 185-1) at 1-2. Based on these representations, Defendant claims that he believed he possessed and distributed THJ-011, which he believed to be a legal substance, and was unaware that the substance he received was, in fact, AB-FUBINACA.

B. Mr. Schwartz's Representation of Defendant

In late 2013, spurred by concerns regarding the legality and detection of his sale of synthetic drugs, Defendant retained Mr. Schwartz based on the recommendation of another shop owner who sold synthetic drugs. The parties dispute the nature and extent of the interactions between Defendant and Mr. Schwartz during the course of this representation.

1. Defendant's testimony

Defendant states that Mr. Schwartz "would inform [him] what products were legal to sell, what substances the [g]overnment considered analogue substances, what substances were being emergency scheduled and when, and any new laws of relevance or tactics used by the federal authorities to prosecute persons selling" synthetic drugs. Defendant's Exhibit B ("Sharp Affidavit") (docket no. 173-3) at 1.2 Defendant states that, in February of 2014, he inquired about the legal status of THJ-011 and Mr. Schwartz told him that the substance "was not an analogue or a controlled substance and it would be legal to sell products containing THJ-011." *Id.* at 2; *see also* Motion Hearing Transcript at 9-10. Defendant states that Mr. Schwartz then requested a sample of the

substance for testing. Sharp Affidavit at 2. Defendant states that, in March of 2014, Mr. Schwartz informed him that he could not have the substance tested but that Defendant should "continue what [he] was doing" while Mr. Schwartz went on vacation, and that Mr. Schwartz would address the issue when he returned. *Id.* at 3.

In June of 2014, after the government's investigation into Defendant became apparent, Defendant states that he asked Mr. Schwartz whether Mr. Schwartz could testify on Defendant's behalf at an eventual trial to tell the jury that he had told Defendant that his actions involving THJ-011 were legal. *Id.* at 4. According to Defendant, Mr. Schwartz said he could not testify. *Id.* Defendant then encouraged Mr. Schwartz to contact other witnesses whom Defendant stated had given him legal advice about his synthetic drug operation. Motion Hearing Transcript at 8; Government Exhibit 2 at 5. Defendant states that Mr. Schwartz contacted the witnesses, but reported that "one of them didn't want to be involved and the other one was vague." Motion Hearing Transcript at 8.3 Regarding the viability of a defense to the charges, Defendant states that Mr. Schwartz told him that his intent and knowledge were not relevant and further states that Mr. Schwartz "push[ed him] to enter a guilty plea." Sharp Affidavit at 4-5. Defendant states that he sent text messages and emails to Mr. Schwartz that would support an advice-of-counsel defense. *Id.*; *see also* Motion Hearing Transcript at 7. However, none were entered into the record.

2. Mr. Schwartz's testimony

Mr. Schwartz describes his representation of Defendant differently. Mr. Schwartz states that he first met with Defendant in December of 2013 due to issues stemming from Defendant's supervised release from a prior federal drug conviction. *Id.* at 10. However, at his first meeting with Defendant, Mr. Schwartz states that Defendant raised the issue of synthetic drugs. *Id.* According to Mr. Schwartz, Defendant voiced concerns about the legality of his operation because he had received attention from law enforcement in previous months and other people selling synthetic drugs had been charged with criminal offenses. *Id.* at 11. Mr. Schwartz states that, based on Defendant's concerns, Defendant chose to retain Mr. Schwartz's services "for a potential . . . future criminal case." *Id.* While discussing synthetic drugs at the initial meeting with Defendant, Mr. Schwartz states that he cautioned Defendant with advice that Mr. Schwartz had heard from another lawyer, "that everything synthetically that causes impairment of the brain either was listed or was an analog[ue] or would be soon thereafter an analog[ue]." *Id.* Because of the risks involved and because of Defendant's criminal history, Mr. Schwartz states that he told Defendant that selling synthetic drugs "was too dangerous a game for him to play and he should stop." *Id.*

In a later interaction during his representation of Defendant, Mr. Schwartz states that Defendant inquired about the legality of THJ-011. *Id.* at 12. Mr. Schwartz states that he looked up the substance on the Drug Enforcement Agency's ("DEA") website, found no record of the substance and communicated that information to Defendant. *Id.* Mr. Schwartz states that he told Defendant that simply because it wasn't listed on the website "didn't mean it wasn't an analog[ue] of something else out there." *Id.* Mr. Schwartz states that he did not tell Defendant that it was legal to sell THJ-011. *Id.* Mr. Schwartz states that he also did not tell Defendant that it was illegal to do so, but again advised Defendant that "it's too dangerous" to be selling synthetic drugs and to "[s]top doing this." *Id.* Mr. Schwartz states that he never requested a sample of the substance for testing, that he never told Defendant that he would test substance samples and that he does not recall receiving any substance samples from Defendant, but that if he had "it would have been destroyed" because he would not want potentially illegal substances in his office. *Id.* at 13.

Regarding his representation of Defendant during the government's prosecution in the instant case, Mr. Schwartz states that he never discussed an advice-of-counsel defense with Defendant as to

MR. CHATHAM: I believe that would suffice, Your Honor.

THE COURT: And Mr. Schwartz, do you believe Mr. Chatham's accurately described the law in this regard?

MR. SCHWARTZ: . . . [W]e are in agreement with that, Your Honor, and we believe that that is the factual basis that Mr. Sharp can admit to.

. . .

THE COURT: Did you believe that the substance in your possession - and right now, I guess we're talking about the substances that were found in your residence in Center Point. Did you believe there was a high probability that those - that substance or substances were subject to federal drug laws?

THE DEFENDANT: Under some federal drug law, yes.

THE COURT: And did you take deliberate action to avoid learning the true identity of the substance and whether or not, in fact, it was the subject of a federal drug law?

THE DEFENDANT: By not getting it tested, yes, yes, I did.Official Transcript of Change of Plea Hearing ("Change of Plea Transcript") (docket no. 165) at 16-19. Defendant proceeded to plead guilty to Count 3, which, like Count 2, charged Defendant with possession with intent to distribute AB-FUBINACA. *See id.* at 20-23. Defendant again admitted to being willfully blind as to a different inventory of the substance in his possession, albeit without qualifying that he failed to have the substance tested. *See id.* at 20-21.

IV. STANDARD OF REVIEW

When a party files a timely objection to a magistrate judge's report and recommendation, "[a] judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1); *see also* Fed. R. Crim. P. 59(b)(3) ("The district judge must consider de novo any objection to the magistrate judge's recommendation."); *United States v. Lothridge*, 324 F.3d 599, 600 (8th Cir. 2003) (noting that a district judge must "undertake[] a de novo review of the disputed portions of a magistrate judge's report and recommendations"). The court's duty of de novo review extends even to the magistrate judge's credibility determination. *See Taylor v. Farrier*, 910 F.2d 518, 521 (8th Cir. 1990). "A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1); *see also* Fed. R. Crim. P. 59(b)(3) ("The district judge may accept, reject, or modify the recommendation, receive further evidence, or resubmit the matter to the magistrate judge with instructions."). It is reversible error for a district court to fail to engage in a de novo review of a magistrate judge's report when such review is required. *See Lothridge*, 324 F.3d at 601. Accordingly, the court shall review the disputed portions of the Report and Recommendation de novo.

V. ANALYSIS

In the Motion, Defendant seeks to withdraw his guilty pleas on two grounds: (1) Mr. Schwartz's representation of Defendant created "an actual conflict of interest" and Mr. Schwartz failed to advise Defendant of an advice-of-counsel defense because of such conflict and (2) no factual basis was established for the pleas. *See* Motion at 1-2. Defendant argues that the alleged deficiencies provide "a fair and just reason" for permitting him to withdraw his guilty pleas and that relevant additional factors further support withdrawal of the pleas. *See* Brief in Support of the Motion (docket no. 173-1) at 14-15.

In the Report and Recommendation, Judge Scoles recommends that the Motion be denied. Judge Scoles concludes that the record does not support a finding that Mr. Schwartz had a conflict of interest and further concludes that there are no grounds for an advice-of-counsel defense. *See* Report and Recommendation at 10-11. Judge Scoles also concludes that there is a factual basis for Defendant's guilty pleas based on Defendant's willful blindness to the fact that the substance in his possession was subject to federal law. *See id.* at 15. On these grounds, Judge Scoles finds that Defendant failed to establish a fair and just reason for withdrawing his guilty pleas. *Id.* at 16. As to the additional relevant factors, Judge Scoles finds that "at least two of the three factors weigh against granting the [M]otion." *Id.*

In the Objections, Defendant objects to some of Judge Scoles's factual findings and contests all of Judge Scoles's legal conclusions. Accordingly, the court shall review those portions of the Report and Recommendation de novo.

A. Applicable Law

"A defendant may withdraw a plea of guilty . . . after the court accepts the plea, but before it imposes sentence if . . . the defendant can show a fair and just reason for requesting the withdrawal." Fed. R. Crim. P. 11(d)(2)(B). "The 'fair and just' standard is a liberal one, but it does not create an automatic right to withdraw a plea." *United States v. Smith*, 422 F.3d 715, 723 (8th Cir. 2005) (quoting *United States v. Wicker*, 80 F.3d 263, 266 (8th Cir. 1996)). "[T]he plea of guilty is a solemn act not to be disregarded because of belated misgivings about the wisdom of the same." *United States v. Murphy*, 572 F.3d 563, 568 (8th Cir. 2009) (quoting *United States v. Thompson*, 906 F.2d 1292, 1298 (8th Cir. 1990)). "Even if . . . a fair and just reason exists, before granting the motion [to withdraw a guilty plea] a court must consider 'whether the defendant asserts his innocence of the charge, the length of time between the guilty plea and the motion to withdraw it, and whether the government will be prejudiced if the court grants the motion.'" *United States v. Heid*, 651 F.3d 850, 853-54 (8th Cir. 2011) (quoting *United States v. Ramirez-Hernandez*, 449 F.3d 824, 826 (8th Cir. 2006)). Defendant bears the burden of proving that "the recognized justifications should permit a withdrawal" of his guilty pleas. *Smith*, 422 F.3d at 723.

B. Factual Objections

In the Report and Recommendation, Judge Scoles credits Mr. Schwartz's testimony over Defendant's testimony in recommending that the court deny the Motion. *See* Report and Recommendation at 10-11. Defendant objects to Judge Scoles's factual findings insofar as they rely on the credibility of Mr. Schwartz's testimony. *See* Objections at 2-5. Defendant challenges Mr. Schwartz's credibility on five grounds, which the court shall address in turn.

Defendant's first factual objection arises from purportedly conflicting testimony between Mr. Schwartz and Defendant as to whether Mr. Schwartz explicitly advised Defendant that it was legal to sell THJ-011. Objections at 2. In his affidavit, Defendant claims that Mr. Schwartz affirmatively told him that it would be legal to sell THJ-011. Sharp Affidavit at 2. However, when asked on cross examination at the motion hearing whether Mr. Schwartz told him it was legal to sell THJ-011, Defendant's response was equivocal: Defendant testified that Mr. Schwartz told him such substances "weren't controlled substances and . . . weren't analog[ue] substances," but he did not testify that Mr. Schwartz advised him that they were legal. Motion Hearing Transcript at 6. On redirect examination, Defendant again testified that "Mr. Schwartz advised [him] that that product was not controlled and not an analog[ue]," but did not state that Mr. Schwartz advised him that the product was legal. *Id.* at 10. In fact, Defendant's testimony on this matter is consistent with Mr. Schwartz's testimony, where he stated that he couldn't find THJ-011 "listed anywhere specifically," but that he never specifically

advised Defendant that it was legal or illegal to sell the substance. *Id.* at 12. Instead, lacking sufficient information "to make any sort of a call" as to the substance's legality, Mr. Schwartz stated that he cautioned Defendant that "it's too dangerous" and he should "[s]top doing this." *Id.*

The court credits Defendant's testimony over his written affidavit, *cf. Garcia-Martinex v. Cty. & Cnty. of Denver*, 392 F.3d 1187, 1191 (10th Cir. 2004) (in the civil context, "[w]hen the 'key factual issues' . . . turn on the 'credibility' and 'demeanor' of the witness, we prefer the finder of fact to observe live testimony of the witness"), and finds, consistent with both Defendant and Mr. Schwartz's testimony at the motion hearing, that Mr. Schwartz did not specifically advise Defendant that THJ-011 was legal. Instead, consistent with Mr. Schwartz's testimony, the court finds that Mr. Schwartz "look[ed] it up on a DEA website . . . . found no record of it anywhere and . . . told him so," but warned Defendant that it was "too dangerous" and to "[s]top doing this." *See* Motion Hearing Transcript at 12. The court's finding is further supported by Government's Exhibit 2, wherein Defendant informs Mr. Schwartz of other lawyers that had purportedly informed him that the substance was legal but does not mention any interaction in which Mr. Schwartz informed him that the substance was legal. *See* Government Exhibit 2 at 5-6.

Defendant's second, third and fourth factual objections arise from purported inconsistencies between Mr. Schwartz's testimony at the motion hearing and the billing records from Mr. Schwartz's representation of Defendant. *See* Objections 3-5; *see also* Defendant's Exhibit C (docket no. 196-1) (billing records). Defendant initially claims that the mere existence of the billing records contradicts Mr. Schwartz's testimony that he does "[n]ot really" keep "time records" "as far as specific dates, times, what was discussed." *See* Objections at 3; *see also* Motion Hearing Transcript at 19. However, at the motion hearing, Defendant corroborated Mr. Schwartz's testimony by stating that Mr. Schwartz never provided him with accounting of payments made or services performed. *See id.* at 10. Mr. Schwartz further testified that time records are not required under "the state of Missouri bar rules." *Id.* at 19. There was no testimony regarding when Mr. Schwartz prepared the billing records provided to Defendant or what method Mr. Schwartz used to compile the billing records. In short, the court lacks sufficient context regarding Mr. Schwartz's preparation of the billing records submitted as Defendant's Exhibit C to conclude that they contradict Mr. Schwartz's testimony about "time records" or otherwise make Mr. Schwartz's testimony less credible.

Defendant proceeds to identify a number of purported inconsistencies between Mr. Schwartz's testimony and his billing records. Defendant points out that the billing records fail to account for basic activities that Mr. Schwartz testified to, that the records contradict Mr. Schwartz's account of his first meeting with Defendant and that the records fail to specifically reflect Mr. Schwartz's investigation of an advice-of-counsel defense as to the various attorneys Defendant stated he had consulted. *See* Objections at 3-5. The court finds that Defendant overstates the significance of these purported inconsistencies. To accept Defendant's argument that the billing records contradict Mr. Schwartz's testimony would require the court to speculate about the idiosyncracies of Mr. Schwartz's law practice-such as whether Mr. Schwartz bills for initial consultations with clients so that they would appear on billing records, whether Mr. Schwartz contemporaneously reviews all mailings sent to him from clients rather than adding them to the case file for subsequent review, how specifically Mr. Schwartz describes his activity in the billing records, and so on. The court declines to speculate in the manner urged by Defendant and does not interpret the billing records to weigh adversely on Mr. Schwartz's credibility. *Cf. United States v. Walton*, No. 07-CR-14-LRR, 2007 U.S. Dist. LEXIS 58183, 2007 WL 2301252, at *4 (N.D. Iowa Aug. 8, 2007) (declining to rely on a defendant's speculation when making credibility determinations in the context of a hearing under *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978)).

Defendant's fifth factual objection takes issue with Judge Scoles's characterization that Mr. Schwartz

"represented Defendant 'years ago' in an unrelated federal drug case." Objections at 5; *see also* Report and Recommendation at 4 n.2. Defendant implies that Mr. Schwartz was misleading when he testified that he represented Defendant "years ago." *See* Objections at 5. However, Judge Scoles's characterization aside, Mr. Schwartz merely testified that Defendant had "a case years ago sometime in the early 2000s," but that Mr. Schwartz only "got involved after the fact." Motion Hearing Transcript at 18. Mr. Schwartz's testimony is entirely consistent with Defendant's report of the docket for that case, which apparently began in 2003 and in which Mr. Schwartz became involved in 2014. Therefore, the court finds that Mr. Schwartz's testimony regarding his involvement in Defendant's prior case does not negatively impact his credibility.

After conducting a de novo review of Judge Scoles's credibility finding based on the record before the court, the court finds that Mr. Schwartz is a credible witness and shall rely on his testimony accordingly. *See Taylor*, 910 F.2d at 521.

C. Conflict of Interest

In the Report and Recommendation, Judge Scoles credits Mr. Schwartz's testimony that he did not advise Defendant that it was legal to possess or distribute THJ-011 and, therefore, concluded that there was no viable advice-of-counsel defense that would create a conflict of interest. *See* Report and Recommendation at 10. Defendant objects to Judge Scoles's conclusion on the grounds that an advice-of-counsel defense does not necessarily require a showing that counsel specifically advised a defendant that his actions were legal. *See* Objections at 6.

"[T]he right to counsel's undivided loyalty is a critical component of the right to assistance of counsel . . . ." *United States v. Washburn*, 728 F.3d 775, 785 (8th Cir. 2013). A conflict of interest may arise when counsel is placed in the situation of being a material witness to his client's defense. *See, e.g., United States v. Merlino*, 349 F.3d 144, 152 (3d Cir. 2003) (observing that a fact which "could have led to [counsel] being called as a witness was a . . . source of potential conflict, as it is often impermissible for an attorney to be both an advocate and a witness"). Correspondingly, where counsel fails to pursue a viable advice-of-counsel defense that could require counsel to testify, a conflict may arise. *See United States v. Evanson*, 584 F.3d 904, 913-14 (10th Cir. 2009) (observing that an advice-of-counsel defense may implicate counsel in a defendant's wrongdoing, which could motivate counsel "to discourage" the defendant from pursuing such defense); *see also Covey v. United States*, 377 F.3d 903, 908 (8th Cir. 2004) (assuming that counsel's failure to pursue an advice-of-counsel defense requiring counsel to testify creates a conflict of interest, citing *Merlino*). However, no conflict arises if counsel simply declines to pursue an advice-of-counsel defense that is meritless. *See United States v. Jones*, 662 F.3d 1018, 1025-26 (8th Cir. 2011) (stating that the right to conflict-free representation "is not violated by . . . disagreements over strategy because there is no 'right to an attorney who will docilely do as she is told or advance meritless legal theories'" (quoting *United States v. Rodriguez*, 612 F.3d 1049,1055 (8th Cir. 2010))). A meritorious advice-of-counsel defense requires a defendant to "show that he: (i) fully disclosed all material facts to his attorney before seeking advice; and (ii) actually relied on his counsel's advice in good faith belief that his conduct was legal." *United States v. Rice*, 449 F.3d 887, 897 (8th Cir. 2006). An advice-of-counsel defense is not established if a defendant merely shows that "he consulted an attorney in connection with a particular transaction." *Id.* at 896-97.

As noted above, the court finds that Mr. Schwartz neither told Defendant that THJ-011 was legal nor told Defendant that it was necessarily illegal. Instead, Mr. Schwartz told Defendant that, despite the substance not appearing on the DEA's website, working with the substance was "too dangerous" and Defendant should "[s]top doing this." Motion Hearing Transcript at 12. Although the fact that Mr. Schwartz did not advise Defendant that the substance was legal may not necessarily defeat an

advice-of-counsel defense, the court concludes that Mr. Schwartz's communications with Defendant do not give rise to a meritorious advice-of-counsel defense for the following reasons.

First, contrary to Defendant's claim that "[t]he first element is not disputed," Objections at 7, Defendant cannot be understood to have disclosed all material facts to Mr. Schwartz. Defendant did not or could not accurately disclose to Mr. Schwartz what substance Defendant possessed. Defendant represented to Mr. Schwartz that he possessed THJ-011; however, he in fact possessed AB-FUBINACA. Additionally, even if Defendant was indeed correct when he informed Mr. Schwartz that he possessed THJ-011, Mr. Schwartz would nevertheless require additional facts to reach any definitive conclusion as to the substance's legality. On the information provided to Mr. Schwartz, he could (and did) look up the named substance to see whether it was listed as a controlled substance. However, provided only with the name of the substance, Mr. Schwartz could not accurately determine whether it was a controlled substance analogue. *See* 21 U.S.C. § 802(32)(A) (defining a controlled substance analogue as a substance having (1) a chemical structure that "is substantially similar to the chemical structure of a controlled substance" or (2) "has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than" the effect of a controlled substance); *see also* Motion Hearing Transcript at 12 (Mr. Schwartz testifying that he did not have enough information to determine whether THJ-011 was a controlled substance analogue). There is no credible evidence in the record that Defendant disclosed any information about the chemical structure of the substance or its effect on the nervous system.4 Therefore, the court finds that Defendant failed to disclose all material facts to Mr. Schwartz as required for an advice-of-counsel defense.

Second, even if Defendant had disclosed all of the material facts, he did not actually rely on Mr. Schwartz's advice. Despite Mr. Schwartz declining to definitively advise whether THJ-011 was legal or illegal, his advice to Defendant was unequivocal: "this is too dangerous of a game for [Defendant] to play and [Defendant] should stop." Motion Hearing Transcript at 11. Defendant did not rely on Mr. Schwartz's advice and continued to possess what he purportedly believed to be THJ-011. In other words, Defendant merely consulted Mr. Schwartz without heeding or relying on his advice. *See Rice*, 449 F.3d at 896-97 ("[A] defendant is not immunized from criminal prosecution merely because he consulted an attorney in connection with a particular transaction.") Absent any actual reliance on Mr. Schwartz's advice, Defendant cannot state a viable advice-of-counsel defense. *See id.* at 897 (requiring that a defendant "actually rel[y] on his counsel's advice in the good faith belief that his conduct was legal"). Therefore, the court finds that Defendant has not stated a basis for a viable advice-of-counsel defense.

Defendant's arguments regarding an advice-of-counsel defense revolve largely around his assertion that the conflicting testimony about the factual basis for such a defense "is for the trial jury to resolve." Objections at 6; *see also id.* at 7 ("If the jury credits Mr. Schwartz . . . ."). However, in the context of a motion to withdraw guilty pleas, it is Defendant's burden to prove that a fair and just reason exists for withdrawing the guilty pleas, not merely to prove the existence of triable issues for the jury. *See* Fed. R. Crim. P. 11(d)(2)(B) (stating that a defendant can withdraw a guilty plea only if "the defendant can show a fair and just reason"); *see also Smith*, 422 F.3d at 723. Defendant has not carried his burden of proving that his communications with Mr. Schwartz established a viable advice-of-counsel defense. And, because there is no viable advice-of-counsel defense that would put Mr. Schwartz in a position to testify as a witness on Defendant's behalf, Defendant has not stated any conflict of interest amounting to a fair and just reason for withdrawing his guilty pleas. Accordingly, the court shall deny the Motion to the extent Defendant seeks to withdraw his guilty pleas on the grounds of a conflict of interest.

D. Factual Basis for Pleas

In the Report and Recommendation, Judge Scoles concluded that a factual basis was established for Defendant's guilty pleas to each count of the Superseding Indictment, based on the theory of willful blindness. *See* Report and Recommendation at 15. Defendant objects to Judge Scoles's conclusion on the grounds that: (1) his admissions at the change of plea hearing did not establish willful blindness, *see* Objections at 14; (2) his admissions were made in "reliance on the incorrect advice of Mr. Schwartz," *id.* at 12; and (3) there is a factual dispute as to whether Defendant sought testing of the substance in question, despite his admission at the change of plea hearing, *see id.* at 14.

"Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea." Fed. R. Crim. P. 11(b)(3). "A factual basis for a plea of guilty is established when the court determines there is sufficient evidence at the time of the plea upon which the court may reasonably determine that the defendant likely committed the offense." *United States v. Green*, 521 F.3d 929, 933 (8th Cir. 2008) (quoting *United States v. Marks*, 38 F.3d 1009, 1012 (8th Cir. 1994)) (alteration omitted). "Facts obtained from 'the prosecutor's summarization of the plea agreement and the language of the plea agreement itself, a colloquy between the defendant and the district court, and the stipulated facts before the district court, are sufficient to find a factual basis for a guilty plea.'" *United States v. Scharber*, 772 F.3d 1147, 1150 (8th Cir. 2014) (quoting *United States v. Bowie*, 618 F.3d 802, 810 (8th Cir. 2010)).

As the United States Supreme Court has recognized, willful blindness defines a mens rea capable of substituting for "knowingly" or "willfully" in a criminal offense:

> The doctrine of willful blindness is well established in criminal law. Many criminal statutes require proof that a defendant acted knowingly or willfully, and courts applying the doctrine of willful blindness hold that defendants cannot escape the reach of these statutes by deliberately shielding themselves from clear evidence of critical facts that are strongly suggested by the circumstances.*Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 131 S. Ct. 2060, 2068-69, 179 L. Ed. 2d 1167 (2011); *see also United States v. Florez*, 368 F.3d 1042, 1044 (8th Cir. 2004) (stating that, if "a defendant's failure to investigate is equivalent to 'burying one's head in the sand,' the jury may consider willful blindness as a basis for knowledge"). Willful blindness has "two basic requirements: (1) the defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact." *Global-Tech Appliances, Inc.*, 131 S. Ct. at 2070. Stated differently, willful blindness exists "if the defendant was presented with facts that put [him] on notice that criminal activity was particularly likely and yet []he intentionally failed to investigate those facts." *See United States v. Hansen*, 791 F.3d 863, 870 (8th Cir. 2015) (quoting *Florez*, 368 F.3d at 1044).

Among other necessary elements not at issue here, to establish a factual basis for his pleas of guilty, Defendant was required to admit that he knowingly possessed a controlled substance. *See* Superseding Indictment at 2 (Counts 2 and 3); *see also* 21 U.S.C. § 841(a)(1) (statute under which Defendant was charged, making it unlawful to "knowingly or intentionally" possess a controlled substance with intent to distribute). Defendant was charged specifically with possessing AB-FUBINACA with intent to distribute. *See* Superseding Indictment at 2. Establishing that Defendant possessed AB-FUBINACA with intent to distribute does not require that he knew (or was willfully blind to the fact) that the substance he possessed was, in fact, AB-FUBINACA. Instead, it requires only that he knew (or was willfully blind to the fact) that he was in possession of *some* controlled substance or *some* controlled substance analogue. *See McFadden v. United States*, U.S. __, __, 135 S. Ct. 2298, 2304-05, 192 L. Ed. 2d 260 (2015) (stating that the "knowledge requirement" is met if "the defendant knew he possessed a substance listed on the schedules, even if he did not know which substance it was" and that the framework extends to controlled substance

analogues). Defendant argues that the knowledge element was not satisfied because he believed he possessed THJ-011 instead of AB-FUBINACA, and he did not believe THJ-011 to be a controlled substance or an analogue. *See* Objections at 11-12.

At the change of plea hearing, Judge Scoles asked Defendant whether he "believe[d] there was a high probability that . . . [the] substance or substances were subject to federal drug laws," to which Defendant responded, "[u]nder some federal drug law, yes." Change of Plea Transcript at 19. Defendant's current argument that he did not believe the substance in his possession was a controlled substance or an analogue contradicts this admission. The court credits Defendant's admission at the change of plea hearing over his present argument. Notably, Defendant has "presented no convincing evidence to establish that his prior admissions" were untrue, *see United States v. Cruz*, 643 F.3d 639, 643 (8th Cir. 2011), and the government has rebutted Defendant's assertion of lack of knowledge at the motion hearing, wherein it elicited testimony from Defendant that he knew the substance in his possession caused "disorientation," Motion Hearing Transcript at 5. Such "disorientation" is emblematic of a controlled substance analogue, which is in part defined by its effect on the nervous system. *See* 21 U.S.C. § 802(32)(A)(ii). Further, the government elicited testimony from Mr. Schwartz that the government's discovery file included evidence that Defendant: (1) refused to store the substance in his shop because he was worried about being raided, (2) purchased the substance in emails bearing the subject line "AB-FUBINACA," (3) stored the substance in a locker that he rented under a pseudonym and (4) included "not for human consumption" labels on the substance's packaging despite his awareness that people would smoke the substance. Motion Hearing Transcript at 15. Therefore, based on Defendant's admission at the change of plea hearing and his failure to convincingly challenge the truthfulness of those admissions, the court finds that there was a factual basis for the first element of willful blindness, which was established by Defendant's admission that he subjectively believed that there was a high probability that the substance at issue was regulated "[u]nder some federal drug law," which can be understood in context to refer to the Controlled Substances Act or the Controlled Substance Analogue Enforcement Act of 1986.

Judge Scoles then asked Defendant whether he took "deliberate action to avoid learning the true identity of the substance and whether or not, in fact, it was the subject of a federal drug law," to which Defendant responded, "[b]y not getting it tested, yes, yes, I did." Change of Plea Transcript at 19. Defendant argues that his admission does not reflect his intentional failure to confirm his belief that the substance was probably a controlled substance or analogue. *See* Objections at 14. Instead, Defendant characterizes his admission as describing his intentional "[f]ailure to test the substance to confirm that it was THJ-011," which Defendant believed to be legal. *Id.* However, Judge Scoles specifically asked Defendant if he took "deliberate action to avoid learning . . . whether or not, in fact, [the substance in Defendant's possession] was the subject of a federal drug law." Defendant answered in the affirmative, admitting that he took deliberate action to avoid knowledge that the substance-whatever its name-was illegal. Therefore, a factual basis for Defendant's guilty pleas was established at the change of plea hearing.

Defendant argues, however, that his admission was invalid for two reasons: (1) he made the admission based on erroneous advice from Mr. Schwartz, and (2) there is a factual dispute as to whether he sought testing despite his denial at the change of plea hearing. *See* Objections at 12, 14.

As to the first argument, Defendant claims that failing to have the substance tested "to verify" that it was THJ-011 does not establish willful blindness-even though he concedes that it "would certainly be relevant"-and that Mr. Schwartz "was inaccurate" in telling him otherwise. *Id.* at 10.5 However, as the court noted above, the record reflects that Defendant subjectively believed that there was a high probability that the substance in his possession was a controlled substance or controlled substance

analogue. Therefore, the issue is not whether Defendant could have "verified" that the substance was or was not THJ-011, because his subjective belief of whether the substance was THJ-011 is not controlling on the willful blindness inquiry in this case. Instead, the controlling issue is whether Defendant could have determined that the substance-whether it was THJ-011 or something else-was a controlled substance or controlled substance analogue. Defendant had a subjective belief that there was a high probability that it was, but he intentionally failed to investigate that fact. Such deliberate inaction provides a basis for willful blindness and Mr. Schwartz was not incorrect in advising Defendant as much. *See Hansen*, 791 F.3d at 870. Therefore, Defendant's challenge to the factual basis of his guilty pleas on this ground shall fail.

As to the second argument, Defendant claims that the factual dispute regarding whether Defendant sent a substance sample for testing "should be resolved in favor of [Defendant], with the jury ultimately determining the facts . . . ." Objections at 14-15. However, at the change of plea hearing, Defendant knowingly and voluntarily waived his right to a jury trial. *See* Change of Plea Transcript 9-10. Having done so, the burden is on Defendant at this stage to state a fair and just reason for withdrawing his guilty pleas, as the court noted above. *See* Fed. R. Crim. P. 11(d)(2)(B) (stating that a defendant can withdraw a guilty plea only if "the defendant can show a fair and just reason"); *see also Smith*, 422 F.3d at 723. Having reviewed the record, the court cannot conclude that Defendant has met his burden in this regard. Therefore, his challenge to the factual basis of his guilty pleas on this ground shall fail.

Accordingly, the court finds that Defendant has not stated a fair and just reason for withdrawing his guilty pleas on account of any deficiencies with the factual basis for his guilty pleas, and the court shall deny the Motion to the extent Defendant seeks to withdraw his guilty pleas for lack of a factual basis.

E. Relevant Factors

Because Defendant has failed to establish a fair and just reason for withdrawing his guilty pleas, the court need not address the additional factors relevant to granting a motion to withdraw guilty pleas. *See Smith*, 422 F.3d at 724. Nevertheless, the court finds that the factors do not support Defendant's withdrawal of his guilty plea.

First, while Defendant asserts his legal innocence to the charge based on his lack of knowledge, such assertion is undermined by Defendant's admission that he knew the substance to "cause a disorientation" and "knew that people would use [the substance] for that." *See* Motion Hearing Transcript at 5.

Second, the court finds the three and one-half months between Defendant's entry of the guilty plea and the Motion constitutes a significant delay. Defendant argues that the delay can be explained by Mr. Schwartz's purported conflict of interest and Defendant's hiring of new counsel. Objections at 16. However, the court observes that Defendant hired new counsel only after the draft PSIR was filed, which put him on notice of his potential sentencing exposure, and Defendant filed the Motion only after the final PSIR was filed to reflect Defendant's potential sentencing range under the United States Sentencing Guidelines. *Compare* Draft PSIR (docket no. 154) (filed December 9, 2015), *with* Notice of Attorney Appearance (entered December 31, 2015); *compare* Final PSIR (issued January 13, 2016), *with* Motion (filed January 22, 2016). In this regard, even if the delay is partially explainable by Mr. Schwartz's purported conflict of interest and Defendant's hiring of new counsel, it also correlates with Defendant's discovery of his potential prison term, which is not a justifiable reason for a delay. *Cf. United States v. Bowie*, 618 F.3d 802, 811 (8th Cir. 2010) ("Post-plea regrets by a defendant caused by contemplation of the prison term he faces are not a fair and just reason for a district court to allow a defendant withdraw a guilty plea." (quoting *United States v. Davis*, 583 F.3d