RECORD NO._____

In The
Supreme Court of The United States

BRADLEY COBBLER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

William L. Welch, III
Attorney
5305 Village Center Drive, Suite 142
Columbia, Maryland 21044
Telephone: (410) 615-7186
Facsimile: (410) 649-5217
wlw@welchattorney.com

Counsel of Record for Petitioner
Bradley Cobbler

LANTAGNE LEGAL PRINTING 801 East Main Street Suite 100 Richmond, Virginia 23219 (804) 644-0477
A Division of Lantagne Duplicating Services

Question Presented

Whether the District Court erred by partially denying Mr. Cobbler's Amended Motion to Withdraw Plea of Guilty?

Parties to the Proceedings

The names of all parties appear in the caption of the case on the cover page.

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No. _____

In the Supreme Court of the United States

Bradley Cobbler,

Petitioner

v.

United States of America,

Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

Petition for Writ of Certiorari

Petitioner Bradley Cobbler prays for the issuance of a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the District of Columbia Circuit.

Opinions Below

The opinion of the United States Court of Appeals for the District of Columbia Circuit appears at *Appendix A* to this Petition. It is unpublished. The District Court's ruling appears at *Appendix C* to this Petition. It is also unpublished.

Jurisdiction

On December 26, 2018 the United States Court of Appeals for the District of Columbia Circuit issued its Judgment and Memorandum. No petition for rehearing was filed.

Jurisdiction of the Supreme Court arises pursuant to 28 U.S.C. § 1254(1). Jurisdiction in the District of Columbia Circuit was based upon 28 U.S.C. § 1291, the final judgment in a criminal case, entered against Mr. Cobbler on February 5, 2018 in the United States District Court for the District of Columbia. The District Court's Judgment appears at *Appendix B* to this Petition. Jurisdiction in the District Court was based upon 18 U.S.C. § 3231, because the United States prosecuted Mr. Cobbler for violation of the United States Code.

Rule Provision Involved

Fed. R. Crim. P. 11 provides in pertinent part:

> (b) Considering and Accepting a Guilty or Nolo Contendere Plea.
>
> (1) *Advising and Questioning the Defendant*. Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following:
>
> (A) the government's right, in a prosecution for perjury or false statement, to use against the defendant any statement that the defendant gives under oath;

(B) the right to plead not guilty, or having already so pleaded, to persist in that plea;

(C) the right to a jury trial;

(D) the right to be represented by counsel—and if necessary have the court appoint counsel—at trial and at every other stage of the proceeding;

(E) the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses;

(F) the defendant's waiver of these trial rights if the court accepts a plea of guilty or nolo contendere;

(G) the nature of each charge to which the defendant is pleading;

(H) any maximum possible penalty, including imprisonment, fine, and term of supervised release;

(I) any mandatory minimum penalty;

(J) any applicable forfeiture;

(K) the court's authority to order restitution;

(L) the court's obligation to impose a special assessment;

(M) in determining a sentence, the court's obligation to calculate the applicable sentencing-guideline range and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. § 3553(a);

(N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence; and

(O) that, if convicted, a defendant who is not a United States citizen may be removed from the United States, denied citizenship, and denied admission to the United States in the future.

(2) Ensuring That a Plea Is Voluntary. Before 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).

(3) Determining the Factual Basis for a Plea. Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.

...

(d) Withdrawing a Guilty or Nolo Contendere Plea. A defendant may withdraw a plea of guilty or nolo contendere:

(1) before the court accepts the plea, for any reason or no reason; or

(2) after the court accepts the plea, but before it imposes sentence if:

(A) the court rejects a plea agreement under 11(c)(5); or

(B) the defendant can show a fair and just reason for requesting the withdrawal.

Statement of the Case

Petitioner seeks review of his conviction. By Indictment filed on March 31, 2016 the Grand Jury charged Mr. Cobbler with: i) conspiracy to distribute and possess with intent to distribute five hundred grams or more of cocaine and less than fifty kilograms of marijuana, in violation of 21 U.S.C. § 846 (§§ 841(a)(1), 841(b)(1)(B)(ii) and 841(b)(1)(D)); and ii) conspiracy to interfere with interstate commerce by robbery, in violation of 18 U.S.C. § 1951.

Mr. Cobbler appeared in the District Court on March 6, 2017, and he pled guilty to the two counts in the Indictment.

On March 16, 2017 Mr. Cobbler moved to withdraw his plea and to appoint conflict free counsel. His counsel at the time also moved to withdraw. Substitute counsel was appointed.

On July 17, 2017 Mr. Cobbler amended his Motion to Withdraw Plea. After a hearing on October 12, 2017, the District Court denied the Motion regarding Count One and granted it regarding Count Two.

On January 29, 2018, the District Court sentenced Mr. Cobbler: on Count One to incarceration for a term of one hundred two months, supervised release for a term of sixty months, and a $100.00 special assessment.

Pursuant to 28 U.S.C. § 1291, Mr. Cobbler requested that the United States Court of Appeals for the District of Columbia Circuit review the District Court's final decision regarding conviction and sentencing by filing the Notice of Appeal on February 12, 2018. On December 26, 2018 the United States Court of Appeals for the District of Columbia Circuit issued judgment affirming the final judgment in the United States District Court for the District of Columbia.

Reason for Granting the Petition

I. A United States Court of Appeals Has Decided an Important Question of Federal Law that Has Not Been, but Should Be, Settled by this Court.

A. Standard of Review.

The Supreme Court reviews a ruling on a motion to withdraw plea for abuse of discretion. *Kercheval v. United States,* 274 U.S. 220, 224, 47 S.Ct. 582, 583, 71 L.Ed. 1009 (1927).

B. Analysis.

1. Prior to Sentencing Mr. Cobbler Showed a Fair and Just Reason to Withdraw His Plea.

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).

Mr. Cobbler appeared in the District Court on March 6, 2017, and he pled guilty to the two counts in the Indictment. App'x at 2. The District Court scheduled sentencing for May 17, 2017.

On March 16, 2017 Mr. Cobbler moved to withdraw his plea and to appoint conflict free counsel, and on July 17, 2017 Mr. Cobbler amended his Motion to Withdraw Plea. Id. On January 29, 2018, the District Court sentenced Mr. Cobbler. App'x at 5. Accordingly, Mr. Cobbler's Motion meets the requirements for proceeding pursuant to Fed. R. Crim. P. 11(d)(2)(B).

Mr. Cobbler stated in his first Motion to Withdraw Guilty Plea and Motion to Withdraw as Counsel that he can show a fair and just reason for requesting the withdrawal. App'x at 2. In support of his Amended Motion to Withdraw Guilty Plea he stated *inter alia* that the plea colloquy did not comply with the requirements of Fed. R. Crim. P. 11(b). App'x at 3.

Specifically, the record does not reflect that the Court informed Mr. Cobbler and determined whether he understood: (A) the government's right,

in a prosecution for perjury or false statement, to use against the defendant any statement that the defendant gives under oath; (F) the defendant's waiver of trial rights if the court accepted a plea of guilty; (G) the nature of each charge to which the defendant is pleading; and (O) that, if convicted, a defendant who is not a United States citizen may be removed from the United States, denied citizenship, and denied admission to the United States in the future. App'x at 3.

While there was some discussion of robbery being used colloquially for burglary (Tr. Mar. 6, 2017 at 26:3 – 28:25), the Court erroneously informed Mr. Cobbler that conspiracy to commit robbery has two elements, even though it has three:

> THE COURT: Mr. Cobbler, let me be clear here. There are two elements.
> DEFENDANT COBBLER: I --
> THE COURT: There are two key issues here, all right. The first is whether you agreed with other people.
> DEFENDANT COBBLER: Right.
> THE COURT: Whether that agreement was to rob them of drugs and cash.
> DEFENDANT COBBLER: I understand –
> THE COURT: That's one thing.
> DEFENDANT COBBLER: Right.
> THE COURT: If you had that agreement with somebody else, that's one element. Element 2 is did somebody you had that agreement with take a step in the direction of stealing drugs from somebody's immediate possession.

Tr. Mar. 6, 2017 at 26:17 – 27:6.

In fact, "[a] Hobbs Act robbery conspiracy has three elements — (1) an agreement to commit Hobbs Act robbery between two or more persons, (2) the defendant's knowledge of the conspiratorial goal and (3) the defendant's voluntary participation in furthering the goal." *United States v. Eshetu,* 863 F.3d 946 (D.C. Cir., July 25, 2017).

Relying on L. Sand, *et al.*, Modern Federal Jury Instructions – Criminal, Mr. Cobbler had stated in his Amended Motion to Withdraw Guilty Plea filed on July 17, 2017 that conspiracy to commit robbery has four elements:

> In order to satisfy its burden of proof, the government must establish each of the following four essential elements beyond a reasonable doubt:
>
> First, that two or more persons entered the unlawful agreement charged in the indictment starting on or about [insert date];
>
> Second, that the defendant knowingly and willfully became a member of the conspiracy;
>
> Third, that one of the members of the conspiracy knowingly committed at least one of the overt acts charged in the indictment; and
>
> Fourth, that the overt act(s) which you find to have been committed was (were) committed to further some objective of the conspiracy.
>
> L. Sand, *et al.*, Modern Federal Jury Instructions – Criminal, Filed through Release No. 69B, Nov. 2016, Instruction 19–3; *See, Tanner v. United States*, 483 U.S. 107, 107 S.Ct. 2739, 97 L.Ed.2d 90 (1987).

However, a week after Mr. Cobbler filed his Amended Motion to Withdraw Guilty Plea, the Court of Appeals decided *Eshetu, supra*. Subsequently, Mr.

Cobbler recognized in his Surreply to Government's Opposition to Amended Motion to Withdraw Guilty Plea that *Eshetu* is currently the law in the D.C. Circuit. Regardless, the District Court erroneously informed Mr. Cobbler that conspiracy to commit robbery has fewer elements than it does. Tr. Mar. 6, 2017 at 26:17 – 27:6.

2. Ruling on the Amended Motion to Withdraw Guilty Plea.

After a hearing on October 12, 2017, the District Court denied the Motion regarding Count One and granted it regarding Count Two. App'x at 25. The District Court cited *Everett v. United States*, 336 F.2d 979 (D.C. Cir., 1964), for the proposition that it may grant a motion to withdraw guilty plea for one count and deny it on another. App'x at 20.

3. The District Court Should Have Granted the Motion for Count One Also.

Everett v. United States, 336 F.2d 979 (D.C. Cir., 1964), involved a guilty plea to Counts 3 and 4 of a six-count indictment, charging three offenses arising out of unrelated robberies and one attempted robbery on a fourth occasion. *Id.* Before sentencing Mr. Everett moved to withdraw his pleas and go to trial on these two counts. *Id.* After a hearing, the District Court permitted Mr. Everett to withdrawal the guilty plea on Count 3 but not

on Count 4, because no valid reason or basis for withdrawal on Count 4 had been claimed or shown. *Id.*

While the majority in *Everett* recognized the Supreme Court's dictum that in exercising discretion the court will permit one accused to substitute a plea of not guilty and have a trial, if for any reason the granting of the privilege seems fair and just; the majority in *Everett* held that when the accused seeks to withdraw because he has a defense to the charge, the District Court should not attempt to decide the merits of the proffered defense, because doing so would be deciding guilt or innocence. *Id.* at 982; See, *Gearhart v. United States*, 272 F.2d 499, 502 (1959). However, when the issue raised by the motion to withdraw is tangential and resolvable apart from the merits of the case, the District Court may appropriately hold a factual hearing to determine whether the accused has a fair and just reason for asking to withdraw his plea. *Everett v. United States*, 336 F.2d at 982; See, *Gearhart v. United States*, 272 F.2d 499, 502 (1959).

The dissent would have held that prior to sentencing and without prejudice to the government a defendant should be allowed to withdraw his or her guilty plea as a matter of course. *Everett* at 985 (J. Wright dissenting); *See, Poole v. United States*, 250 F.2d 396, 400 (1957).

Juries properly pass on the culpability of the accused. *Everett* at 985 (J. Wright dissenting). An element of the crime charged is *mens rea,* and if the

jury cannot find that the state of mind existed in the accused, it must acquit. *Id.*

The power of the jury to pass upon culpability is reflected in the general verdict. *Id.* Juries decide "guilty" or "not guilty," criminal or not criminal, instead of bringing a special verdict as to commission of the act charged. *Id.* Reflected in the jury's decision is the judgment of whether, under all the circumstances of the event and in the light of all known about the defendant, the prohibited act, if committed, deserves condemnation by the law. *Id.* at 985 – 986; See, Frank, Law and the Modern Mind 170 – 185, 304 – 305 (1930); Curtis, *Trial Judge and Jury,* 5 Vand. L. Rev. 150 (1952).

In England, the Star Chamber punished juries who acquitted men who had obviously done the acts charged. *Everett* at 986 (J. Wright dissenting); *See,* 1 Holdsworth, History of English Law 164 – 165 (1903). With the development of the common law, attaints, fines and imprisonments of juries were abolished, leaving juries free to find as the evidence and their oaths led them. *Everett* at 986 (J. Wright dissenting).

A jury acquitted John Peter Zenger for seditious libel even though he admitted the facts charged, but claimed that he was not criminally culpable. *Id.* By acquitting Zenger, the jury protected against unjust laws or unfair application. *Id.*

Later juries were generally recognized in American jurisprudence as the agent of the sovereign people, and as such juries had a right to acquit those whom it felt it unjust to call criminal. *Id.* The Supreme Court affirmed that the jury had this power. *Id.*; *See, Sparf and Hansen* v. *United States,* 156 U.S. 51, 110-183, 15 S.Ct. 273, 39 L.Ed. 343 (1895). A minority went further and reaffirmed the American common law tradition that this was no mere power of the jury, but their right. *Everett* at 986 (J. Wright dissenting); *See, Sparf and Hansen* v. *United States,* 156 U.S. at 110-183, 15 S.Ct. 273 (Mr. Justice Gray, dissenting); See also, *Horning v. District of Columbia*, 254 U.S. 135, 41 S.Ct. 53, 65 L.Ed. 185 (1920).

4. The Court of Appeals Should Have Reconsidered Its Precedent and in Particular the Reasoning of the Dissent.

Mr. Cobbler asked the Court of Appeals to reconsider its decision in *Everett v. United States*, 336 F.2d 979, 984 (D.C. Cir., 1964) and in particular the reasoning of the dissent. However, the Court of Appeals did not do so. Instead, it wrote that "[i]t is well-established precedent that the district court has power to make such a claim-specific ruling[]" and cited *Everett*.

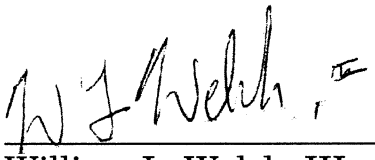
Conclusion

The Court should grant the petition for a writ of certiorari.

Counsel of Record and Other Counsel

Jessie K. Liu, U.S. Attorney

John L. Hill, Asst. U.S. Atty.
Office of the U.S. Attorney
555 Fourth Street, NW, Room 2806
Washington, D.C. 20530
(202) 252-7227



William L. Welch, III
5305 Village Center Drive, Suite 142
Columbia, Maryland 21044
wlw@wwelchattorney.com
Telephone: (410) 615-7186
Facsimile: (410) 649-5217
Counsel for Bradley Cobbler

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Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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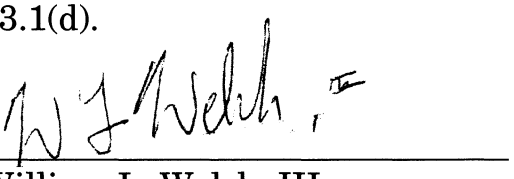
Certificate of Compliance

I, William L. Welch, III, counsel for petitioner, and a member of the Bar of this Court, certify that on this 26th day of March, 2019 the Petition for Certiorari in this case contains approximately 2,566 words, excluding the parts of the petition exempted by Rule 33.1(d).



William L. Welch, III
Counsel of Record
5305 Village Center Drive, Suite 142
Columbia, Maryland 21044
wlw@wwelchattorney.com
Telephone: (410) 615-7186
Facsimile: (410) 649-5217

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

William L. Welch, III
Attorney
5305 Village Center Drive, Suite 142
Columbia, Maryland 21044
Telephone: (410) 615-7186
Facsimile: (410) 649-5217
wlw@welchattorney.com

Counsel of Record for Petitioner
Bradley Cobbler

LANTAGNE LEGAL PRINTING 801 East Main Street Suite 100 Richmond, Virginia 23219 (804) 644-0477
A Division of Lantagne Duplicating Services

Index of Appendices

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18-3014 **September Term, 2018**

FILED ON: DECEMBER 26, 2018

UNITED STATES OF AMERICA,
APPELLEE

v.

BRADLEY COBBLER, ALSO KNOWN AS B-RAD,
APPELLANT

Appeal from the United States District Court
for the District of Columbia
(No. 1:16-cr-00052-5)

Before: PILLARD, *Circuit Judge*, and GINSBURG and SENTELLE, *Senior Circuit Judges*.

JUDGMENT

This appeal was considered on the record from the United States District Court for the District of Columbia and on the briefs filed by the parties. *See* FED. R. APP. P. 34(a)(2); D.C. CIR. R. 34(j). The court has accorded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. CIR. R. 36(d). It is

ORDERED AND ADJUDGED that the district court's decision be affirmed for the reasons set forth in the memorandum filed simultaneously herewith.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after the disposition of any timely petition for rehearing or petition for rehearing *en banc*. *See* FED R. APP. P. 41(b); D.C. CIR. R. 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk

No. 18-3014 **September Term, 2018**

MEMORANDUM

Appellant Bradley Cobbler pleaded guilty to a two-count indictment in the district court and subsequently attempted to withdraw his pleas. The district court allowed his motion as to the second count, but denied it as to the first and entered judgment thereon. We affirm.

Cobbler pleaded guilty to a two-count indictment: (1) conspiracy to distribute and possess with the intent to distribute five hundred grams or more of cocaine and less than fifty kilograms of marijuana, in violation of 21 U.S.C. §§ 841 and 846; and (2) conspiracy to interfere with interstate commerce by robbery, in violation of 18 U.S.C. § 1951. Prior to sentencing, Cobbler filed a motion to withdraw his guilty pleas. The district court granted the motion in part, allowing Cobber to withdraw his guilty plea as to count two, but denied the motion as to count one. Cobbler contends the district court erred in refusing to allow him to withdraw his guilty plea as to count one. We disagree.

Prior to sentencing, a defendant may withdraw a guilty plea if he "can show a fair and just reason for requesting the withdrawal." Fed. R. Crim. P. 11(d)(2)(B). Withdrawals of pleas prior to sentencing are to be "liberally granted," *United States v. Taylor*, 139 F.3d 924, 929 (D.C. Cir. 1998); however, we review a district court's denial of withdrawal for an abuse of discretion. *United States v. Hanson*, 339 F.3d 983, 988 (D.C. Cir. 2003). Refusals are reviewed for three factors: "(1) whether the defendant has asserted a viable claim of innocence; (2) whether the delay between the guilty plea and the motion to withdraw has substantially prejudiced the government's ability to prosecute the case; and (3) whether the guilty plea was somehow

tainted." *United States v. Curry*, 494 F.3d 1124, 1128 (D.C. Cir. 2007) (quoting *Hanson*, 339 F.3d at 988). Cobbler has not advanced a viable claim of innocence. The government does not argue that a delay would have prejudiced its ability to prosecute Cobbler. Only the third factor is at issue.

Federal Rule of Criminal Procedure 11(b)(1) requires that, before accepting a guilty plea, the district court must inform the defendant of specific rights and ensure the defendant understands those rights. Cobbler claims his guilty plea was tainted because his plea hearing did not comply with Rule 11. Specifically, he claims the district court did not inform him: that the Government had the right to use any statements Cobbler gave under oath in a prosecution for perjury or false statement; that Cobbler waived his trial rights if the court accepted a guilty plea; that if convicted, a defendant who is not a United States citizen could face immigration consequences; and the nature of each charge to which Cobbler pleaded. But an examination of the plea hearing reveals no plausible deficiencies.

The plea colloquy addresses everything Cobbler claims was missing. The district court informed Cobbler that he had been placed under oath and that if he made any false statements, he "could be prosecuted for perjury." Cobbler was informed that he had "a right to go to trial on these charges," what the Government's burden at trial would be, that he would be presumed innocent, and that by pleading guilty Cobbler was giving up all of his trial rights. The district court also confirmed that Cobbler is a U.S. citizen, and that there would be no immigration consequences as a result of his guilty plea. Cobbler's claim that the plea hearing did not discuss the nature of the charge to which he was pleading related only to count two of the indictment, but

the district court allowed Cobbler to withdraw his guilty plea to that count. Therefore, that argument does not affect this appeal.

Appellant asserts a further argument that the district court erred in denying his motion as to one count while it granted it as to the other. It is well-established precedent that the district court has power to make such a claim-specific ruling. *See, e.g., Everett v. United States*, 336 F.2d 979 (D.C. Cir. 1964).

For the reasons stated above, the district court's judgment is affirmed.

AO 245B (Rev. 09/17) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT

District of Columbia

UNITED STATES OF AMERICA
v.
BRADLEY COBBLER

JUDGMENT IN A CRIMINAL CASE

Case Number: CR 16-052-05 (APM)

USM Number: 34825-016

William Lawrence Welch III
Defendant's Attorney

FILED
FEB - 5 2018
Clerk, U.S. District and Bankruptcy Courts

THE DEFENDANT:

☑ pleaded guilty to count(s) 1ss of the superseding information filed on 2/27/2017

☐ pleaded nolo contendere to count(s) which was accepted by the court.

☐ was found guilty on count(s) after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21 USC §§ 841(a)(1), (b)(1)(B)(ii) and (b)(1)(D)	Conspiracy to Distribute and Possess With Intent to Distribute 500 Grams or More Cocaine and Less than 50 Kilograms of Marijuana	8/1/2014	1

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☑ Count(s) All Remaining Counts ☐ is ☑ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

1/29/2018
Date of Imposition of Judgment

Signature of Judge

Amit P. Mehta, United States District Judge
Name and Title of Judge

2/5/18
Date

DEFENDANT: BRADLEY COBBLER
CASE NUMBER: CR 16-052-05 (APM)

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

One Hundred and Two (102) Months as to Count 1ss.

☑ The court makes the following recommendations to the Bureau of Prisons:

(1) Defendant to be placed at FCI Butner, North Carolina.
(2) Defendant to participate in the 500 Hour Drug Treatment Program when eligible.
(3) Defendant to participate in the BRAVE (Bureau Rehabilitation And Value Enhancement) Program

☑ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: BRADLEY COBBLER
CASE NUMBER: CR 16-052-05 (APM)

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of:

Sixty (60) Months as to Count 1ss.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☑ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: BRADLEY COBBLER
CASE NUMBER: CR 16-052-05 (APM)

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

DEFENDANT: BRADLEY COBBLER
CASE NUMBER: CR 16-052-05 (APM)

ADDITIONAL SUPERVISED RELEASE TERMS

The defendant shall submit to substance abuse testing as approved and directed by the Probation Office.

The defendant shall submit to a mental health evaluation/assessment and if appropriate mental health treatment and counseling as approved and directed by the Probation Office.

The probation office shall release the presentence investigation report to all appropriate agencies in order to execute the sentence of the Court. Treatment agencies shall return the presentence report to the probation office upon the defendant's completion or termination from treatment.

A Re-Entry Hearing should be scheduled with the Court within weeks upon the defendant's release from incarceration.

Pursuant to 18 USC § 3742, the defendant has a right to appeal the sentence imposed by this Court if the period of imprisonment is longer than the statutory maximum or the sentence departs upward from the applicable Sentencing Guideline range. If he chooses to appeal, he must file any appeal within 14 days after the Court enters judgment.

As defined in 28 USC § 2255, the defendant also has the right to challenge the conviction entered or sentence imposed if new and currently unavailable information becomes available to him or, on a claim that he received ineffective assistance of counsel in entering a plea of guilty to the offense(s) of conviction or in connection with sentencing.

If the defendant is unable to afford the cost of an appeal, he may request permission from the Court to file an appeal without cost to him.

Pursuant to D.C. Circuit opinion in U.S. v. Hunter, No. 14- 3046, decided on January 12, 2016 - There were no objections to the sentence imposed that were not already noted on the record.

DEFENDANT: BRADLEY COBBLER
CASE NUMBER: CR 16-052-05 (APM)

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	JVTA Assessment*	Fine	Restitution
TOTALS	$ 100.00	$ 0.00	$ 0.00	$ 0.00

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss**	Restitution Ordered	Priority or Percentage

TOTALS $ 0.00 $ 0.00

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: BRADLEY COBBLER
CASE NUMBER: CR 16-052-05 (APM)

ADDITIONAL TERMS FOR CRIMINAL MONETARY PENALTIES

THE COURT FINDS that the defendant does not have the ability to pay a fine and, therefore, waives imposition of a fine in this case.

The special assessment is immediately payable to the Clerk of the Court for the U.S. District Court, District of Columbia. Within 30 days of any change of address, the defendant shall notify the Clerk of the Court of the change until such time as the financial obligation is paid in full.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	)	
	)	
v.	)	Criminal No. 16-52
	)	
BRADLEY COBBLER,	)	
	)	
Defendant.	)	Washington, D.C.
	)	

Thursday, October 12, 2017

TRANSCRIPT OF ORAL ARGUMENT
BEFORE THE HONORABLE AMIT P. MEHTA
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Government: EMORY COLE, AUSA
KENNETH WHITTED, AUSA
U.S. Attorney's Office
555 Fourth Street, NW
Washington, D.C. 20530

For the Defendant: WILLIAM LAWRENCE WELCH, III, ESQ.
5305 Village Center Drive
Suite 142
Columbia, Maryland 21044

Court Reporter: PATRICIA A. KANESHIRO-MILLER, RMR, CRR
U.S. Courthouse, Room 4700A
333 Constitution Avenue, NW
Washington, D.C. 20001
(202) 354-3243

Proceedings reported by stenotype shorthand.
Transcript produced by computer-aided transcription.

trafficking activities in order to obtain money when the defendant's earnings were low from drug trafficking in order to obtain narcotics to sell for money."

So it's no doubt, and we submit to you that that proffer dovetails completely with *Eshetu* and the elements that you've outlined, which are consistent at page 26 and 27.

THE COURT: Okay. Thank you, Mr. Cole.

Let's take a short break. I will be right back.

(Recess taken from 11:24 a.m. to 11:38 a.m.)

THE COURT: Okay, everyone, Mr. Cobbler, welcome back.

I'm just going to rule here from the bench on this. Bear with me for a few minutes, and I will give you my decision.

The standard is that set forward in Federal Rule of Criminal Procedure 11(e)(2)(B), the defendant may withdraw a guilty plea before sentencing if he can "show a fair and just reason for requesting the withdrawal."

The Circuit, in *U.S. v. West,* 392 F.3d 450, 455, laid out the three considerations, three factors I must consider: One, whether the defendant has asserted a viable claim of innocence; two, whether the delay between the guilty plea and the motion to withdraw would substantially prejudice the government's ability to prosecute the case; and three, whether the guilty plea was somehow tainted.

The court goes on to say, the last of these is the

most important and usually requires a showing that the taking of the plea did not conform to the requirements of Rule 11. A defendant who fails to show some error under Rule 11 has to shoulder an extremely heavy burden if he is to ultimately prevail.

All right. Let me address it in the following way: Let me first take on sort of the general arguments that Mr. Cobbler has made, and then I will get to the specific argument about count two. Mr. Cobbler has made several arguments that allege or contest the validity of the Rule 11 colloquy, so let me start with those. The first concerns the assistance received by Ms. Shaner.

Mr. Cobbler has alleged that Ms. Shaner didn't properly inform him about the plea and essentially strong-armed him and coerced him into taking the plea either directly or through providing insufficient information. Counsel has represented that Ms. Shaner essentially gave Mr. Cobbler no choice and told him he needed to plead. That is one argument.

The other argument is that -- there are three. The second one is that Mr. Cole said at a hearing on February 28th that Mr. Cobbler, as a career offender, his sentence would, quote/unquote, be someplace in the 20-year range. The claim is that Ms. Shaner was ineffective for not correcting that statement.

Third, there is an allegation that Ms. Shaner shared Mr. Cobbler's confidences or secrets with another one of her clients, a gentleman by the name of Londell Mitchell, and Mr. Cobbler claims that she therefore was laboring under a conflict of interest during the course of the plea.

Let me take those things in reverse order. First, there is no evidence before me that Ms. Shaner actually revealed any confidences or secrets of Mr. Cobbler's to Mr. Mitchell. Ms. Shaner has an affidavit that has been presented to the Court in which she denies that allegation. There is no evidence whatsoever to contradict that allegation. I gave Mr. Cobbler's counsel an opportunity to cross-examine Ms. Shaner if he wished, and he has declined to do so. Therefore, the evidence that Ms. Shaner divulged secrets to Mr. Mitchell, there is just no evidence of it. It is based on pure speculation, and the only evidence before me is to the contrary. So that is not a basis for Mr. Cobbler to withdraw his plea.

Next is the allegation that the government's statement that Mr. Cobbler, as a career offender, would be someplace in the 20-year range, that somehow that clouded his judgment and Ms. Shaner was ineffective for failing to correct that. Also, it is not a basis for withdrawing the plea. It creates no problem with Rule 11 colloquy. First of all, that statement was made by the government and not by Ms. Shaner. Secondly,

it was made at least a week to eight days before the actual plea itself was entered. That statement was made on February the 28th. The plea itself was entered about seven or eight days later. And during the plea colloquy I made it abundantly clear to Mr. Cobbler what the consequences would be if he was a career offender. We went through what that meant both in terms of what it would mean for his base offense level as well as his criminal history score and what it would mean for his guidelines range. In every instance when I asked him whether he understood what that meant he answered affirmatively. At no point did he express any concern, doubt, or misunderstanding about my inquiries and what the potential consequences were about the consequences of being a career offender. To the extent that he was at all confused or claimed confusion about the statement the government made, he certainly would have been disabused of that during the plea colloquy itself.

Finally, in terms of this allegation that Ms. Shaner essentially presented the plea to Mr. Cobbler as a fait accompli and that essentially she was badgering him or hectoring him into taking a plea, there is no basis for that. Again, the only evidence on the record is from Ms. Shaner in a sworn affidavit, and she denies that. More importantly, judging Mr. Cobbler's behavior throughout the course of these proceedings, he has more than capably demonstrated on more

than one occasion that he is a free-thinker and has an independent mind and that certainly his lawyer has not coerced him or convinced him to do anything he is not prepared to do. He, on at least two occasions, was presented with pleas that he indicated he was going to take and he ultimately decided at the last minute not to accept them. On the morning of the actual plea itself, we began the plea colloquy, and he was asked the question: Have you had enough time to ask all the questions you need about this plea? And he said no. And that ended that portion of that plea colloquy.

And so Mr. Cobbler's claims that somehow the Rule 11 process, plea process, was tainted because of ineffective assistance that his counsel provided him, there is just no basis for that, and I reject that as a basis for withdrawing the plea.

Secondly, in terms of the flawed Rule 11 process, there have been four separate claims that Mr. Cobbler set forth as to why that colloquy was insufficient. The first is that I did not advise Mr. Cobbler about the possible use of his statements and, if they were false, they could be the basis for false statements or perjury prosecution.
Mr. Cobbler is correct, that in the actual plea itself, I did not ask him that question. That said, two things: One, I did ask him that question prior to the lunch hour when the initial plea colloquy was started and then was aborted when he

responded "no" to the question of whether he had had enough time to get answers to the questions he needed about the plea. He answered the question "yes" when I asked him whether he understood whether any false statements could be used for a government prosecution. He answered that question "yes." Therefore, he should have had no doubts about that issue when the plea colloquy continued after lunch.

Secondly, even if that were a failure and the failure to re-question him was not sort of saved by the earlier questioning, the case law from *United States v. Graves*, and also a case called *U.S. v. Vonn*, 535 U.S. 56, provide that a failure to object to a Rule 11 colloquy is only reversible upon a showing of plain error and that it affected the defendant's substantial rights. In this case, both of those cases stand for the proposition that Mr. Cobbler, even if he didn't receive that question as part of an actual plea colloquy, it was harmless or did not affect substantial rights. Mr. Cobbler, as I said, received the question earlier, answered the question earlier. There is no perjury prosecution pending, and so he hasn't been prejudiced in any way, shape, or form by virtue of the non-asking of that question the second time around.

In terms of the trial rights waiver under Subsection (f), I'm not quite sure what the argument is. The claim generally is that Mr. Cobbler wasn't advised what rights

he would be giving up if he pled. I have looked at the plea transcript, and Mr. Cobbler was advised, one, as to all of his rights, and two, as to each of those rights, if he pled, he would be forfeiting those rights, whether that was his trial rights, appeal rights, collateral attack rights. In every instance, Mr. Cobbler was asked whether he understood what his rights were and, secondly, whether he understood by entering a plea he would be foregoing those rights. And he answered affirmatively as to each of those questions and didn't express any sort of doubt or misgivings about his answers.

The third general concern raised about the plea colloquy is that I failed to ask Mr. Cobbler whether he understood the immigration consequences of his plea, and there is no violation there. I asked Mr. Cobbler whether he was a U.S. citizen, and when he answered that question affirmatively, there was no need to then follow up and ask him whether he understood the immigration consequences of the plea because there are no immigration consequences for a plea for someone who was born in the United States and is a citizen of the United States.

All right. That brings us to the question of whether Mr. Cobbler was sufficiently apprised of the nature of the offense itself. I'm actually going to separate this into each count because I think that is appropriate. There is a case from the Circuit, believe it or not, from 1964, although it is

not directly on point, that suggests that I can consider the charges here separately. It is a case called *Everett v. United States*, 336, F.2d 979, in which a defendant had simultaneously pleaded guilty to two counts. The district court allowed him to withdraw one count and not the other, and the circuit, on appeal, held at least it was proper for the court to deny withdrawal of one of the two counts. It doesn't address the question directly as to whether a court can do what the district court did but at least by implication it suggests that splitting the counts is not inappropriate unless there is a defect in the Rule 11 proceeding that affects both counts or all counts. And there is no such defect in this case.

So, as to count one, there is absolutely no defect in the Rule 11 pleading, and Mr. Cobbler hasn't cited any. Mr. Cobbler was asked, or the government was asked, what the evidence was that would support the conspiracy to traffic in a narcotics charge, and the government presented that on the record. Mr. Cobbler was asked whether that was accurate, and he answered affirmatively. In fact, I went so far in the plea colloquy as to make sure that Mr. Cobbler understood that he was not pleading to any quantities except for that which was in the indictment and that the government would have the opportunity to, at sentencing, plead up higher quantities. So it was clear what he was pleading to, the quantity he was

pleading to, and the nature of the offense to which he was pleading.

Furthermore, given that he has offered no taint in the Rule 11 proceeding with respect to the drug trafficking charge, he does bear an extremely heavy burden, in the words of the court in *West*, and he clearly hasn't met it. He has offered no evidence whatsoever that he is actually innocent on the charges alleged in count one.

Mr. Cobbler, I don't know why you keep raising your hand. You don't talk to me directly; you talk to your lawyer. If you have got something to say, talk to him.

THE DEFENDANT: Yes, sir.

THE COURT: He has offered no evidence whatsoever as to his innocence. There is a statement in his opening motion that the drugs that were found in his home were fake drugs, but the fact that those were fake drugs doesn't in any way demonstrate his innocence as to the conspiracy charge. I sat through Mr. Durrette's trial. There was ample evidence to support Mr. Cobbler's participation in the conspiracy. That evidence showed that he traveled back and forth from Washington, D.C., to California to purchase drugs from dealers out west, drugs that were ultimately shipped here to the Washington, D.C. area, and then distributed through the network of people that were named in count one of the indictment. And so there is no question in my mind that the

evidence was sufficient to demonstrate his guilt as to count one, and there is certainly no defect as to the Rule 11 colloquy, and he has offered no evidence whatsoever that he is actually potentially innocent of count one.

That leads us to count two. Look, I have struggled with this, and I will tell you, folks, I'm going to let him withdraw the plea as to count two, and here is why: There is no doubt that during the plea itself Mr. Cobbler expressed some confusion about the difference between a robbery and a burglary. I tried to make that clear to him, that a robbery involves the taking of property from the immediate possession of somebody, whereas a burglary is breaking into a home and not taking of property from the immediate possession, and that what he was pleading to was conspiracy to take property from the possession of others through force, violence, etc.

And the transcript reveals that it took a number of questions, as well as multiple proffers from the government to both establish the facts to support a Hobbs Act robbery; and two, for Mr. Cobbler to understand that the Hobbs Act robbery differs from a conspiracy to burglarize. And in my efforts to clarify to him what the elements are of a Hobbs Act robbery/conspiracy, I sort of distilled them to two: One, the agreement itself; and two, an overt act. Now, I'm less concerned here about the distillation of elements into fewer elements than there actually are. What I'm concerned about

more is whether Mr. Cobbler understood what the actual basis was and whether he ultimately agreed to a factual basis that would support the Hobbs Act robbery. And the circuit, in *Eshetu*, sets forth what the elements are. As I have already said, I don't really understand the elements and how they are separate from one another, but they are an agreement to commit Hobbs Act robbery between two or more persons, the defendant's knowledge of the conspiratorial goal and the defendant's voluntary participation in furthering the goal.

All of this really, it seems to me, comes down to the last two questions that I asked Mr. Cobbler. There was a lot of back-and-forth beforehand, multiple times where I attempted to get him to make admissions that were then ultimately interrupted. But the final two questions are the ones that he actually answered, which is: "You heard Mr. Cole describe evidence that supports the following, that you" --

MR. COLE: What page, Your Honor?

THE COURT: This is page 28 of the transcript.

"You heard Mr. Cole describe evidence that supports the following, that you and at least one other person entered into an agreement to rob people of drugs and money.

"Yes, sir."

Okay. Second question:

"And that one of the other people that you agreed with in fact took steps to rob; that is, took by force or threat

from somebody's immediate possession drugs and money."

He answered that question: "Yes, sir."

I think those questions taken together certainly satisfy the first and second elements of *Eshetu*. He certainly agreed that there was an agreement to rob and it was to take drugs and money from other people, and he certainly expressed knowledge of that goal.

I think the question in my mind is whether he ultimately agreed that he voluntarily participated in furthering the goal, which is the third element of *Eshetu*.

I don't know what that means. If it does not mean overt act, I don't know what it means. I don't know what voluntary participation in furtherance of a goal would mean other than an overt act. I suppose it could mean voluntary versus involuntary. But that doesn't sufficiently address the question of participation in furtherance of the goal, which to me seems to require more than simply an agreement by the defendant. And those two questions that I asked and posed to him during the plea colloquy arguably do not capture that third element, that is, his acknowledgement that he did voluntarily participate in the scheme to further a goal of robbing two or more people, and that is the unlawful basis of the Hobbs Act conspiracy.

So because I do think the Rule 11 colloquy was tainted on that score, to the extent that I have heard evidence

concerning the government's proof about that Hobbs Act robbery, Mr. Durrette, his co-defendant, was acquitted, and I think he was largely acquitted based upon an absence of proof at least in that case that he participated in a Hobbs Act robbery conspiracy as distinct from a conspiracy to burglarize, and so I do think that there is a basis for actual innocence here potentially on the Hobbs Act robbery, recognizing that the government may have evidence against Mr. Cobbler that it didn't introduce against Mr. Durrette, but at least there is something here that is plausible, it seems to me.

So for those reasons, I'm going to deny the motion as to count one, but I will grant the motion as to count two.

Let us do the following: Mr. Cole and Mr. Welch, why don't you all sort of think about next steps, and why don't we set a status hearing for two weeks out where we can come back and figure out where we are. If it means we'll set a trial date, we will set a trial date.

MR. COLE: That's fine, Your Honor.

THE COURT: Mr. Cole.

MR. COLE: My thought was that you could set a sentencing date. Assuming we remain where we are now, he would be sentenced on count one. I would suggest we get that done, and we can get back with the Court in 30 days on --

THE COURT: I don't want to do that for two reasons: